Stella Passage Development

Fast-track Approvals Act 2024
Referral Application

Attachment 5: Port of Tauranga Limited v BoPRC [2023] NZEnvC 270

Port of Tauranga Limited

September 2025

[2023] NZEnvC 270
Environment Court, Auckland

Port of Tauranga Ltd v Bay of Plenty Regional Council

ENV-2021-AKL-153
Hearing: 27 February 2023 - 3 March 2023, 6 – 10 March 2023 and 13 – 17 March 2023 6 April 2023
Decision: 13 December 2023
Chief Judge Kirkpatrick, Commissioner Hodges, Commissioner Leijnen, Deputy Commissioner Paine

Synopsis

This matter concerned the proposed expansion of the Port of Tauranga ('the Port'), and specifically a direct referral to the Court under s 87G of the RMA 1991 for an application for consent for activities to enable the expansion; The proposal by Port of Tauranga Ltd ('POTL') involved the expansion of berthing facilities, land reclamation and additional dredging to increase the depth of water; The most stringent class of the proposed activities for which resource consent was required was a restricted discretionary activity ('RDA') under the Bay of Plenty Regional Coastal Environment Plan ('RCEP'); A key matter to which Bay of Plenty Regional Council ('the council') had restricted its discretion was 'site specific historical or cultural values under ss 6(e) or 7(a) of the [RMA 1991]'; Therefore, a key consideration was whether adverse effects on resources in the coastal environment, including areas of spiritual, historical or cultural significance to tangata whenua, could be avoided or, where avoidance was not practicable, whether they could be adequately remedied or mitigated, or, if not, whether it would be possible to provide positive effects that offset the effects of the activity; A number of tangata whenua parties had joined the proceedings in opposition; The Court examined, in some detail, the history of development of the Port, the impact on tangata whenua, and the poor relationship between POTL and tangata whenua; In a 2011 decision regarding earlier applications by POTL to widen and deepen the harbour channels, the Court had found that POTL had not been a good neighbour and warned that, in future, applications made without the 'proper approach and consideration of the requirements of the relevant national and regional documents' could lead to refusals of applications for consent (see Te Runanga o Ngāi te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402); Cumulative effects were a key issue in the present proceedings; The locality had developed in a manner that was presently causing cumulative adverse effects at levels which did not enable the people and communities of Whareroa Marae to provide for their social, economic, and cultural well-being and their health and safety; The Court said that to grant consents which would result in further cumulative adverse effects, however minor, without remedying or mitigating the existing adverse effects would not promote sustainable management; The Court stressed that it was necessary to understand the baseline condition of the environment against which future cumulative effects could be monitored and assessed; The Court also acknowledged that while its decision on this RDA had to be guided by the matters to which the council had restricted its discretion, matters relevant under ss 6(e) and 7(a) were wide-ranging and required consideration of cumulative effects with a 'wide lens', including effects on land, air and water; While it may have seemed that there were constraints implicit in the term 'site specific', the site in this case was the Port located in Te Awanui, and the effects of the activities arising from the proposal were wider in scope than those in the immediate vicinity of new structures; The Court considered the evidence of a number of effects and concluded that the evidence did not allow the current state of the environment to be understood with any certainty; This was partly due to POTL's own non-compliance with earlier consent conditions requiring annual monitoring; The Court also found that the proposal did not adequately provide for the relationship of Māori and their culture and traditions as required in s 6(e); While POTL's approach to consultation had improved since 2011, it appeared that POTL had learned little about building effective relationships with tangata whenua; The Court clarified that this interim decision was not to veto further Port development, but was to be regarded as an opportunity for POTL to reassess its position in relation to cultural matters and by all parties as an opportunity to find a way forward; The Court directed that consent for the Stage 1 Sulphur Point wharf extension within the already consented area of dredging would be granted, subject to several matters being addressed to the Court's satisfaction; However, its decision on whether to grant consents for the Stage 2 Sulphur Point wharf extension and proposed works on the Mount Maunganui wharf was reserved, pending provision of further information; POTL was directed to: prepare a more detailed scope of its proposed Southern Te Awanui Harbour Health Plan in partnership with tangata whenua; propose a meaningful kaitiaki role for tangata whenua to promote the objectives and policies of the RCEP; provide further evidence to demonstrate that the extent and degree of recognition of and provision for the relationship of Ngāti Kuku and

Whareroa Marae with their ancestral taonga was appropriate; undertake kaimoana surveys; undertake a comprehensive state of the environment report; produce 'before and after' visual simulations to demonstrate the extent of increased visual enclosure; prepare an updated Blue Penguin and Avian Management Plan; and convene a wananga with tangata whenua and the council to discuss all of this further information; Costs were reserved

Legislation Considered

Biosecurity Act 1993 (NZ) s 12B, s 13
COVID-19 Recovery (Fast-track Consenting) Act 2020 (NZ) s 17
Fisheries Act 1996 (NZ)
Maori Fisheries Act 2004 (NZ)
Marine and Coastal Area (Takutai Moana) Act 2011 (NZ)
Maritime Transport Act 1994 (NZ)
Public Works Amendment Act 1908 (NZ)
Resource Management Act 1991 (NZ) s 2, s 3(d), s 6, s 6(e), s 7, s 7(a), s 8, s 12(1), s 15(1), s 30, s 30(1)(a), s 31, s 32, s 87A(3), s 87A(3)(a), s 87C, s 87D, s 87F, s 87G, s 87G(6), s 87I, s 92, s 104, s 104(1), s 104C, s 112, s 127, s 274, Pt 2
Te Ture Whenua Maori Act 1993 (NZ) s 338(1)(a)
Wildlife Act 1953 (NZ)
Marine Safety Charges Regulations 2000 (NZ)

Party Names

Port of Tauranga Limited *(Applicant)*, Bay of Plenty Regional Council *(Respondent)*, Ngati Kuku *(Section 274 parties)*, Whareroa Marae Trustees *(Section 274 parties)*, Nga Hapu O Nga Moutere Trust *(Section 274 parties)*, Ngati Ranginui Fisheries Trust *(Section 274 parties)*, Ngati Ranginui Iwi Society *(Section 274 parties)*, Ngati Kaahu A Tamapahore Trust *(Section 274 parties)*, Te Runanga O Ngai Te Rangi Iwi Trust *(Section 274 parties)*, Tupuna Trust *(Section 274 parties)*

Legal Representatives

V Hamm, *M Exton* and *L Murphy* for Port of Tauranga Limited; *M Hill* and *J Hollis* for Bay of Plenty Regional Council; *R Enright* for Ngāti Kuku and Whareroa Marae Trustees; *T Urlich* and *J Pou* for Ngā Hapu o Ngā Moutere Trust; *Ms P Bennett* on behalf of Ngāti Kahu; *L Burkhardt* for Ngāti Ranginui Fisheries Trust; *J Koning* for Ngāti Ranginui Iwi Society; *Mr W McLeod* on behalf of Ngāti Kaahu A Tamapahore Trust; *J Pou* for Te Runanga o Ngāi Te Rangi Iwi Trust; *Mr P Nicholas* on behalf of the Tupuna Trust

Orders

In memory

The Environment Court acknowledges the passing of Mr Patrick Nicholas of Ngāti Makamaka, who are tangata whenua of Te Awa o Tukorako. Mr Nicholas was a trustee of the Tupuna Trust and represented that Trust at the hearing of this proceeding. We express our condolences to his whanau and to Ngāti Makamaka.

Interim Decision of the Environment Court

Orders and Directions

A. Consent for the Stage 1 Sulphur Point wharf extension within the already consented area of dredging will be **granted** on the revised conditions of consent proposed by the applicant but subject to the additional matters set out in the directions in section C below being addressed to the satisfaction of the Court.

B. Decisions on whether or not to grant consents for the Stage 2 Sulphur Point wharf extension and for the proposed works on the Mount Maunganui wharf are **reserved** pending the provision of further information as directed in this decision.

C. Directions:

(1) Port of Tauranga Limited (**POTL**) is directed to file and serve within six months of the date of this decision a detailed scope of the proposed Southern Te Awanui Harbour Health Plan as referred to and described in this decision at [135], [391], [464] and [615] prepared cooperatively with tangata whenua (subject to their willingness to participate) and the Regional Council.

(2) Either as part of the Southern Te Awanui Harbour Health Plan or separately, POTL is directed to propose a meaningful kaitiaki role for tangata whenua as referred to and described in this decision at [392] to promote the objectives and policies of the Bay of Plenty Regional Coastal Environment Plan including in relation to planning, implementing and reviewing monitoring programmes and contributing to management decisions arising from implementation of these programmes. These details should include a management structure which recognises the relationships between POTL and tangata whenua and how the implementation of the plan is to be funded.

(3) POTL is directed to provide further evidence that the extent and degree of recognition of and provision for the relationship of Ngāti Kuku and Whareroa Marae with their ancestral taonga is appropriate, as referred to and described in this decision at [414].

(4) POTL is directed to undertake a minimum of three surveys of kaimoana at Te Paritaha within 6 months of the date of this decision as referred to and described in this decision at [566], unless some or all have been undertaken since the hearing, before we make our final decision in relation to Sulphur Point Stage 1.

(5) POTL is directed to undertake follow-up surveys of Te Paritaha at intervals, as well as surveys of kaimoana in other parts of Te Awanui affected by POTL operations, in accordance with previous consent conditions and as referred to and described in this decision at [436] and [565] — [568].

(6) POTL is directed to undertake a comprehensive state of the environment report of the areas affected by Port operations within six months of the date of this decision as referred to and described in this decision at [437] and [569].

(7) POTL is directed to produce "before and after" visual simulations to demonstrate the full extent of increased visual enclosure on Whareroa Marae that would result from structures, vessels and stacked containers on the Sulphur Point side, and from the proposed development on the Mount Maunganui side as referred to and described in this decision at [410] and [573]

(8) POTL is directed to prepare an updated Blue Penguin and Avian Management Plan in consultation with the Department of Conservation and tangata whenua, including some restoration of the area of the sand pile towards the area available at the time of the 2011 consent as referred to and described in this decision at [494] and [572].

(9) POTL is directed to convene a wananga with tangata whenua and the Regional Council to discuss the further information produced as a result of these directions and any related outcomes from the above work as referred to and described in this decision at [427] and [438].

D. We direct that a conference be convened on a date to be fixed by the Registrar in consultation with parties to discuss the process for the provision of further information.

E. Costs are reserved.

Judgment

Reasons

Judge D A Kirkpatrick, Commissioner J Hodges, Commissioner A C E Leijnen, Commissioner G Paine

Executive Summary

[1] Port of Tauranga Limited (**POTL**) applied directly to the Environment Court [1]

1 In accordance with ss 87C - 87I of the Resource Management Act 1991 (**RMA**).

for resource consents to expand the Port of Tauranga in the Port Zone of, and in general accordance with the Outline Development Plan in Schedule 9 to, the Bay of Plenty Regional Coastal Environment Plan (**RCEP**). The works involved in the expansion include reclamations, extensions to the wharves in Stella Passage and additional dredging. [2]

2 A list of the proposed works and structures is in Sections 3.1 - 3.3.

[2] The most stringent class or type of the proposed activities for which resource consent is required is a restricted discretionary activity (**RDA**). [3]

3 A list of the consents required and their activity classes is in Section 4.1.

For such activities, the power of a consent authority [4]

4 In the case of an application for resource consent which is directly referred to the Court, under s 87G(6) the Court must consider the application under ss 104 to 112 of the RMA as if it were a consent authority.

to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted in the relevant plan.

[3] Among the several matters to which the discretion of a consent authority is restricted in the RCEP in this case [5]

5 As provided in rules PZ 8, PZ 10 and PZ 11 of the RCEP.

is to: site specific historical or cultural values under ss 6(e) or 7(a) of the RMA.

[4] Under s 6(e), in achieving the purpose of the RMA, all persons exercising powers and functions under it must recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga as a matter of national importance.

[5] Under s 7(a), in achieving the purpose of the RMA, all persons exercising powers and functions under it must have particular regard to kaitiakitanga, which is defined in s 2 of the RMA to mean:

> "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship."

[6] As a consequence, the Court's discretion whether or not to grant consent to those parts of the application which are to be considered as RDAs under ss 104 and 104C of the RMA, which is to be exercised subject to the requirements of ss 6(e) and 7(a), requires careful consideration of the evidence relating to those requirements.

[7] The applications by POTL are opposed by a number of entities representing tangata whenua on grounds which include effects on a number of cultural values and associated matters under ss 6(e) and 7(a) of the RMA.

[8] The witnesses who gave evidence at the hearing are listed in Appendix 1.

[9] As acknowledged by counsel for the Regional Council in opening submissions, one of the issues apparent in this case is that there has been a lack of assessment of cultural values and mātauranga monitoring both at RCEP development stage, and through consenting and implementation of existing activities which are contributing to cumulative adverse cultural effects.

[10] The evidence in this case recounts a long history of Port development and activities in relation to which the requirements of ss 6(e) and 7(a) of the RMA were largely overlooked or ignored.

[11] In a decision in 2011 relating to POTL's earlier applications for resource consents to widen and deepen the channels of the harbour (the **2011 Decision**), this Court stated: [6]

6 Te Runanga o Ngāi te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402 at [316] and [317]. This decision was affirmed on appeal in Ngāti Ruahine v Bay of Plenty Regional Council [2012] NZHC 2407.

> "[316] … Some 20 years after the enactment of the Resource Management Act, it is surprising that an infrastructural company of the size of the Port would not have been aware of its obligations in terms of the Regional Coastal Environment Plan, the New Zealand Coastal Policy Statement 2010 and the Act.
>
> [317] During the course of this hearing, the Port has done a great deal to try and address this situation. However, we feel obliged to note that further examples of applications made without proper approach and consideration of the requirements of the relevant national and regional documents could lead to refusals of applications for consent."

[12] It is clear from the 2011 Decision that POTL needed to be a better neighbour than it had been in the past and to take seriously the importance of building positive relationships with tangata whenua. Putting this into practice is not something that can be directed by an Environment Court decision. It is solely a matter that POTL must determine for itself.

[13] In this context, while acknowledging that it is outside the scope of the Court's role in this procedure as a consent authority, we question why the Regional Council both as a regulatory authority and as its ultimate majority owner allowed POTL to continue to operate in the way it has over such a long period. This question raises an issue about the effectiveness of the integrated management of the environment in and around the Port.

[14] As part of the process leading to the 2011 Decision, Court-assisted mediation occurred which resulted in some conditions of consent being agreed, including conditions to address ss 6(e) and 7(a) matters. These were included in the 2011 Decision as conditions of the consents granted by the Court. For reasons set out in this decision, the intended outcomes of the 2011 Decision were not achieved. On the evidence before the Court the situation today, on which our consideration of POTL's applications is based, remains essentially the same as it was found to be by the Court in 2011: the relationship under s 6(e) has not been recognised or provided for and no particular regard has been given to kaitiakitanga under s 7(a).

[15] As one example, in 2016, POTL advised the Ngā Mātarae Charitable Trust that it was intending to further develop the port in Stella Passage but it was not until 2019 that any formal consultation with affected iwi and hapū was undertaken. Broadly speaking, POTL did not make any approach to consult affected iwi and hapū for eight years following the 2011 Decision and only then, it appears, because it needed to obtain further resource consents.

[16] There is evidence that POTL has shown a disregard for its responsibilities under the RMA. It has failed to meet the annual monitoring requirements of its 2011 dredging consent for the last seven years. It operated without a stormwater discharge consent for its Mount Maunganui wharves for almost 30 years. It continues to operate without an air discharge consent, which became apparent during a hearing by a different division of the Court relating to air quality and appeals arising from Plan Change 13 of the Bay of Plenty Regional Plan.

[17] The locality around Whareroa Marae has developed in a manner that causes cumulative adverse effects at levels which do not enable the Marae community to provide for their social, economic, and cultural well-being and for their health and safety. To grant consents which would result in further cumulative adverse effects in that locality, however minor, without remedying or mitigating the existing adverse effects would, on the face of it, not promote the sustainable management of the resources of the locality.

[18] POTL's activities are among the main contributors to these adverse effects. Other activities also contribute, but often those are only located where they are in order to be close to the Port and hence are associated with it. While POTL is not responsible for the effects caused by its neighbours, some of those other activities occur on leased areas within the Port's boundaries and so presumably POTL ought to be in a position to control or at least influence those activities so that their adverse effects are appropriately managed. We see no evidence that POTL has done so.

[19] Prior to 2019, the evidence shows that POTL made little effort to address its social or cultural effects within the ambit of ss 6 (e) and 7(a) of the RMA, other than by providing funding for discretionary use by tangata whenua in accordance with consent conditions, which did not achieve the intended outcomes. POTL initially offered a number of conditions as part of its current application which were intended to contribute towards better outcomes, stating that these represented its best offer. Then, in response to questions posed by the Court prior to and during the hearing, POTL offered significant further conditions by way of mitigation and reduced significantly the extent of works it then considered necessary to meet its requirements.

[20] The timing of this response was unfortunate. These conditions could have been offered in the course of consultation with tangata whenua earlier in the process. We have seen little to demonstrate that POTL prepared and pursued its application in a manner that addressed the cultural values of the area affected by its application under ss 6 (e) and 7(a) of the RMA.

[21] The offer made in closing submissions for POTL to provide $25,000 a year to Whareroa Marae is indicative that POTL has made no adequate inquiry into or assessment of the cultural values of tangata whenua in relation to the area it occupies and the effects of its activities on that area. We accept the evidence of tangata whenua that this case is not about money and that the people and communities of the area are seeking only to be able to live on Whareroa Marae in reasonable conditions and enjoy the ancestral relationships they have with this area.

[22] On the basis of our evaluation of the evidence in the context of the relevant statutory planning documents and our consideration of the application before this Court, we consider the conditions offered in POTL's closing submissions relating to Te Awanui can form a basis on which consent may be granted for the proposed Stage 1 expansion of the Sulphur Point wharf, subject to there being no increase of the footprint of the dredged area already authorised by Coastal Permit 62920 and to robust conditions being met before that consent could be exercised.

[23] We have concluded that consent to deepen the area of Coastal Permit 62920 for capital dredging in Stella Passage can be granted for a term to 6 June 2027 so that it aligns with the terms of consent for dredging activities elsewhere in the vicinity of the Port.

[24] Our decision on whether to grant consent for Stage 2 of the extension to the Sulphur Point wharf is reserved for the reasons set out later in this interim decision. It will likely be necessary for the hearing to be reconvened once the various outstanding matters identified in this interim decision have been addressed. It would be desirable for that to occur at the same time as renewal of the occupation permit, which expires on 30 September 2026 or at the time of renewal of Coastal Permits 65806 and 65807, which expire on 6 June 2027. This would enable the achievement of integrated management of the coastal environment as sought by Objective 1 of the RCEP and ensure that there are consistent conditions of consent for all dredging activities associated with Port activities. It would also enable a review of the effectiveness of measures to address cultural values and provide an opportunity for additional conditions to be imposed if necessary.

[25] We have concluded that it would be inappropriate to grant consents for further activities on the Mount Maunganui side which cause adverse cultural effects cumulative to existing effects on Whareroa Marae, unless appropriate remedies, mitigation, restoration or compensation are in place first. We consider that POTL's original proposal did not give any serious consideration to the cumulative adverse cultural effects of its activities and proposed development on the Marae. The hearing will need to be reconvened once POTL has addressed this matter appropriately.

[26] We consider the time has passed when conditions of consent can be based on statements of intent as to what will be done at some time in the future. We will require greater certainty of what will occur, by when, what outcomes are to be achieved, who will be responsible and what enforcement mechanisms will be available.

[27] In the course of the hearing before us, tangata whenua stated on several occasions that they accepted the need for a port at Tauranga and did not seek to prevent its reasonable operations and their effects. In light of that, we express the hope that a workable way forward can be found through a revised application in the future. This will require POTL to be a better neighbour than it has been to date and to enter into future consultation with an open mind and a willingness to consider and discuss new ways of doing things.

[28] For the avoidance of doubt, we do not see this decision as the exercise of a veto of further Port development, including on the Mount Maunganui side. Instead, it should be seen as an opportunity for POTL to reassess its position in relation to cultural matters and by all parties as an opportunity to find a way forward that is based on principles that can protect the interests of all who share a commitment to maintaining and enhancing of the environment of Te Awanui.

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Part 1 Introduction

1.1 Key issues

[29] The application by Port of Tauranga Limited (**POTL**) relates to proposed activities to expand berthing facilities and associated land areas and to increase the depth of water at the Port of Tauranga (the **Port**). A key consideration in the application is whether adverse effects on resources in the coastal environment, including areas of spiritual, historical or cultural significance to tangata whenua, can be avoided or, where avoidance is not practicable, whether they can be adequately remedied or mitigated, or, if not, whether it would be possible to provide positive effects that offset the effects of the activity. [7]

[7] RCEP Policy IW 2.

[30] The Port is located in the coastal marine area (**CMA**) of Te Awanui or Tauranga Moana in an area of the harbour known as Stella Passage and on land on either side of Stella Passage. All parties agreed that Te Awanui should be front and centre of any future resource consents that may be granted affecting it.

[31] The current state of Te Awanui is degraded as a result of existing human activities, including those of the Port. Effects of the proposed activities on Te Awanui and on Whareroa Marae are central to the determination of the application and will be cumulative with existing effects.

[32] There is a long history of conflict in Tauranga Moana both prior to POTL being established and in the almost 40 years since. A consistent theme of the evidence presented by tangata whenua is that throughout that time they were either not consulted at all about Port developments or their views about them were ignored. This has resulted in a serious lack of trust of POTL as a corporate entity. Nevertheless, it was evident that improved relationships are starting to be built between tangata whenua and the new chairperson of the board and senior executives of POTL. It is to be hoped that this will provide a starting point from which the parties will be able to move forward constructively together.

[33] The cumulative effects of the proposed works were identified by all parties as a key issue. Assessing these requires an understanding of the existing state of Te Awanui as a baseline. This was not provided in evidence and requires further monitoring to be completed before we can make our determination. It also requires consideration of the integrated management of Te Awanui as a whole, with a related requirement being, as far as possible, to differentiate between existing effects which are caused by Port activities, and those which result from other activities.

[34] Many complex issues require consideration concerning both natural and physical resources, social, economic, and cultural well-being, and health and safety. However, the significance of the Port is not in question.

1.2 The Port of Tauranga

[35] The first port in Te Awanui was established in 1873. The original wharves of what is now the Port of Tauranga were constructed in 1953 by the then Bay of Plenty Harbour Board. The Port of Tauranga was registered on 25 July 1988 as Port of Tauranga Limited.

[36] The applicant is a public company with over half of its shares owned by the Bay of Plenty Regional Council through a series of holding companies. The applicant owns 114.3 ha of land at Mount Maunganui and 76 ha of land at Sulphur Point. In addition to its own operations and wharf activities, POTL leases land within port boundaries to independent companies for port-related activities and to provide port facilities for marshalling, stevedoring, cargo-handling contractors, Ministry for Primary Industries and Customs.

[37] The port currently has 2,055m of linear (continuous) berth face and a discrete tanker berth comprising 80m of wharf and mooring dolphins on the Mount Maunganui side of Te Awanui. More than 90 hectares of back-up land is available for cargo handling and storage. The Mount Maunganui wharves are the multi-cargo area within the Port. The wharves handle a range of cargo such as bulk cargo, breakbulk and bulk liquid and dry. While specific storage areas vary spatially due to export/import demand, logs are typically stored at the southern end of the wharves.

[38] Sulphur Point is built on 60 hectares of reclaimed land which was obtained from a dredging programme started in 1965. The original wharf was opened in April 1992. Currently 768m of linear berth face is adjacent to Stella Passage. Immediately behind the berth is a container terminal of approximately 33 hectares of heavy-duty pavement. Around the perimeter of the container terminal are various cargo sheds and further from the berth are empty container yards. The Sulphur Point Wharves operate purely as a container terminal where any manner of cargo is transferred to and from ships in containerised form. The Port of Tauranga currently operates eight ship to shore gantry cranes.

[39] The port handles in excess of 25 million tonnes of cargo a year. It currently handles 32% of all New Zealand cargo (in tonnes), 36% of all New Zealand exports (in tonnes), and 42% of all shipping containers. [8]

8 Mr Dan Kneebone, EIC at 6.

Expansion of the Port is now sought to provide for growth of the Upper North Island supply chain.

1.3 The proposal as applied for

[40] Briefly, the activities requiring consent at the time of application included:

> "(a) 385 m of new wharves and 1.81 ha of reclamation of the coastal edge on the Sulphur Point (western) side of Stella Passage;
>
> (b) 918 m of new wharves and reclamation totalling 2.9 ha on the Mount Maunganui (eastern) side; and
>
> (c) An additional dredged area of 85,000 m^2. [9]
>
> 9 The existing dredging (capital and maintenance) resource consents 65806 and 65807 already cover part of the area required to be deepened for the southern wharves extension, with the 85,000 m^2 being additional to the area already covered.
>
> "

[41] Disposal of dredged material is already authorised under Permits 65806 and 65807. Permit 65806 was varied pursuant to section 127 of the RMA on 2 September 2021 to make it clear that disposal associated with future dredging activities is authorised under the existing consents. There is sufficient capacity within the above permits to accommodate the disposal of dredged material from this application, meaning no resource consent is sought for the disposal of dredged material.

[42] The areas to be occupied by the proposed structures and reclamations are located in part of the Coastal Marine Area for which POTL holds an occupation consent under s 384A RMA (**Occupation Licence**). This expires in 2026. POTL does not have exclusive occupation rights over other areas of Stella Passage. The following Figure 1 [10]

10 DWG 270-117 — Source: AEE.

illustrates the Occupation Licence area relative to the Outline Development Plan in Schedule 9 of the RCEP.

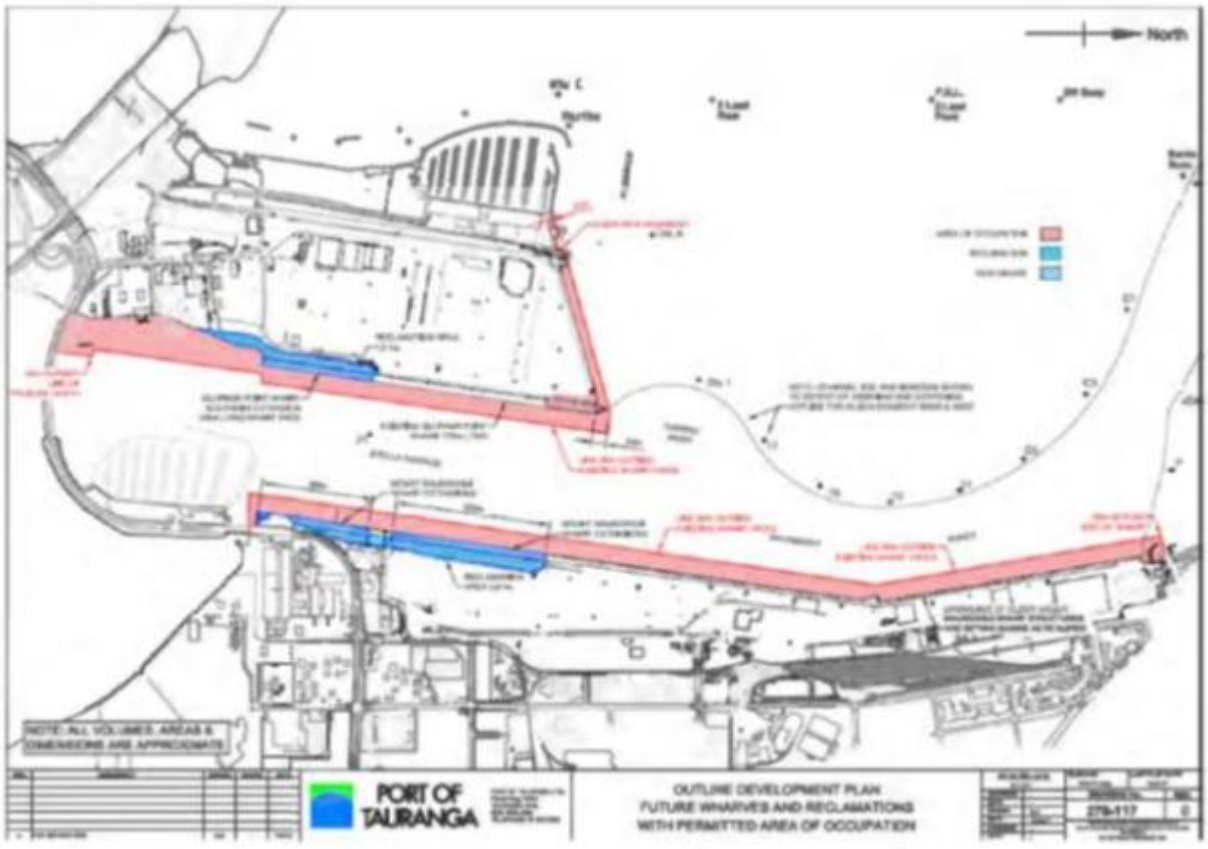


Figure 1 - Occupation licence area and original extent of reclamation and new wharf structures in the Outline Development Plan

[43] The application did not include the wharves shown at the northern end and most southerly parts of Sulphur Point.

1.4 The amended proposal

[44] By a minute dated 21 July 2022, the Court requested further information about the minimum extension that would meet the Port's future cargo handling needs on the Mount Maunganui side. The amended layout as presented at the start of the hearing is shown on the following Figures 2A and 2B. [11]

11 Reproduced from Mr Johnstone, reply evidence at Appendix 1 and supplementary evidence at Appendix 1.

Figure 2A - Amended proposal - overview

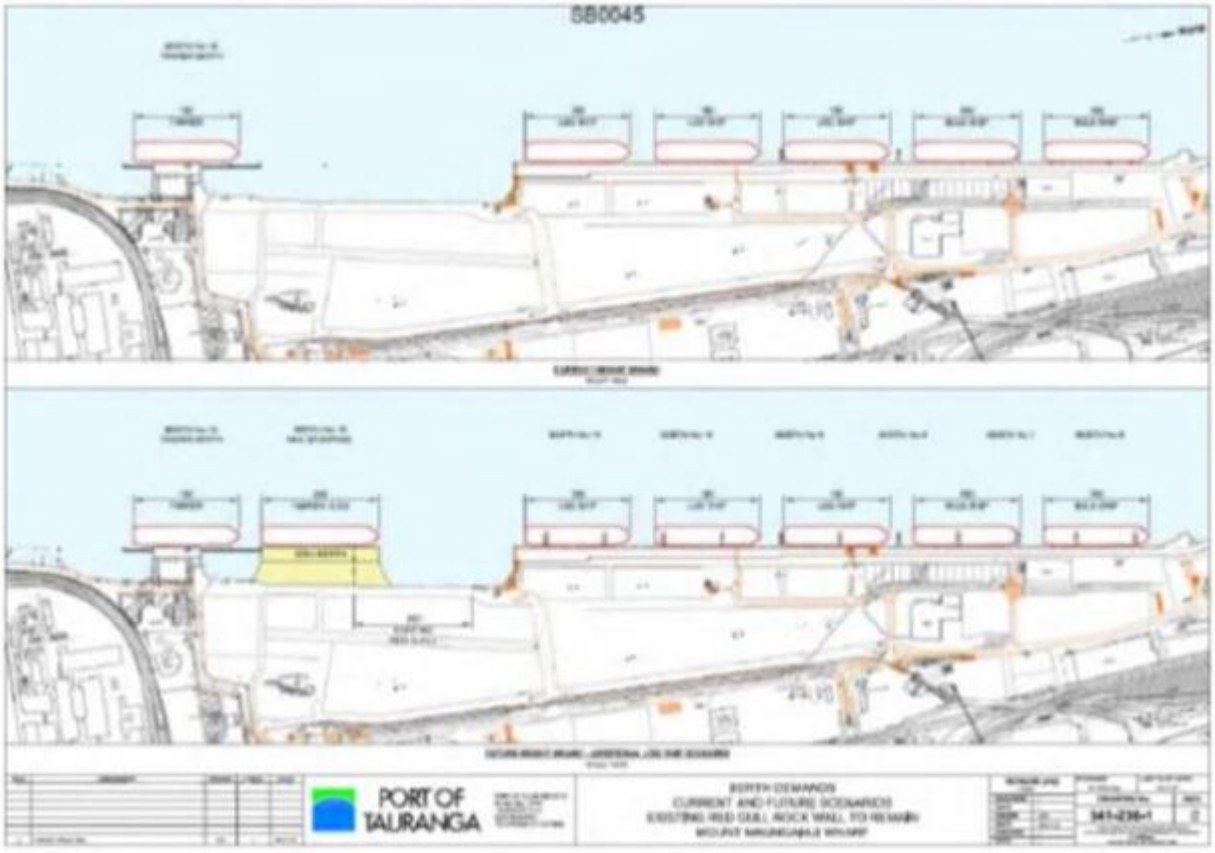


Figure 2B - Amended proposal - Mount Maunganui side - berthing options

[45] Mr R K Johnstone, POTL Engineering Manager, indicated that in general terms, the amended proposal on the Mount Maunganui side would involve the construction of approximately 315 m [12]

12 Mr Johnstone noted that 315m was used as an estimate of what he considers would be required to allow for the scenario shown in Figure 2B but that detailed design will need to be undertaken before determining the specific length required.

of new wharves to the south of existing Berth 11, compared to the 918 m originally applied for. The existing tanker wharf would be retained and there would be sufficient space for a red billed gull nesting area between that wharf and the extension. The proposal would allow a log ship or a second tanker to be moored at the southern end of the extension. Construction south of the 315m mark would be required to cater for the berthing and mooring dolphins for the additional tanker.

[46] In addition, the amended proposal was to provide berthage for vessels up to 2,000 tonnes south of the main extension, with dredging to a depth of 6 m alongside.

1.5 The further amended proposal

[47] In closing submissions, POTL introduced further amendments to the proposed works as shown in Figures 3A and 3B. [13]

13 Reproduced from Mr Johnstone supplementary evidence at Appendix 1.

The further amendments on the Mount Maunganui side include the use of mooring dolphins instead of new wharf construction between the existing Berth 11 and the tanker berth and to the south of the tanker berth. No further dredging on the eastern side of Stella Passage is proposed in this further amended proposal.

[48] On the Sulphur Point side, the proposed Stage 1 wharf extension was increased to "up to 285 m" from the 220 m proposed in the Assessment of Environmental Effects (**AEE**). The overall completed length of the Sulphur Point wharf extension, including Stage 2, remains unchanged at 385 m and no changes to reclamation configuration were proposed from those shown in the AEE.

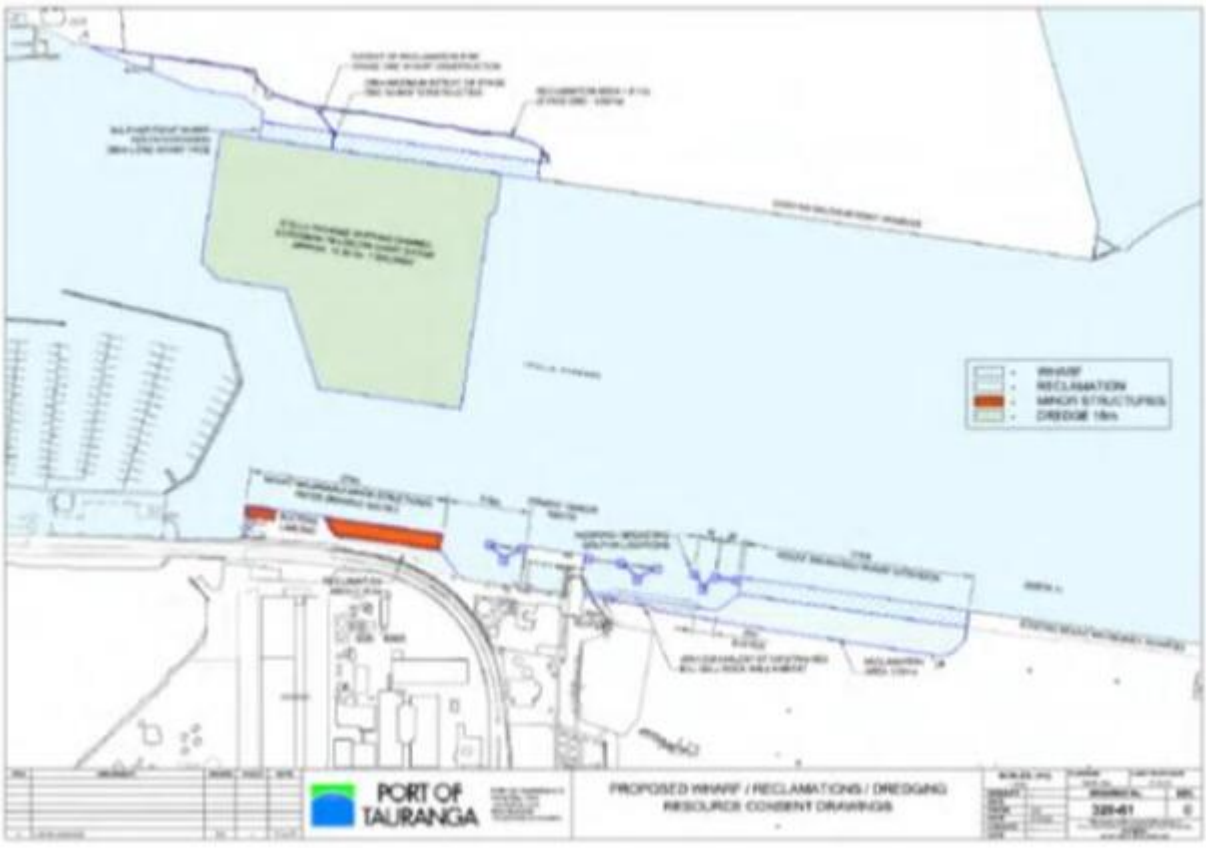


Figure 3A - Further amended proposal - overview

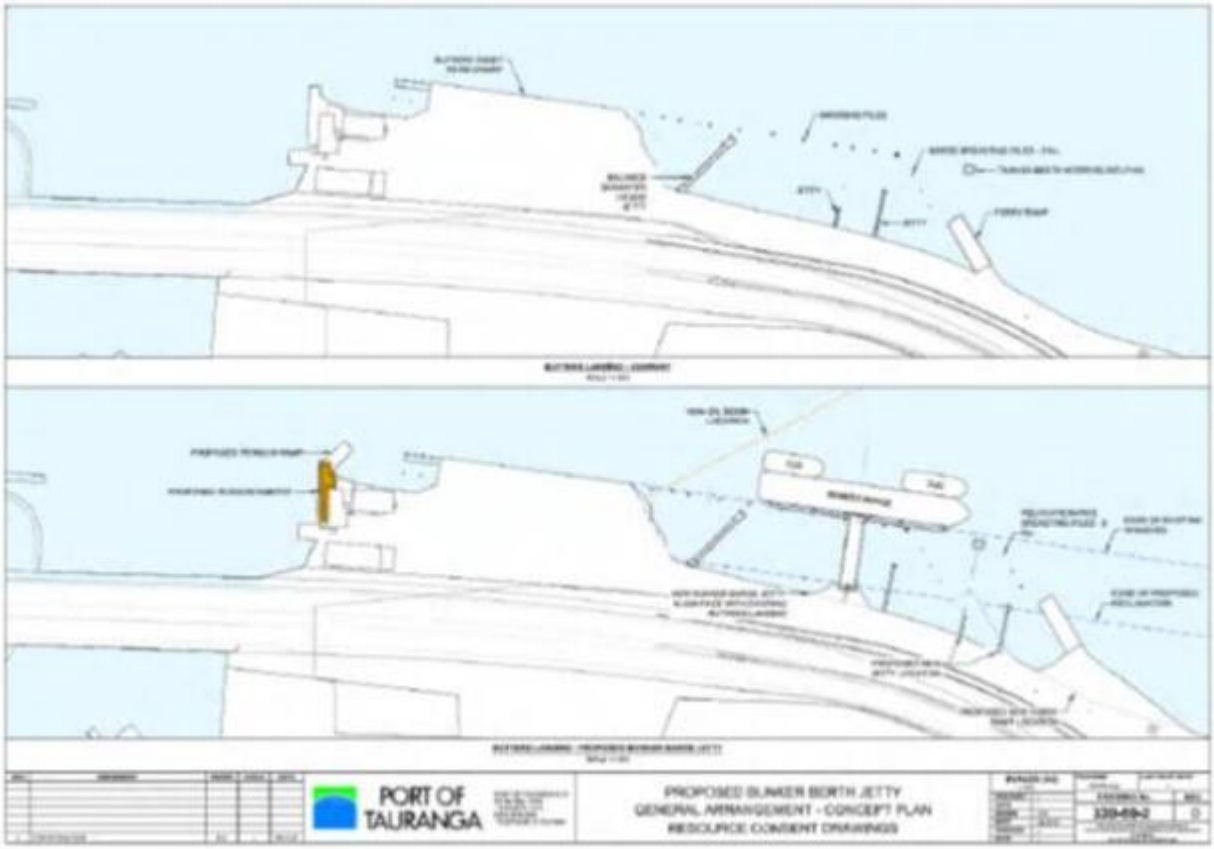


Figure 3B - Further amended proposal - Mount Maunganui side - southern end

1.6 The consent application process

[49] The most stringent class or type of the proposed activities for which resource consent is required is a restricted discretionary activity under the RCEP. A key matter to which the Council has restricted its discretion is "site specific historical or cultural values under ss 6(e) or 7(a) of the RMA". Section 6(e) requires the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga to be recognised and provided for as a matter of national importance. Section 7(a) requires particular regard to be had to kaitiakitanga. Under s 8 of the RMA, both of these provisions should be understood by taking into account the principles of the Treaty of Waitangi — Te Tiriti o Waitangi.

[50] Importantly, as well as objectives and policies relating to the Port, the RCEP also contains objectives (Objectives 13, 14, 15, 16, 17 and 18) addressing "Iwi Resource Management" and "Resource management policies to achieve integrated management of the coastal environment". There are fifteen policies designed to implement these objectives. It is explained in Part One of the Plan that:

> " … … … this Plan deals with resource management issues that cross the land/water divide and includes objectives, policies and methods that apply to both the sea and land areas of the coast. The RMA allows for such an approach by empowering regional councils to develop objectives, policies and methods to achieve the integrated management of natural or physical resources. [14]

14 RCEP Part One, section 3.2.

”

[51] Part Three of the RCEP “provides policy direction on those matters that cross the land/water divide and where an integrated approach to management is critical to achieving the objectives of the Plan”.

[52] As we read it, there is no hierarchy of provisions of the RCEP other than the relevancy of any part when a proposal is to be considered under the Plan. Accommodating these widely differing policy directions presents significant challenges when determining the outcome of the application. We will address the relevant provisions as we set out our reasoning for our decision.

[53] POTL initially applied for resource consents from the Regional Council on a non-notified basis. An independent commissioner determined that the process should be limited notified. Subsequently, and after unsuccessful bids to have the proposal assessed under the Shovel Ready and then the Covid-19 Recovery (Fast Track Consenting) Act consenting processes, POTL applied for the necessary resource consents as a Direct Referral to the Environment Court under section 87G of the Act.

1.7 The significance of Te Awanui

[54] To the iwi and hapū of Tauranga Moana, Te Awanui is a tupuna and a taonga. This was unchallenged. Its significance was captured in the conclusions reached by the Environment Court in its 2011 Decision, as follows: [15]

15 Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402 at [228] - [229].

> “[228] The undisputed evidence before the Court is that Mauao and Te Awanui and their surrounds are iconic lands and waters of great historic and cultural significance to the tribes of Tauranga Moana. We also understand that their relationship with these features including Te Paritaha o te Awanui, Panepane Point and Mauao including Tanea Shelf, is an ancestral and historical one that extends back to settling of Aotearoa by their ancestors from Hawaiki, and for Ngai Te Rangi after arriving in the Tauranga region from the East Coast.
>
> [229] We note that the appellants consider that Mauao and Te Awanui are indivisible and inextricably linked thus any effect on any aspect of these features, will affect the whole. … ”

[55] We reached the same conclusions based on the evidence before us, which we address in more detail in Part 4 of this decision.

[56] The significance of Te Awanui and the Te Paritaha area within it are recognised in the RCEP as Areas of Significant Cultural Values (**ASCV**) 4 and 4A, respectively. The Te Awanui overlay covers most of Te Awanui but not all areas. The Tauranga Harbour Port Zone and the Port occupation area, together with the main navigation channel, which includes Stella Passage, is not within the Te Awanui ASCV 4, but the Port Zone does apply to the eastern edge of the Te Paritaha ASCV 4A.

[57] Part Four of the RCEP directs applicants and decision-makers to have regard to a range of matters when considering an application for resource consent for activities in an ASCV, which are identified in its Schedule 6. As the Plan indicates, the same matters need to be considered in relation to other areas or sites of significant cultural value identified by Statutory Acknowledgments, Iwi/Hapū Management Plans, or by evidence produced by tangata whenua and substantiated by pūkenga, kuia and/or kaumatua.

1.8 The current state of Te Awanui

[58] There is evidence of degradation of Te Awanui stretching back over many decades, including a deterioration in water quality and kaimoana resources. This has resulted from human activities and other anthropogenic influences, including from the Port, and it is under increasing threat from climate change and wider catchment-related influences such as erosion and nutrient discharges, independent of the existence of the Port.

[59] A broad measure of the existing effects on Te Awanui was provided in the officers' recommendation report to the Minister for the Environment and the Minister of Conservation relating to POTL's unsuccessful Covid-19 Recovery (Fast Track Consenting) Act application, [16]

16 Exhibit 5, FTC 44 Application for referred project under the Covid-19 Recovery (Fast Track Consenting) Act - Joint Stage 2 decision on: Application 2020-29- Port of Tauranga Limited for Ports of Tauranga Stella Passage Wharves and Dredging Project, Memorandum dated 4 March 2021.

which included the following statements:

> "In the Ngāi Te Rangi and Ngā Potiki settlement the Crown acknowledged that:
>
> a. public works have had an enduring negative effects on the lands, resources, and cultural identity of Ngāi Te Rangi and Ngā Potiki, including the development of the Port and airport
> b. the development of the Port has resulted in environmental degradation of Tauranga Moana and reduction of biodiversity and food resources.
>
> In the Ngāti Ranginui settlement the Crown acknowledged that development of the Port has resulted in environmental degradation of Tauranga Moana which remains a source of great distress to the hapū of Ngāti Ranginui.
>
> The Ngāti Pūkenga Treaty settlement also acknowledges the grievances felt by Ngāti Pūkenga as a result of their marginalisation in Tauranga Moana by the Crown.
>
> In each settlement the Crown seeks to address these acknowledgements by committing to relationship with each iwi (relevant to the settlement) based on mutual respect, co-operation and respect for the Treaty of Waitangi."

[60] The Bay of Plenty Regional Policy Statement (**RPS**) states [17]

17 RPS at s 2.9.

that the declining water quality of Te Awanui is one of the two most important issues for the region to address in the next 10 years, the other being the water quality of the Rotorua Lakes. The RPS also states that land use and land management practices lead to erosion and soil loss resulting in water quality degradation and accelerated accumulation of sediment in Te Awanui.

[61] We considered it necessary to look back at this history for two main reasons. First, it is a major reason why all tangata whenua who joined this proceeding as s 274 parties are united in their fundamental opposition to the application. Second, we need to understand the existing effects of the Port on Te Awanui and combined effects when considered together with those arising from other activities that contribute to degradation of Te Awanui. This is required to enable us to assess the cumulative effects of the proposal.

[62] Many factors have contributed to the degradation of Te Awanui. Professor C N Battershill, the Chair of Coastal Sciences at the University of Waikato and an expert in marine biology, marine ecology and environmental toxicology, who was called by POTL to give evidence, identified these factors as including sedimentation, nutrients and other pollutants in catchment run-off. He considered them to be "manageable", and more likely to be the cause of the problem than the effects of the Port, stressing the need for in-catchment management solutions. He also identified recreational fishing pressure as "enormous". [18]

18 NOE from page 574.

[63] While we accept Professor Battershill's opinion that such effects are manageable in theory, achieving effective management of them will require a paradigm shift from how catchments are managed now and, if it can be achieved, it will take time, likely involving decades, not years.

[64] Increased rainfall intensity associated with climate change has significantly increased sediment loss from catchments [19]

19 NOE at page 525. Professor Battershill stated that the recent weather events such as Gabrielle and other storms are doing quite significant things to the hinterland which are significantly affecting the sediment rates throughout much of the harbour, particularly in those stream systems and river systems that are prone to erosion further up.

and increased cliff erosion and the potential for slips to occur along the coastal margins of Te Awanui, independent of the existence of the Port. This will inevitably increase the build-up of sediment on parts of the seabed of Te Awanui, likely leading to a need for increased dredging to maintain boat access to Rangiwaea Island, for example. This will again occur independently of the existence of the Port.

[65] Mr H Palmer, a witness for the Te Runanga O Ngai Te Rangi Iwi Trust, who has dedicated a lot of his time over the years to learning the history of the area, described the collapse of the Ruahihi canal into the Wairoa River as having had a huge impact on the traditional seafood gathering sandbanks named Nga Matarae: "Not only have the seabed contours changed, but the capacity of what was once a prolific shellfish bank has just not recovered." [20]

20 Mr Palmer, EIC at 49.

[66] Professor Battershill also identified marine heatwaves as a legacy effect of a changing climate that cannot be controlled, recording that " … the harbour is influenced by a changing marine climate with a marine heat event occurring over the last 6-12 months." [21]

21 Professor Battershill, EIC at 91.

The associated increased temperatures also will put stresses on the marine ecosystem that, equally inevitably, can be expected to affect the type, diversity and abundance of kaimoana living in Te Awanui in the future.

[67] One of the many challenges arising through this case is to be able to fairly and reliably ascertain what effects have been or will be caused by Port activities as opposed to those arising from other activities or causes. Some are obvious, such as the removal of kaimoana during dredging, the enclosing effects of Port activities on Whareroa Marae and restrictions on sight lines from culturally important sites to Mauao.

[68] Others are less obvious, such as wider effects of erosion and sedimentation in Te Awanui. We received evidence from a number of tangata whenua parties suggesting that effects of shoreline cliff erosion, land slips and catchment sourced

effects such as sediment and other contaminant build up could be attributed to Port activities. We found minimal or no evidence of any demonstrated causal link to support these suggestions.

[69] Dr W P De Lange was engaged by POTL and is a senior lecturer at the University of Waikato and an expert in coastal processes, hydrodynamics and sediment transport. His experience has included hydrodynamic modelling, analysis of monitoring data and personal observations prior to and following previous Port dredging and the construction of the Tauranga Harbour Bridge. His evidence was that there was little to no evidence of anthropic impacts on sedimentation and associated contamination and hydrodynamics beyond the immediate area of the Port and the urban areas of Tauranga and Mt Maunganui. [22]

22 Dr De Lange, supplementary evidence at 50.

[70] There is undisputed evidence that Port activities on their own have resulted in significant adverse effects on the relationships of Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga with their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Equally, there is no doubt that Port activities have seriously constrained the three iwi and their associated hapū in relation to their ability to exercise kaitiakitanga. These are matters that we must consider in the context of the provisions of the RCEP and subject to Part 2 of the RMA.

1.9 Effects on Whareroa Marae

[71] In addition to the wider adverse effects of Port activities on tangata whenua, there was agreement among all parties that Whareroa Marae has been particularly adversely affected by the activities of the Port, its associated industries and other infrastructure in the locality. The effects of these activities collectively are of such significance that they do not enable the people and communities of the marae to provide for their social, economic, and cultural well-being and for their health and safety. If the purpose of the RMA is to be met, it will be necessary to mitigate or compensate for those effects before any further cumulative effects can be authorised, however minor they may be considered to be.

1.10 The need to move forward in a way that reflects differing world views

[72] The evidence supporting the parties' respective positions brought into sharp focus the widely differing world views from the perspective of Te Ao Māori and the Western perspective. This is unsurprising as this difference has been at the forefront of all previous Port developments in Te Awanui, including the 2011 dredging consents referred to above. In the past this has been described as a clash of cultures which in our view unnecessarily and inappropriately draws attention to the differences between the perspectives, rather than looking for common ground and opportunities to incorporate the best of both worlds.

[73] Tangata whenua view effects holistically, including cumulative effects on the mauri of air, the whenua and the moana and the mauri of people. Our decision approaches the assessment of cumulative effects through a wide lens that incorporates all of these, as discussed in more detail in Part 6 of this decision. This wider view is essential to enable us to understand how to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. In our view, it is also what is meant by integrated management as sought to be achieved by the RCEP in order to carry out the Regional Council's function under s 30(1) (a) of the RMA.

[74] There was an acknowledgement by all parties, and their expert witnesses who expressed a view, that mātauranga Māori should form an integral part of the future management of Te Awanui. [23]

23 For example, Dr de Lange, NOE at p. 290 and Dr Battershill, NOE at pp. 528-531.

Our understanding is that this should sit alongside western science-based knowledge, with each complementing the other and enabling the strengths of both to be used to guide the way forward.

[75] Our understanding of mātauranga Māori was assisted by Mr R McGowan, also known as Pa Ropata, who gave evidence for the Ngāti Ranginui Fisheries Trust. He explained "It's the knowledge of the land, knowledge of the moana, of the people who belong to those places. It's a result of living with it for centuries, harvesting, fishing, doing all those things all the time, watching, listening, learning in order to survive." [24]

24 NOE at p. 1257.

[76] Mr C Taiapa, who has qualifications in marine ecology and his research includes reclamation and reinstatement of mātauranga Māori stated: [25]

25 Mr Taiapa, EIC at 33.

> " … I believe that if a matauranga maori approach was to take place it would provide a holistic perspective that would form a more cohesive baseline as a measure of change in the environment due to consecutive disturbance and shifting baselines related to the Port dredging consents."

[77] When considering how this might work in practice, it will be important that all parties are realistic in that, if for no other reason, experts in mātauranga Māori are in great demand and there may be difficulty securing ready access to their knowledge at times. We also consider that there are entrenched attitudes on both sides that will need to change considerably if the interests of Te Awanui are to be front and centre of its future management, which all parties agreed is necessary.

[78] For the reasons set out in Part 7.9 of this decision, there should have been no basis on which POTL could say it did not understand the relationship of tangata whenua with their taonga in accordance with s 6(e) RMA. However, POTL's evidence did not state what its understanding was or what measures were proposed to address specific relationship issues. Instead, the approach was largely to make sums of money available for tangata whenua to use as they wished. That did not provide an evidential basis from which we could make any clear determination as to the extent to which adverse effects were avoided, remedied or mitigated. Further, the evidence provided no clear understanding of how kaitiakitanga was intended to be provided for in any meaningful way, or how mātauranga Māori was intended to be incorporated. A number of times in answer to questions in cross-examination Mr Kneebone acknowledged on behalf of POTL that "We can always do better". Yet no specific proposal was advanced.

[79] Listening to the evidence of some tangata whenua witnesses, there appeared to be resistance to placing any significant reliance on western science. In some cases, it appeared to us that there was reluctance to afford it any credibility. Perhaps this is not so much resistance to western science as to the perception of a western attitude of relying on its science (including scepticism) to the exclusion of matauranga Māori. However, entrenched views will not assist Te Awanui.

[80] It is our understanding that mātauranga Māori is not static and can be adapted to a changing environment. The way in which it is adapted to address the current degraded state of Te Awanui compared to a more pristine state prior to colonisation and industrial development when mātauranga Māori concepts were first developed, will be critical. Unless there is a mutual acceptance by all parties that both western science and mātauranga Māori need to and can work together in the interests of Te Awanui, Te Awanui will be the loser.

1.11 Parties

Port of Tauranga Limited

[81] POTL's position is that the consents can be granted subject to amendments and conditions proposed in the closing submissions of its counsel.

[82] Policy CE 14B of the RPS, "Providing for ports", requires recognition of the national and regional significance of the Port and the need for it to be located within the coastal environment. This is reflected in the RCEP which includes amongst other provisions, a Port Zone which specifically addresses the area occupied by the Port within the CMA. The RCEP includes objectives for the Port Zone (Objectives 52 and 53) and specific policies and rules for the Port under Part Four of the Plan. As well, an "Outline Development Plan for the Port of Tauranga 2013" is provided in nine drawings at Schedule 9 to the RCEP.

[83] No party to the proceedings questioned the consistency of the proposal with the Outline Development Plan.

Bay of Plenty Regional Council

[84] The Regional Council adopted a neutral position in its submissions. The planning witness, Mr Greaves, who prepared a report on the application under s 87F of the RMA recommended the grant of the application, subject to conditions.

[85] Ms Hill submitted in opening submissions that the Regional Council's role is to "be available" to the Court (as a party to a directly referred application proceeding pursuant to s 87F of the RMA, as distinct from being the respondent to an appeal from one of its decisions under the RMA) and to provide reasonable assistance to the Court. She stated that the duty to assist the Court does not preclude the Council from supporting, opposing or taking a neutral position on the application. [26]

26 Mainpower NZ Ltd v Hurunui DC [2012] NZEnvC 56 at [45] and [46].

However, she did not state the Council's overall position on the application, noting instead that:

> "Any conflict of interest, actual or perceived, is managed (and has been in this case) through the application being processed by an independent consultant (Mr Greaves) who has provided an officer's report and planning evidence to assist the Court, as required by ss 87C-H RMA. The notification decision was made by an independent commissioner. Ultimately, given the direct referral, this Court will determine the application at first instance not the Council."

[86] She submitted that the RCEP Port Zone provisions were enabling and in her submission the emphasis is on "appropriate management rather than avoidance of effects". Among other submissions she made, it was the Regional Council's view is that:

> " … … all of the 'technical' (scientific) evidence demonstrates that the cumulative effects of the current proposal (as modified by reducing the extent of the Mt Maunganui wharves) can be managed through conditions of consent to acceptable levels. The more challenging issue is how to address the cumulative cultural effects of the proposal."

and

> " … … the issue is perhaps how to 'quantify' the cumulative impact of this proposal on those cultural relationships, particularly when the evidence is principally qualitative in nature. While the required assessment is not necessarily solely quantitative, if the s 274 parties are pursuing an argument that the proposal ought to be declined because a tipping point has been reached (this remains unclear), then some degree of quantification is likely to be required."

[87] In relation to evidence of cultural effects, she submitted:

> "The appropriate approach to the assessment of cultural evidence has been described by the courts as the 'the rule of reason' approach, which allows the Court some flexibility in its analysis. The approach involves consideration of the following factors when the Court is assessing and weighing the cultural evidence:
>
> (a) whether the values correlate with physical features of the world;
> (b) people's explanations of their values and their traditions;
> (c) whether there is external evidence (e.g Māori Land Court Minutes) or corroborating information (e.g waiata or whakatauki) about the values;
> (d) the internal consistency of people's explanations;
> (e) the coherence of those values with others;
> (f) how widely the beliefs are expressed and held.
>
> One of the issues apparent in this case is that there has been a lack of cultural values assessment and matauranga monitoring both at RCEP development stage, and through consenting and implementation of existing activities which are contributing to cumulative cultural effects. This application therefore presents a further opportunity to enhance the knowledge and matauranga base, such as through the suggested Southern Te Awanui landscape study [27]
>
> 27 Subsequently proposed by POTL to be the Southern Te Awanui Harbour Health Plan.
>
> and the Cultural Effects Monitoring and Mitigation Plan mechanism."

[88] With reference to the difficulty in preparing conditions for a consent, based on the consent conditions put forward by the POTL at the start of hearing, and the Regional Council's experience, Ms Hill had this to say:

> "While not intending to direct a solution, the Regional Council has been involved in several different approaches in the Region which are put forward in these submissions for consideration. It may be that a combination of approaches could provide a more bespoke solution in this case, with tangata whenua input.
>
> A number of consented projects in the Bay of Plenty have sought to address ss 6(e) and 7(a) relationships including through mātauranga monitoring, mauri modelling, cultural management plans, and the establishment of kaitiaki groups. Some go further, seeking to respond to s 8 matters including the Treaty / Te Tiriti principles of partnership and rangatiratanga through enabling tangata whenua a greater governance role. However, it must be acknowledged that those examples involved a local authority as consent holder, which has different statutory obligations than a private (although publicly listed) port company.

> The options are perhaps less than perfect, largely due to issues of vires or enforceability. Where there is doubt as to whether there is a 'direct connection' between the proposed condition and the effects arising from the consent, as established on the evidence, or where a condition relies on the input of a third party, there are limits to what a consent authority is willing to impose absent an Augier undertaking."

Section 274 Parties

[89] A number of parties representing tangata whenua joined the proceeding under s 274 of the RMA and are listed alphabetically below, together with brief details about them. Some parties who were not submitters to the limited notification process for this direct referral joined the proceeding subsequently under s 274, with no objection from POTL.

[90] For completeness, we record that Ngāti Pūkenga was not a party to the proceedings but provided a letter dated 15 March 2023, strongly supporting the opposition by Ngāi Te Rangi and Ngāti Ranginui in the defence of Te Awanui. The letter was signed by both Co-Chairs of Ngāti Pūkenga, Mr Samuel Mikaere and Ms Kylie Smallman. It stated:

> "The development of the port has had a detrimental impact on our iwi and our association with our traditional waters. We believe it is critical that the Environment Court acknowledge mātauranga Māori as a critical determinant of the health and wellbeing of any area within our Taiao (environment) and the impacts to our people when our pātaka moana (marine food source) is interrupted. … "
>
> (our translations in brackets).

Ngā Hapū o Ngā Moutere Trust

[91] The Ngā Hapū o Ngā Moutere Trust is the entity that encompasses the five hapū of Matakana, Rangiwaea and Motuhoa Islands: Ngāti Tauaiti, Ngāi Tuwhiwhia, Te Whānau a Tauwhao, Ngāi Tamawhariua and Te Ngare. The Trust was established to collectively represent the interests of the five hapū and does not replace the role of individual hapū, who each manage their own interests.

Ngāti Hē

[92] Ngāti Hē are indigenous to Te Tahuna o Rangataua and the wider coastal areas to which the application for consents apply. Ngāti He exercise rangatiratanga and kaitiakitanga and other cultural practices over the moana areas and consider that they will suffer significant adverse effects as a result of the proposed activities.

Ngāti Kaahu A Tamapahore Trust

[93] Ngati Kaahu A Tamapahore Trust are kaitiaki of the area along with several other Ngai Te Rangi hapū.

Ngāti Kuku Hapū

[94] Ngāti Kuku are descendants of the Ngāi Te Rangi Chief Taiaho Hori Ngatai, who was the spokesperson for Ngāti Kuku in the late 1800s. It was he who established their kāinga known today as Whareroa. Taiaho referred to the waterways near the marae as his pātaka or "garden". Te Pataka Kai a Taiaho provided an abundance of kai moana for not only his people but for the wider Tauranga District as well. Ngāti Kuku's indigeneity is cemented through their long-standing association to the areas that are the subject of the application. Ngāti Kuku exercise kaitiakitanga and other cultural practices over the moana areas that they consider will suffer significant adverse effects as a result of the proposed activities.

Ngāti Ranginui Fisheries Trust

[95] The Ngāti Ranginui Fisheries Trust is an entity mandated under the Maori Fisheries Act 2004. The main role of the Trust is to receive, hold, manage and administer the Trust Fund for every charitable purpose benefitting Ngāti Ranginui. The s 274 Notice states that Te Awanui is considered a significant Taonga to Iwi and Hapu and a source of recognition and sustenance for future generations.

Ngāti Ranginui Iwi Incorporated Society

[96] The Incorporated Society exists through the membership of Nga uri o Ngati Ranginui Iwi and the representation of the 10 marae who form the governing fabric of the society. The Society has a constitutional obligation to its uri (descendants) to promote and advance their interests, to provide and be concerned with the provision of facilities and amenities which will foster the moral, intellectual, spiritual and social features of Ngati Ranginui Iwi. [28]

28 Ms Gardiner, EIC

Ngāti Tapu

[97] Ngāti Tapu are indigenous to the coastal areas to which the application for consents applies. Its coastal setting overlooks Te Awanui with their marae being located on the coastal edge of the Matapihi headland pa. Viewshafts to their chiefly maunga, Mauao also form part of their cultural setting. The customary interests of Ngāti Tapu lie within an area stretching from Otumoetai/Matua through Te Papa peninsula inland to the bush at Maenene; from Matapihi, the inner harbour (Taumata kahawai) through Horoipia to the moana.

Te Rūnanga o Ngāi Te Rangi Iwi Trust

[98] The interests of Te Rūnunga o Ngāi te Rangi Iwi Trust concern, but are not limited to, matters of national importance in respect of section 6(e) and other iwi Māori sensitive issues specifically embodying the principles of kaitiakitanga, Te Tiriti o Waitangi, the active protection of taonga and the recognition of rangatira authority within decision making processes affecting their taonga.

Te Rūnanga o Ngāti Kahu

[99] Ngāti Kahu are descendents of Ngā Marama. Te Rūnanga o Ngāti Kahu also encompasses Ngāti Pango and Ngāti Rangi. The three Hapū are known as the Wairoa Hapū. Their histories and associations with Te Awanui are rich and enduring and directly relevant in the context of the application for consent. They stated that tikanga requires Te Runanga to stand beside (and in some case, behind) whaunaunga with connections to the tribal landscape.

Tupuna Trust

[100] The case for the Tupuna Trust focussed on the ancestral area of Te Awa o Tukorako and its support for Ngāti Kuku and Whareroa Marae. [29]

29 Mr Nicholas, EIC at 4.

Trustees of the Whareroa Marae Trust

[101] The Whareroa Marae Trust (**WMT**) administers the Whareroa Marae and Marae Reservation lands at Whareroa. The main hapū who affiliate to Whareroa Marae are Ngāti Kuku and Ngāi Tukairangi, however, we were told that all uri of Tauranga Moana enjoy Whareroa Marae.

1.12 The positions of the Section 274 Parties

[102] All tangata whenua parties opposed the grant of consents and sought that the application be declined. The opposition from Ngāti Kuku and Whareroa Marae in particular, who have been most affected by Port activities, was particularly strong. While the same level of opposition was not expressed so clearly by others, a consistent message from all tangata whenua was their distrust of POTL as a corporate entity given its consistent lack of respect for them. Historically, they consider they were only approached by POTL when it wanted something, following which nothing changed.

[103] In their opposition to the proposal, submitters gave the following broadly common reasons:

> "(a) The proposal does not recognise and provide for the relationship of tangata whenua with their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga as required by section 6(e) of the RMA;
> (b) The proposal does not have particular regard to kaitiakitanga as required by section 7(a) of the RMA); and
> (c) The proposal does not adequately take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."

[104] In addition, the Whareroa Marae Trust opposed the application because it does not consider the full range of adverse effects associated with the proposed activities on Whareroa Marae and the resident whanau and has the potential to cause significant adverse effects on them. The Trust considered the application fails to assess cumulative effects in the context of the culture and traditions of the Marae and its customary and traditional activities, mātauranga and tikanga. It was concerned about more ships being "berthed even closer to the Marae community, and it will degrade the mauri of air, the moana and impact the mauri of our people."

[105] Ngāti Kuku identified their taonga as including but not limited to their ancestral waterways which are part of their identity and their airways which have been severely degraded by all users. They considered the mauri of their taonga will be irreversibly damaged as a result of the proposed activity.

[106] The Ngāti Ranginui Iwi Society Incorporated identified the continued loss of Maitaitai and modification of habitat as concerns.

[107] The Ngāti Ranginui Fisheries Trust stated it has a responsibility to protect the mauri of Te Awanui and Nga Taonga tuku iho on behalf of its beneficiaries. The Trust has a kaitiakitanga responsibility in accordance with ss 6, 7 and 8 of the RMA.

[108] Mr Nicholas for the Tupuna Trust opposed the application as it involves the destruction of customary kaimoana property rights and it "is illegal to take so much Kaimoana without a permit."

[109] Mr G J Carlyon, an expert planner called by a number of tangata whenua parties to give evidence, stated that: [30]

30 Mr Carlyon, EIC at 6.16.

> "Throughout discussions between Te Rūnanga and mana whenua and the Applicant, the need for expansion of the Port was not challenged with respect to the need to provide for domestic and international goods. I recognise that there is an established functional need for the Port to be located at the current site."

[110] However, he also stated that: [31]

31 Mr Carlyon, EIC at 1.2.

> "For those who have ahi kā, the expansion of the Port effectively constrains their occupation to a 'postage stamp' area of land with Tauranga Airport on one boundary, petrochemical storage facilities and fertiliser processing plant on another boundary."

[111] Mr Paora Stanley, who is the CEO of Ngāi te Rangi Iwi Tribal Authority, acknowledged the importance of the Port, stating: [32]

32 Mr Stanley, EIC at 49.

> "We have a great deal to lose from anything that would stymy the economic viability of the Port itself — Maori Trusts and organisations account for as much as $2b in the Tauranga moana region, most of that being kiwifruit and horticulture - this is our livelihood as well."

1.13 Existing resource consents

[112] POTL holds five existing coastal permits in relation to Port operations, the first four of which are summarised in Appendix 2 to this decision. These are:

Reference	Activity	Expires
04 0128	Occupation of the CMA	30 September 2026
65806	Channel Deepening and Widening	6 June 2027
65807	Channel Deepening and Widening	6 June 2027
62920	Dredging in Stella Passage of 800,000 m3	31 January 2026

[113] We were told that the fifth permit, reference 68192, relates to the rebuilding of Berths 4, 5 and 6. No details about it were provided to us and no issues about it were raised by any party.

[114] Permit 65806 was the subject of an Environment Court hearing in 2011 [33]

33 Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402 and [2011] NZEnvC 197

and authorised disturbance of the bed of the Tauranga Harbour by dredging and disturbance and damage habitat on the bed of Tauranga Harbour Channel Deepening and Widening. The consented area includes the seabed in front of the proposed amended extension of the main Mount Maunganui wharves as far south as the existing tanker terminal. Permit 62920 authorises dredging of an area in front of the proposed first stage of the Sulphur Point Wharf to a maximum water depth of 12.9 m.

[115] One matter of relevance to the present application is that the ecologists giving evidence at the 2011 hearing were all agreed that the extent of the disturbance of the intertidal exposed parts of the Te Paritaha pipi beds would be very small and the effect on the ability to harvest pipi would be inconsequential. The Court's 2011 Decision recorded that Dr Grace, a consultant ecologist for POTL, considered that just a tiny fraction of the dried bank would be affected, plenty of large pipi would still be available and that pipi would re-colonise in the vicinity of Te Paritaha following the dredging so that the habitat would not be lost although it would suffer a significant short-term disruption. [34]

34 Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402 at [159] - [162] and [168].

In that decision the Court found:

> "[168] We accept that the loss of pipi is small in scale and would have no long-term discernible effect on the extensive and widely dispersed pipi population of the harbour as a whole. At a local level the dredging and slumping along the edge of Te Paritaha is a temporary disruption and the habitat is disturbed rather than destroyed. The dredged areas are expected to recover quickly, with re-colonisation by pipi and other species, as a result of natural processes within the harbour."

[116] The conditions of the 2011 consents required POTL to undertake annual monitoring of kaimoana at Te Paritaha. However, POTL has not complied with this requirement since 2015, so there is no or inadequate scientific evidence to assist in understanding the actual effects of the dredging on the kaimoana resources or the accuracy of the ecologists' opinion evidence at the 2011 hearing. On the other hand, the tangata whenua evidence is that significant adverse effects on these resources have occurred. There is a serious information gap of relevance to the accuracy of earlier scientific predictions which is relevant to our assessment of the baseline to be used for assessing any cumulative effects of the current proposal.

[117] A number of other requirements of the 2011 consent conditions which were intended to contribute to addressing ss 6(e) and 7(a) matters did not achieve the outcomes sought. These have implications for the current application, and we explain the reasons below.

The Ngā Mātarae Trust

[118] The Ngā Mātarae Trust was established as a condition of consent 65806. Its purpose was to address the effects of the dredging activities on tangata whenua and their cultural and spiritual values and to promote the wellbeing of Te Awanui and its environs in a manner that benefits iwi. The conditions identified the Tauranga Moana Iwi Customary Fisheries Trust (**TMICFT**) as the appropriate mechanism through which the Consent Holder could recognise the relevant Iwi and Hapū as kaitiaki of Te Awanui Tauranga Harbour and the importance of Te Awanui including Mauao and Te Paritaha to Tangata Whenua.

[119] In closing, Ms Hamm for POTL submitted that:

> "36. Various evidence has been presented by iwi and hapū that the TMICFT and Ngā Matarae Trust referenced in consents 65806 and 65807 are not meeting their expectations. … it is acknowledged that a different format is likely to be required to better reflect the aspirations of iwi and hapū as articulated through the course of the hearing.
> 37. It is clear that iwi and hapū that have a relationship with Te Awanui prefer to establish an advisory group 'on their terms' and through a tikanga based process. Such a process may take time but the evidence before the court from these parties is that they are confident it can be achieved."

[120] Ms Hamm outlined a possible process that could be followed, which we return to in our evaluation in Part 7.

[121] Ms P Bennett, who is employed as the Kaiarataki (Leader), Te Ohu Kaupapa Taiao, gave evidence that:

> "The kaitiaki and hapū landscapes are different to what they were 10 years ago. Hapū are asserting their desire to be responsible kaitiaki within their rohe and are readying themselves for such. Notwithstanding the accommodations being made in this expansion consent and within the proposed conditions for the Customary Fisheries Trust to lead out different projects, with all due respect, the plain truth of it is that they are no longer as relevant as they maybe once were in terms of a preferred vehicle."

The Kaimoana Restoration Plan (KRP) and monitoring requirements

[122] Further conditions of Permit 65806 required that:

> "Prior to carrying out any works under this consent, the Consent Holder shall develop a **Kaimoana Restoration Programme (KRP)** in close conjunction with the TMICFT. The purpose of the KRP is to determine and mitigate the actual and potential loss of kaimoana by identifying methods and techniques to ensure the ability of Ngai Te Rangi, Ngati Ranginui and Ngati Pukenga and their Hapu to collect the kaimoana species that are affected by the works authorised by the consents is maintained.
>
> … annual monitoring of the main kaimoana species, their locations, abundance, size health and harvesting pressure within the vicinity of dredging and disposal sites comprising Te Paritaha o Te Awanui, the southern Matakana Panepane Point Area Mauao, Tanea Shelf, Motuotau and Moturiki Islands and surrounding rocky reefs."

[123] It was clear from the evidence that the KRP did not deliver the expected outcomes. There were a range of reasons for this, including difficulties in enforcement where some aspects were outside of POTL's control. Ms Hamm identified that incorporating mātauranga into consent conditions is particularly challenging for a consent holder where the consent holder cannot be the one to carry out the monitoring. [35]

35 Ms Hamm, closing submissions at 131.

We accept this is a challenging issue.

[124] However, that does not excuse POTL's failure to undertake the annual kaimoana monitoring referred to above. In response to a question under cross examination, Mr Johnstone agreed that the baseline studies and the ongoing monitoring required by consent conditions are critical for targeting species under the restoration programme. When asked about the fact that annual monitoring had not been undertaken since 2105 and that the port was essentially in breach of the consent, he didn't think he had self-reported or notified the regional council. [36]

36 Mr Johnstone, NOE at page 196.

1.14 Integrated management and cumulative effects

[125] In our minute to the parties dated 21 July 2022, the Court identified the need for further evidence in relation to integrated management of the Port area and cumulative effects in the following terms:

> "Integrated management is described in the issues, objectives and policies of the Regional Coastal Environment Plan in the context of requirements relating to cumulative effects across the boundary of regional and district planning regimes. The evidence presently before the Court does not allow a full assessment of the integrated management of the Port area or the cumulative effects of the existing and proposed development

as a whole to be made. Further evidence should be provided on all relevant effects of the proposal on the harbour environment. While the restricted matters of discretion may not expressly refer to these matters, it is important that the full effects are at least made clear."

[126] Relevant elements of Objective 1 of the RCEP are:

"Achieve integrated management of the coastal environment by:

…
(b) Adopting a whole of catchment approach to management of the coastal environment
…
(d) Enabling the exercise of kaitiakitanga;
(e) Planning for and managing:
(i) cumulative effects; and
…"

[127] A number of issues require consideration in relation to integrated management, including:

"(a) As noted above, when assessing the effects of a proposal, including its cumulative effects, it is necessary to understand the baseline condition of the environment against which future cumulative effects can be monitored and assessed. We were provided with no baseline report describing the condition of the existing environment across the area of Te Awanui affected by Port activities;
(b) It will not be possible to provide such a report until updated kaimoana monitoring is provided in accordance with the conditions of consent 65806, as discussed above; and
(c) Dredging conditions placed on any new consent would be different to those on existing consents 65806 and 62920 and they would likely be different again in the event that further maintenance dredging consents are granted when the existing ones expire in 2027."

[128] Professor Battershill acknowledged tangata whenua concerns about the decline in mauri of Te Awanui, stating he is wholeheartedly and sincerely empathetic to this substantial and long-lasting concern and strongly concurs with calls for an urgent and holistic Iwi-led review of the biophysical, cultural and spiritual status of Tauranga Moana. He also agreed with Mr Taiapa that mātauranga Māori should form part of any future assessments of Te Awanui, encompassing the entire Tauranga Moana ecosystem; with the working port being a possible starting place.

[129] Ms Hamm for POTL submitted in opening that the key issue raised in this case is in relation to cumulative effects. She submitted that case law indicates that cumulative effects are not confined to effects of the same activity, citing the *Unison Windfarms* [37]

37 Outstanding Landscape Protection Society Inc v Hastings District Council [2008] NZRMA 8 at [50] - [53].

case as an example. She also cited Blampied v Whangarei District Council, [38]

38 Blampied v Whangarei District Council [2012] NZEnvC 54 at [58].

in which the Environment Court expressed the concept of cumulative effects as "assessment of an effect that is proposed to occur over and above an existing situation. That is, against an existent situation whether that came about gradually or as a result of a single event."

[130] Ms Hill for the Regional Council submitted in opening that "the management of cumulative effects may require some innovative and collaborative mechanisms … "

[131] Ms Bennett on behalf of Te Rūnanga o Ngāi te Rangi stated: [39]

39 Ms Bennett, EIC at 106 and 107.

> "Above everything, this case is one that is firmly couched in the permanence and cumulative effects sphere. For Ngāi Te Rangi, all our hapū, and for Te Awanui, the greatest impacts are cumulative in nature and the fear is those effects will continue to swell.
>
> The effect of this proposal must be seen in the context of the cumulative effects of past development and modification to Te Awanui. These cumulative effects have had an adverse and continuing impact on the connections and relationship of Ngāi Te Rangi with our taonga."

[132] Unless the context otherwise requires, s 3(d) of the RMA defines effects as including any cumulative effect which arises over time or in combination with other effects, regardless of the scale, intensity, duration, or frequency of the effect …

[133] All of the planning witnesses agreed that cumulative effects require the assessment of effects that may be individually insignificant but, when considered in relation to wider activities and development, reach a threshold or "tipping point" where the combined effects are then considered to be significant. [40]

40 JWS Planning dated 27 June 2022.

[134] We acknowledge that our decision on an application for a restricted discretionary activity must be guided by the matters to which the Council has restricted its discretion, but we also acknowledge that matters relevant under ss 6(e) and 7(a) are wide-ranging and require consideration of cumulative effects with a wide lens, including effects on land, air and water.

1.15 Other amendments to the proposal made in closing submissions

[135] In closing submissions, in addition to describing further amendments to the extent of physical works proposed, Ms Hamm submitted on behalf of POTL that:

> "31 The proposal for which consent is sought is as follows:
>
> (a) Resource consents which recognise the mana of Te Awanui and place it at the forefront of the consents through:
>
> (i) Facilitating the preparation of a Southern Te Awanui Harbour Health Plan to promote integrated management and with the goal of improving the health of Te Awanui
>
> (ii) Establishment of a Te Awanui scholarship with Waikato University for the iwi and hapū of Tauranga Moana, to promote the health of Te Awanui and enhance capacity within iwi and hapū;
>
> (iii) Completion of a scientific baseline study of Te Paritaha prior to Stage One of Sulphur Point and the bunker barge berth;

(iv) Completion of a baseline report (compilation / desk based study) of all information on the Port Zone … to provide for a wide purpose. … This could include the cultural and environmental or economic health of the harbour,

(b) A further significant modification to the proposal at Mount Maunganui by further minimising works south of the existing tanker berth, … The modifications also involve no dredging in the eastern side of Stella Passage …

(d) The ability to undertake Stage One of Sulphur Point straight away. …

(e) Increased iwi and hapū involvement in the consents with relevant matters to be iwi and hapū led. …

(j) With respect to other mitigation options that were identified by iwi and hapū during the hearing:

(i) A condition securing the barge ramp access for the duration of the consent as long as here remains a need for cargo to be transferred from Matakana and Rangiwaea Island to the Port of Tauranga.

(ii) Retention of the sandpile at Sulphur Point …

(k) A term of 35 years."

[136] Ms Hamm also stated that POTL now proposes that any vessels berthing south of the existing tanker berth on the proposed minor structures on the Mount Maunganui side will connect to shore power. We understand this is so that they do not need to operate their engines while berthed and so can reduce their discharges to air which affect Whareroa Marae. We note the intended relevant condition 8.2 does not limit berthage to vessels that do connect to shore power. As we will return to later, consideration needs to be given to requiring all ships berthing at the Port, including on the Sulphur Point side, to connect to shore power when they are equipped to do so.

[137] We address the responses of tangata whenua to the revised proposal in Part 4.7 of this decision.

Part 2 Background

[138] There have been centuries of occupation of the lands surrounding Te Awanui by Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pukenga. [41]

41 Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402 at 7.

The many hapū within those Iwi [42]

42 There are 13 hapū of Ngāi Te Rangi and 10 of Ngāti Ranginui.

each have their own individual relationships, culture and traditions with Te Awanui and sites, waahi tapu and other taonga within it, and have a strong interest in how its resources are managed. Individual marae may be affected differently by what happens in Te Awanui and will want to be involved in decisions about any aspects of its management that affect it. This presents a complex environment within which the management of Te Awanui must be undertaken. It also presents difficulties for consent applicants in terms of knowing who they should consult with.

2.1 Tauranga Moana and tangata whenua

[139] We reproduce below relevant history as described in the 2011 Decision relating to dredging of Te Awanui by POTL. [43]

43 Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402 at [14] to [31], drawing on the reports of the Waitangi Tribunal in *WAI 215: Tauranga Moana; 1886-2006* and *WAI 215: Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (2004).

"[16] Tauranga was one of the first areas settled by Māori in New Zealand. Tauranga was blessed with a mild climate and a range of available resources, access to these resources ensured that Māori thrived in the area:

> ' … The entire Tauranga district, estimated at 290,000 acres, was included in the confiscation proclamation of 1865. Of this area, the Crown retained a 50,000 acre area known as the "confiscated block". Though the land outside the 50,000 acre block was returned to Māori between 1865 and 1886, most of this land was quickly lost from Maori ownership as well. The Crown purchased some 90,000 acres within the district known as the Te Puna-Katikati block and a further area of "returned land", estimated at 75,000 acres, was sold to the Crown or private purchasers. By 1886, Tauranga Maori retained only an estimated 75,000 acres of relatively poor quality land and this was no longer held under customary title.
>
> The land loss of Tauranga Māori in the late nineteenth century was considerable. Added to the effects of the raupatu, that loss forms a critical backdrop to understand the impact of Crown policies and practices in the century or so that followed.
>
> … As a consequence of the Raupatu and its aftermath, Māori communities in the Tauranga area were confined to reserves on the coastline around Tauranga Moana; to a handful of blocks of land around the eastern end of the harbour and to some slightly larger blocks in the hill country running into the Kaimai ranges

"[17] Māori therefore had to adapt and became reliant on the sea and rivers to sustain themselves in the area:

> ' … During the early intercourse of Europeans with New Zealand[,] Tauranga became of much consequence as a port.

"[18] This was due to the location of Tauranga between Auckland and Wellington and the ability for a safe, all-weather, deep water berth to be utilised:

> ' … by the 1880s, Māori and the Crown had assumed distinctly contrary positions as to who rightfully possessed and controlled the foreshore and seabed - positions that remain today. In Tauranga, these differences emerged over the question of who possessed and controlled Tauranga Moana. In practice, the Crown settled this question by passing a series of Acts that vested authority in bodies entirely composed of Pakeha settlers. With these Acts, possession and authority over Tauranga Moana passed from Tauranga Māori, without consultation … Their Harbour was under the direct jurisdiction of the Tauranga Harbour Board, and its control was backed by the full authority of the Crown. Henceforth, Tauranga Māori would struggle to assert their Treaty rights to participate in the management of the harbour before the Crown; the question of ownership was foreclosed.

"Therefore,

> ‘ … Tauranga Māori lost the great majority of their ancestral lands. Even so, they [did not and] have not lost their association with those many places and environments, which remain the source of their cultural identity.

[140] Ngāti Ranginui, Ngāi Te Rangi and Ngāti Pūkenga stated in a 1997 Report prepared at the request of the Waitangi Tribunal [44]

44 *The issues concerning the use, control and management of Tauranga Harbour and its estuaries* by A. Fisher, K. Piahana, Te A. Black and R. Ohia, 16 March 1997 (a commissioned research report (A50) in Wai 215 - Tauranga Moana 1886-2006 - Report on the post-Raupatu claims 2010) at Section 6.1, page 56 (**1997 Report**).

that the traditional and customary relationship between the iwi and hapu of the Tauranga District and the Harbour was violated at a fundamental level by the Crown, including by failure to:

> “• recognise and acknowledge the sacred status of Te Marae o Tangaroa;
> • uphold the kaitiaki status of Ngai Te Rangi, Ngati Ranginui and Ngati Pukenga;
> • adopt kaitiakitanga practices which are consistent with the sacred nature of Tangaroa's domain;
> • maintain the natural, spiritual and cultural resources of Te Marae o Tangaroa for future generations; and
> • uphold the natural character of the natural environment;”

2.2 A brief history of Whareroa Marae and surrounding development

[141] Whareroa Marae is home to whanau of Ngāti Kuku and Ngāi Tukairangi, hapū of Ngāi Te Rangi Iwi. The marae was built in 1873 by Ngāi Te Rangi and Ngāti Kuku Rangatira Taiaho Hori Ngātai and that the area has been a key strategic location for Maori since time immemorial. [45]

45 Mr J Natuere, EIC at 21 on page 1738 of the Evidence Bundle.

Mr M Ngatai, who is Chairperson of the Whareroa Marae Trust, understands the name “Whareroa” to mean “forever home”, where he is going to stay forever, “our turangawaewae mo ake tonu atu.” [46]

46 Mr M Ngatai, EIC at 7, page 1426 of the Evidence Bundle.

[142] The Marae is a Maori Reservation pursuant to section 338(1)(a) of Te Ture Whenua Maori Act 1993 for the purpose of a marae and recreation ground for the common use and benefit of the members of the Ngāi Tukairangi hapū of Ngāi Te Rāngi Iwi and other Maori resident in the locality. By the late 1860s, Whareroa had become Ngati Kuku's principal area of settlement. [47]

47 Wai 215 Report at 2.4.2, page 36.

[143] Te Awanui was the primary food source for Ngāi Te Rangi. Oral and written accounts confirm that all of the hapū were almost totally dependent on the Te Awanui as a food source and that kai moana formed the Iwi's staple diet until well into the twentieth century. [48]

48 Fn 44, Section 8.5.1, p. 74.

[144] The alienation of lands in the Mount Maunganui area from their tribal land holders and the first sales of land in that area to Pakeha settlers occurred in 1888. [49]

49 Fn 44, Section 5.1.1, p. 40.

The effect of development of the Mount Maunganui wharves on Ngāi Te Rāngi was " … especially dramatic" [50]

50 Fn 44, Section 5.1.3, pp. 48 and 50.

, particularly for Whareroa Marae:

> "For them, the development and growth of the Port has occurred at the expense of the traditional and customary relationship they had formerly enjoyed with the Harbour. The impact of the Port development on the Harbour eco-systems and the ability of those systems to support the cultural values and lore of Ngai Te Rangi was particularly severe. …
>
> At the same time, land-based enterprise development on the shores of the Harbour kept pace with wharf development:
>
> - …
> - the Bay of Plenty Co-Operative Fertiliser Company's new processing works were in production south of the Mount Maunganui wharf, immediately adjacent to the Whareroa Marae; and
> - substantial tank storage for petroleum products had been in use in the vicinity of the Mount Maunganui wharf since 1957."

[145] Development of the Port was not the only infrastructure development to directly and significantly affect the Marae. In 1934, the Crown acquired land at Whareroa from Ngāi Tukairangi by compulsory acquisition for the development of Tauranga's Airport. The 1997 Report to the Waitangi Tribunal records that:

> "Ngai Tukairangi fiercely contested the acquisition and even took the case to the Privy Council. However, the hapu's case was unsuccessful. In this instance, the hapu chose to pursue their cause by using Pakeha law instead of the taiaha. Even so, the process represented a futile endeavour and the outcome for the hapu was a catastrophe.
>
> The development included clearing, draining and filling significant wetlands and streams. These wetlands and streams filtered run-off and drained into Te Tahuna o Waipu, and like other wetlands around Te Moana o Tauranga, were an integral part of a highly developed natural eco-system. [51]
>
> 51 Fn 44, Section 5.1.1, p. 43.
>
> "

[146] The Waitangi Tribunal found that: [52]

52 Report of the Waitangi Tribunal in *WAI 215: Tauranga Moana; 1886-2006* at page 838.

> " … the port and airport developments resulted in much of their whareroa land being lost to public works, with only limited compensation - it is relevant to note here that the Crown in fact took more land than it needed and sold off the excess for considerable profit."

[147] The Environment Court stated: [53]

53 Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402 at [23].

> "These sales did little to strengthen the belief that the land was needed for the national interest and created a feeling of distrust and animosity between iwi and the Port authorities, which is still evident today."

[148] Port development has been accompanied by extensive neighbouring industrial development. On the Mount Maunganui side, a number of industrial activities are located in close proximity to the Marae, including Ballance Agri-Nutrients, Waste Management NZ, NZ Oil Services, NZ Logging, Lawter Chemical Solutions, CRS Containers and Te Awanui Hukapak. Also of concern in terms of effects on the Marae are the transport activities on the state highway and at Tauranga Airport. These activities generate a variety of discharges to air that are of concern to Ngāti Kūku and Whareroa Marae because of their adverse effects on the health of those living at the Marae. Bright street lighting is a further adverse effect on the Marae.

[149] The Tauranga Harbour Bridge is located immediately to the west of the Marae. The 1997 Report to the Waitangi Tribunal records that: [54]

54 Fn 44, Section 5.1.2, p. 45.

> " … although the Marae Committee objected to the construction of the bridge itself, they ended up focusing on the proposed siting of the eastern accessway to the Bridge. In some respects, continuing to object to the Bridge itself was perceived by some members of the Marae Committee as an exercise in futility.
>
> … the bridge structure has had a dramatically negative effect on the mataitai, used by the hapu of that marae for harvesting tuangi, pipi and kukuroroa. The area's renown for an abundance of kai moana of that type has now been lost."
>
> The Bridge, and its associated causeway, impede the cultural association which is reinforced by being able to see an important tribal pa site across the Harbour. It blocks the view, from Whareroa Marae, of Otamataha, an ancestral pa site on the Tauranga side of the Harbour where two Ngai Tukairangi chiefs, Taiaho and Puhirake, are buried, and which has great significance in the history of the settlement of the area94 by Ngati Tapu and Ngai Tukairangi."

[150] The Tauranga Bridge Marina, with 500 berths, is located immediately to the west of the Harbour Bridge causeway. It occupies 11.74 hectares of the seabed within the Port Zone of the Coastal Marine Area (CMA). The area was used traditionally as a source of kaimoana by Ngāti Kūku and Whareroa Marae.

[151] The above developments have resulted in a high level of visual enclosure of the Marae on three of its four sides. The construction of the fertiliser manufacturing plant in the late 1950s prevented any view to Mauao from the Marae and the harbour bridge causeway prevents direct views to the urupa at Otamataha, where Taiaho Hōri Ngātai is buried.

[152] Whareroa currently has a resident population of approximately 90 people. It also has a kohanga reo attended by 20 children and five kaimahi (employees) and is where the offices of Te Runanga o Ngai te Rangi are located.

[153] We discuss the existing effects on Whareroa Marae in detail in Part 6 of this decision but consider the following answer given by Mr Carlyon when asked about the effects of neighbouring development to align very closely with our own experiences during the hearing on the Marae:

> " … I've been sitting on this marae for this last week as *(if)* I was a warranted officer and general manager for pollution management at a regional council, and I sat on this paepae as what I viewed to be offensive and objectionable odours wafted across that paepae, and the people of this marae apologised to me for the things I might have to endure in their place and I've observed that and I've watched from outside as 15 or 20 planes, five every two hours fly straight over the top of this whare, amongst any number of other things, which I think we've all acknowledged. And I am left really wondering how did it get to this place, and to assume that those issues were resolved to everyone's satisfaction at a point in time that's gone by, it's not very planner-like, but in my view it beggars belief."

2.3 Port development

[154] The first wharf on the Harbour was constructed on the Tauranga side in 1871. [55]

55 Fn 44, Section 5.1.1, p. 39.

The Stella Channel was dredged and the Cutter Channel deepened in 1923.

[155] In the early 1950's, the government authorised a commission of inquiry to study the establishment of a new export port to cater, in the first instance, for forestry produce from the Bay of Plenty. This resulted in the development of a new deep-water port at Mount Maunganui, with construction starting in 1953 and subsequent extension of the wharves from Waikorire (Pilot Bay), to Whareroa. The 1997 Report to the Waitangi Tribunal stated that "[d]uring this period, Maori interests were ignored." and "The Crown and Harbour Board's predisposition to ignore the will of the iwi and hapū of Tauranga continued throughout the extensive Port developments. Indeed their behaviour remained not only arrogant, but also insulting as the construction of the Port itself was undertaken." [56]

56 Fn 44, Section 5.1.3, p. 47.

[156] Mr Johnstone provided further details of port development, stating that: [57]

57 Mr Johnstone, EIC at paragraphs 18 to 25.

> "Throughout the 60s, 70s and 80s progressive wharf extensions were added to the north and south, with the last extension carried out in 1988 to create the 2060 metres of continuous wharf that exists today. A stand alone Tanker Berth was built in 1978, located in Stella Passage on the Mount side and south of the Mount wharves.

> The capital dredging improvements to date occurred in three episodes: the periods 1968 — 1978, 1991 - 1992 and in 2015 -2016.
>
> In 1968 the first dredging occurred in Cutter Channel to eliminate the need to use the Pilot Bay channel. … In 1971 another … dredging project was carried out in the Entrance Channel. In 1972, the first deepening and widening of the channel at Tanea Shelf (Mauao) took place. … Two further smaller … dredging projects took place in 1974 and 1978.
>
> The Sulphur Point reclamation began in 1969 … . Between 1969 and 1989, material was dredged from the Maunganui Roads Channel and Stella Passage and pumped ashore via pipelines to form the reclamation. … with the construction in 1991 of 600 metres of wharf and the provision of two container cranes and related infrastructure.
>
> In 2013 a northern extension extended the Sulphur Point wharves to a length of 770 metres, …
>
> Since 1992 maintenance dredging has been regularly required. This work has typically being undertaken annually."

[157] In its 2011 Decision, the Environment Court recorded that: [58]

58 Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402 at [152].

> "[152] Development of the port over time has altered both the foreshore, through reclamation and wharves, and the seabed, by dredging. Development of the Mt Maunganui wharf area resulted in the complete loss of the natural shoreline from Whareroa to Pilot Beach and the Sulphur Point reclamation removed high value (ecologically and for kaimoana) intertidal areas and a substantial bird roost. … "

2.4 Contribution to restoration of Te Awanui by POTL

[158] To enable us to gain some understanding of POTL's historical contribution to restoration of Te Awanui, we sought further information in our minute dated 21 July 2022. Data provided by Mr D A Kneebone, POTL Property Manager, showed that over the last 10 years, restoration funding from POTL amounted to approximately to $1.65 m. Over the same period, the net profit of POTL amounted to around $927 m. Most of the funding was intended for distribution by the Ngā Matarae Trust. Around $1 m remains unallocated, meaning the actual amount of restoration expenditure has been minimal.

2.5 The air quality environment

[159] While the Council has not restricted its discretion to the consideration of air quality in the RCEP, the Whareroa Marae Trust raised effects on the mauri of air in its s 274 Notice and the concern was also raised in the evidence of tangata whenua witnesses. In addition, air quality requires consideration in terms of integrated management and cumulative effects in accordance with Objective 1 of the RCEP. Ms C A M Loomb, a planning consultant engaged by POTL, stated that it requires consideration within the wide lens of s 6(e) of the RMA.

[160] Air quality in the Mount Maunganui airshed is degraded. Proposed plan provisions relating to discharges to air are the subject of a separate proceeding before a differently constituted quorum of the Court involving appeals relating

to Plan Change 13 to the Bay of Plenty Regional Plan. Commissioner Hodges is a member of that quorum. In that proceeding the Court has issued two interim decisions dated 10 January 2023 [59]

59 Swap Stockfoods Limited and Timberlands Limited v Bay of Plenty Regional Council [2023] NZEnvC 1

and 20 October 2023. [60]

60 Swap Stockfoods Limited and Timberlands Limited v Bay of Plenty Regional Council [2023] NZEnvC 221.

Emissions to air from Port activities are a matter addressed in those decisions and are relevant to any assessment of effects, including cumulative effects, in the vicinity of the Port. As in the present case, the issues for determination in that proceeding are complex, but we note the following finding in the first interim decision: [61]

61 Fn 59 at [251].

> " … there have been serious adverse effects on the mauri of air and human health at Whareroa Marae over an extended period as a result of the way discharges of PM_{10} to air have been managed in the MMA. This cannot be allowed to continue."

2.6 Stormwater management at the Port

[161] Mr Nicholas raised the issue of the POTL's track record on stormwater consents, [62]

62 Mr Nicholas, EIC at 24.

stating that it took nearly three decades for POTL to get resource consent for the discharge of stormwater from its Mount Maunganui wharves to Te Awanui. He went on to say the first stormwater consent application was lodged in 1998 but stalled.

[162] Mr Nicholas then referred to an attempt to link the Port's consent with one for the Tauranga City Council, but that also failed because the Council and the Port could not agree and "a third application, lodged in 2013, stalled for five years due to consultation, the Port said." A fourth attempt at a new application was made in in January 2018 and we understand a consent has now been granted. Mr Nicholas said that POTL has never been subject to enforcement action for the delay. This evidence was not challenged.

2.7 Lease of land to Timaru Oil Services Limited

[163] A resource consent application was made by Timaru Oil Services Limited (**TOSL**) to erect four large fuel tanks 60m away from the Whareroa Marae boundary on land owned by POTL. Mr J Ngātuere, a witness for Whareroa Marae, stated that the Port chose not to speak with tangata whenua of Whareroa before signing a long term lease with TOSL, even though they knew of the plans to increase industrialisation of the area and cause further damage to the community. [63]

63 Mr Ngātuere, EIC, at [40].

He further stated that the managing director of TOSL had made it clear to Whareroa that they would have never entered into the project and lease agreement at the site if the Port had informed them of Whareroa as neighbours, the cultural significance of the area and compounding issues already affecting the marae and community. [64]

64 Mr Ngātuere, EIC, at [41].

[164] Mr Ngātuere referred to soil and groundwater sampling undertaken at the site in 2016, which identified elevated concentrations of heavy metals and organics within soils and groundwater across the site. He commented that POTL is aware of the shallow groundwater and aquifer below but has taken no action to remediate the land at this site.

[165] Mr Kneebone stated that "The site is within the Industrial Zone and is adjacent to the existing tank farm, and industrial operations, some of which is on land owned by iwi interests." He acknowledged that in 2016 POTL leased the site to TOSL, a fuel company, with the intended use of fuel storage. He did not dispute any of the matters raised by Mr Ngātuere. The application was subsequently declined.

2.8 Request for support for return of land on Matakana Island

[166] The POTL navigation beacon at Panepane Point is located on land compulsorily acquired for harbour purposes in 1923, under the Public Works Act 1908, by the Tauranga Harbour Board. The area required for the beacon was 2.5 ha but 172 ha was taken. The Western Bay of Plenty District Council inherited the land from the Tauranga Harbour Board in 1989 and the five Matakana Island hapū entered into discussions with the Council to return the land less the area required for the beacon.

[167] When asked by the hapū in 2020 to support their submission requesting that the land be returned to them, Ms N Taingahue, who is Chairperson of both the Rangiwaea Marae Trust and Te Whānau a Tauwhao ki Ngā Moutere Trust, stated that POTL would not do so. [65]

65 Ms Taingahue, EIC at 47 and NOE at 1183.

Mr Kneebone acknowledged that POTL did not lodge a submission but stated it did have positive engagement with the hapū representative and WBOPDC in support of the transfer. [66]

66 Mr Kneebone, reply evidence at 42.

2.9 Increased traffic

[168] Ms Bennett raised this issue as follows: [67]

67 Ms Bennett, updated EIC at 132.

> "When we raise issues of increased traffic on our busy roads, and the safety concerns for our tamariki who walk these roads to their bus stop to catch the bus to kura, we're told the issue is not in scope or it has nothing to do with our [the POTL] development. Clearly they are related. The planning provisions even cover the issue at CE 14B(a)(iii) however this is the way in which cumulative effects are not addressed and definitely not avoided. Further than that, they are sometimes they are created and then ignored."

[169] Mr Ngātuere referred to trucks operating as early as between two and four o'clock in the morning "that wake a whole lot of people up". [68]

68 NOE at page 1006.

2.10 Hazard management close to Whareroa Marae

[170] Mr Ngātuere referred to threats to the safety of Whareroa Marae and its residents. [69]

69 NOE at page 1024.

He referred to an aircraft crashing and a concern about the flight risk of a plane crashing into the Marae. This has been raised, including with councils and the government, but it is unclear if anything has been done about it.

[171] He also referred to a chemical spill at Lawter Chemical Solutions and not being allowed "to get in and out to get our kids, our kaumatua … , so we were locked out." In Mr Ngātuere's words:

> "When we asked how we're going to get our babies and our kaumatua out, the - what's the hazard plan, where's your risk management, what is the plan and we were told: 'The only way that you're going to be able to get your babies is for them to run out onto the motorway, you guys pull over to the side, throw them in and then carry on.' This was at 5.30 in the afternoon. So obviously that didn't go down too well with us and what - subsequently what came from that is we realised pretty quickly that there was no hazard management plan for our area."

[172] This evidence was not challenged.

2.11 Preliminary observations on this background

[173] The Court acknowledges that a number of the matters referred to above are not matters in relation to which the Regional Council has restricted its discretion under the relevant rules in the RCEP. Nevertheless, they raise serious questions about the way in which the area around Whareroa Marae, including the Port, has been allowed to develop by the City and Regional Councils. There has been a lack of consideration of the cumulative effects on the Marae and those who live and visit there. The evidence indicates a systemic failure by the councils to undertake their functions in ss 30 and 31 of the RMA. In particular, there has been a failure to achieve integrated management of resources and of the effects of the use of those resources, including control of the use of land to maintain and enhance the quality of the environment.

Part 3 Potl's Amended Proposal

3.1 Amended proposal on the Mount Maunganui side

[174] The proposed works for which consent is now sought on the eastern or Mount Maunganui side is more fully described as:

> "(a) A 315 m extension to the south with associated breasting and mooring dolphins;
> (b) Reduced reclamation from a total of 2.9 ha to 1.77 ha;
> (c) Mooring and breasting dolphins to strengthen the existing cement tanker berth and the proposed extension (in the absence of any reclamation or wharf);
> (d) Construction of a bunker berth jetty;
> (e) No dredging on the eastern side of Stella Passage.
> (f) Retention of the existing minor structures which have a 2,000 tonne dead weight limit, restricting use of the Butters Landing area to vessels of the same size as those that can already berth there. POTL also proposes that any vessels berthed at the minor structures will have the ability to connect to shore power. [70]
>
> 70 Draft conditions RC RM21-0341 condition 8.2
>
> Examples of other vessels using the minor structures would be tugs, dredges, barges, work and fishing boats, some of which berth there at present.

(g) A new ramp for penguin access at Butters Landing and modifications to the existing ramp used for island produce barge transport which POTL have indicated will be retained via a condition of consent. [71]

71 Draft conditions RC RM21-0341 condition 7.2

”

3.2 Proposed works on the Sulphur Point side

[175] The proposed works are shown on the following Figure 4. They involve the Stage 1 construction of a maximum length of 285m of wharf extension and a reclamation area of 0.88 ha. The subsequent Stage 2 extension would increase the total length of new wharf to 385 m and the area of new reclamation to 1.81 ha.

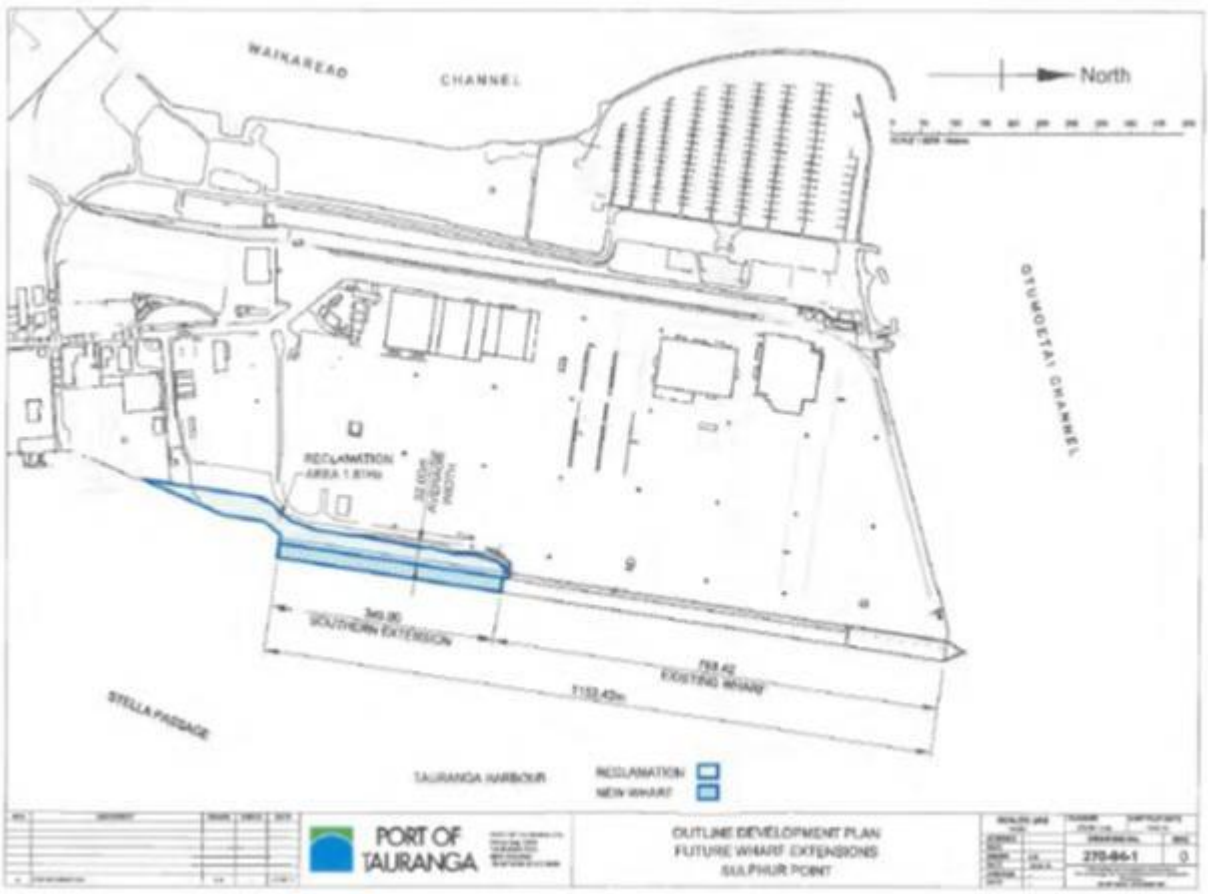


Figure 4 - Works proposed on the Sulphur Point side

3.3 Proposed further dredging

[176] As noted in Part 3.1, dredging in the eastern side of Stella Passage is no longer proposed. On the western side, existing Permit 62920 allows 5.9 ha and 800,000 m^3 to be dredged to a depth of 12.9 m. [72]

72 AEE at 1.0 and 3.4.

The purpose of the consent is to allow excavation by dredging to extend the existing channel to the south. The location and dimensions of the consented area are shown on the part plan included in Appendix 2. [73]

73 Part of second plan attached to Consent 62920.

The amended proposal requires dredging of 10.55 ha of seabed on the western side, an increase of 4.65 ha compared to Permit 62920, as shown on Figure 5.

Figure 5 - Proposed further dredging in closing submissions

[177] We note that the originally proposed 220 m extension of the Sulphur Point wharf falls within the already consented area, although the depth authorised is less than the 16 m now proposed. It is unclear to us if the 285 m Stage 1 extension would be within the already consented area.

[178] For completeness, we record that Mr Johnstone stated that: [74]

74 Mr Johnstone, supplementary evidence at 36.

> "To complement the consented future shipping channel depth the wharves will be designed for a sitting basin of 16.0m alongside. This requires an excavation deeper than the 16.0m at the toe of the batter slope to allow for the keying in of the revetment rock armour to ensure there is no undermining of the structure from prop wash or when/if the rest of the channel is reduced to 16.0m. … The detailed drawings for the proposed stage 1 extension to Sulphur Point included in the s 92 response shows this detail as 19.65m deep."

[179] It is not clear if this would apply to new wharves on both sides of Stella Passage.

3.4 The economic benefits of the proposal and the case for urgency

[180] Mr Kneebone provided a copy of a 2018 economic impact report by a consultant economist and referred to a report commissioned by POTL from international consultancy company TBA.

[181] The TBA report was not provided to the Court and neither the author of that report nor the economic impact report was called to give expert evidence, providing no opportunity for cross examination or questions from the Court. Accordingly, we placed no weight on either report.

3.5 Design and construction of structures

[182] Mr Johnstone stated that new structures will be designed to the latest standards providing improved resilience to seismic events and that methods of construction will be those used previously, which we understood to mean tried and tested. The design was peer reviewed by the Council. We accept the evidence of POTL in relation to the design of structures and reclamations. We also accept that with appropriate conditions, the effects of construction of both structures and reclamations can be managed effectively.

[183] Submitters raised no issues about the design of the structures but Mr C Bidois in particular, a witness for the Ngāti Ranginui Fisheries Trust, spoke of a design method which can include features to attract sea life. The Court is familiar with examples where opportunities have been taken in the design of wharf infrastructure to celebrate cultural history and connection, for example, at Russell wharf in the Bay of Islands and various initiatives at the Port of Auckland. This initiative appears to have been identified in the draft consent conditions offered in reply. [75]

75 RC RM21-0341 condition10.

[184] To minimise adverse effects on marine mammals, pile driving equipment will be selected and operated to ensure underwater noise is minimised to the extent possible while ensuring the piles meet design requirements. There are also proposed conditions requiring management plans and to address noise at the Whareroa Marae, which we come to later.

[185] At the very southern end of Butters Landing, where a new ramp is required for the proposed penguin habitat, timber piles are expected to be acceptable because of the size of the structure. For the bunker barge jetty, they are expected to be driven steel tubular piles. [76]

76 Mr Johnstone, NOE at page 239.

3.6 Staging of construction

[186] The proposal as amended and presented in closing submissions is that Stage 1 of the Sulphur Point wharf extension and the minor berths south of the existing tanker berth on the Mount Maunganui side will proceed immediately. Other construction on the Mount Maunganui side is proposed to commence no sooner than three years following commencement of consent. Construction of the Stage 2 Sulphur Point wharf is proposed to commence no sooner than 10 years following commencement of consent.

[187] Dredging on the western side of Stella Passage is expected to take six months and wharf construction approximately 20 months. We were told the design has been completed for the wharf, noting some changes may be necessary, and once certainty of a resource consent is evident a contract will be let for the dredging and wharf construction. We accept Mr Johnstone's evidence that commercial drivers strongly encourage the completion of each stage of works as soon as practicable after its commencement. [77]

[77] Mr Johnstone, supplementary evidence at 6.

This will reduce the period over which construction effects are experienced.

[188] While not included in the current applications, we were also told that reconstruction of Mount Maunganui wharves 4, 5 and 6 is consented and they will be replaced at an appropriate time.

3.7 Crane locations and heights at Sulphur Point

[189] The erection, reconstruction, placement, alteration or extension of any wharf crane on the existing Sulphur Point Wharf, a portion of the proposed Sulphur Point Extension (being 286 metres south of the existing Sulphur Point Wharf), and the Mt Maunganui Wharves north of the southern end of Berth 11 is a permitted activity under Rule PZ 4 of the RCEP, subject to Civil Aviation rules and the requirements of Tauranga Airport.

[190] Two additional cranes are proposed in Stage 1 of the Sulphur Point Wharf extension. They will be 110m high above mean sea level. Cranes exceeding 100m (Moturiki datum [78]

[78] There was inconsistency in the way sea level was expressed between evidence and the RCEP, which should be made consistent in conditions.

) are a controlled activity in the Port Zone and control is limited to airport height restrictions and the safe operation of the Airport. (Rule PZ 9).

[191] In the full 385m extension a third crane will be added with a height restriction on cranes to 78m high over the southernmost 109m of the Sulphur Point wharves, being the height the Airport and Civil Aviation Authority have approved. The cranes would not be fixed and would be able to move along the length of the wharf on rails.

3.8 Lighting

[192] We were told that POTL's number one priority for lighting is safety and it is required to meet the standards set in AS/NZS 1680.5 2012.

[193] The maintenance, minor alteration, repair, removal or reconstruction of any existing lawful structure (which we understand to include lighting structures) within the Port Zone, subject to a number of exceptions, are permitted activities under Rule PZ 2 of the RCEP.

[194] New lighting structures are a restricted discretionary activity under Rule PZ 8 of the RCEP. Matters to which the Regional Council has restricted its discretion most relevantly in this case include the finished visual appearance when viewed from a public place, the effects of glare and lighting and site specific historical or cultural values under ss 6(e) or 7(a) of the RMA.

[195] Existing lighting is a mix of older high-pressure sodium and modern LED fixtures, the latter of which better target the light to where it is required. The landscape experts recommended that POTL should use modern technology to reduce light spill from all areas. POTL started a five-year programme to change older lamps to LED on the Mount wharves in 2020, and this will be followed by upgrading the Sulphur Point lighting.

[196] All new wharves will use modern LED fixtures. There are also old sodium lamps on the existing wharf cranes, except for the newest one which has LED lighting. POTL proposes to upgrade the old crane lights and all new cranes will be fitted with LED fixtures.

[197] Three navigational lights are located on each crane and there is incidental lighting for areas such as walkways.

3.9 Increased vessel calls, public safety and navigation

Increased vessel calls

[198] The longest vessel currently calling at Sulphur Point is 347 m and the next vessel size up would be to 366 m. Modelling undertaken by POTL to date suggests that these large vessels would not need any additional deepening or widening of the Stella Passage than is currently consented. With these sizes in mind, the proposed Sulphur Point extension would enable a return to a true three berth operation.

[199] We were told that there will be some increase in the number of vessels as current berth constraints will no longer apply but there will not be a dramatic change in the number of vessel calls. However, the vessels will be of a greater size. An additional vessel a day would equate to an increase of ship movements in the Stella Passage above today's levels of 30 minutes twice daily.

[200] With respect to the Mount Maunganui wharves, allowing for vessel size increases over time, the proposed development would allow one additional vessel to berth. Due to the longer dwell time of these types of vessels at berth, the increase in shipping in the inner harbour would be of the order of 30 minutes, four times a week.

[201] In the pre-Covid period, when ships arrived in accordance with a schedule, a peak of 18 vessels a week was recorded in 2017 at Sulphur Point and a maximum of 90 vessels a month was recorded over a five-year period at the Mount Maunganui wharves. This equated to 162 vessels in total over a four-week period.

[202] The projected monthly increase that would result from the proposal is 16 vessels at Sulphur Point and 8 at Mount Maunganui, or 24 in total. Total vessel calls are projected to increase from 162 to 186 in an average four-week period, or in the order of one to two vessels a day. Mr P J Julian, the senior pilot at POTL, stated this number of vessels was handled without incident in 2012 after the Rena disaster, when the mix of vessels was more complex than will be the case with the proposed development.

[203] By way of clarification, Mr Julian confirmed that the annual number of vessel visits is expected to increase in broad terms from 1,700 in recent years to 2,000 in the future. [79]

79 NOE at page 519.

Public safety and navigation

[204] Public uses of the Stella Passage include small recreational craft, rowers, waka ama and other activities typical in a sheltered New Zealand harbour. Navigational risks will potentially arise during dredging and once the additional berthage is developed, with additional ship movements and small craft transiting through the shipping channel. POTL has nominated various risk mitigation measures in conditions to attach to any consent.

[205] The navigational risk posed by the dredge to other vessels using the shipping channel is controlled under the Maritime Transport Act 1994 including rules made under that Act, and by the navigation bylaws made by the Regional Council. This legislation imports international regulations to address such things as the prevention of collisions and other aspects of safe ship management. All users of the harbour are required to comply with these controls.

[206] The Port Customer Service Centre (CSC) plays a pivotal part in coordinating the safe movement of all vessels. The CSC is a 24-hour a day, 7 day a week operation and without it the Port cannot operate. Pilotage is compulsory for vessels over 500 gross tonnage in the Tauranga pilotage area. The Bay of Plenty Regional Navigational Safety Bylaw sets out these rules at a local level, with particular provisions for the Tauranga Pilotage Area and the harbour approaches.

[207] Issues associated with navigation arising from port operation were summarised in the Assessment of Environmental Effects as follows: [80]

80 AEE at 9.3.3.

> "The type of dredging equipment proposed are not uncommon in the Tauranga Harbour Port Zone. The location of the future shipping enabled by the proposed dredging is just an extension of that which already occurs and does not introduce any new navigational hazards.
>
> The proposed wharf structures and associated reclamations are in line with the existing developments and do not create any further restriction to those wanting to navigate the channel.
>
> The ship to shore cranes that will sit on the proposed Sulphur Point extensions are not an issue up to 286m south of the existing wharf and the Airport and the Port are working on solutions for the last 99m."

[208] The proposed conditions of consent set out requirements relating to notifications of dredging operations. Mr Julian concluded that the increase in the number and size of vessels are not introducing any new navigational risks and there are good controls and practices in place now, which will ensure that future risks will be negligible. The Tauranga Harbour Master advised that "In general terms I have no maritime safety concerns with the proposed development." [81]

81 AEE at 9.3.1.

3.10 Biosecurity

[209] Some of the s 274 party evidence raised concerns about biosecurity issues, particularly marine pest incursion.

[210] The Ministry of Primary Industries (**MPI**) is responsible under the Biosecurity Act 1993 for policing all biosecurity rules as they apply to ships entering New Zealand waters and all commercial vessels are required to obtain MPI clearance at their first port of arrival in New Zealand. Arriving vessels are not permitted to discharge ballast water until they have been cleared by MPI. [82]

82 Mr Johnstone, reply evidence at 11 to 15.

[211] The Regional Council has the function under s 12B of the Biosecurity Act of providing leadership in pest management activities in its region. That Act includes in s 13 specific duties and powers in relation to this function, which include monitoring and surveillance of pests, pest agents, and unwanted organisms, and broad powers to take any action necessary for giving effect to any provision of that Act.

[212] In response to the concerns of the s 274 parties, Mr Greaves gave evidence that he had consulted with the Regional Council's biosecurity team about the dive surveillance being undertaken around Tauranga Harbour. He stated that this work is some of the most extensive in New Zealand. He concluded that any risk of biosecurity incursion can be managed through this surveillance. [83]

83 Opening submissions for the Regional Council.

[213] In closing submissions, POTL proposed as a condition of the resource consent for reclamation and structures to pay $27,000 to the Regional Council for each stage of development involving the construction of new structures within

the coastal marine area. This financial contribution would be towards the Council's biosecurity programme and would enable that programme to be extended so that any new wharf structures authorised by this consent would be included in the programme.

3.11 Birds

[214] A number of threatened species of birds are present within the Port operational area, as discussed in Part 5.13 of our decision. On the western Sulphur Point side, these birds nest or roost in an area known as the sand pile, which is located immediately south of proposed extension of the Sulphur Point wharf. This area is proposed to be retained for the benefit of those birds. On the eastern Mount Maunganui side, red billed gulls nest along a 200 to 300 m length of rock wall south of existing berth 11. It is proposed that an area equivalent to a 200 m length will be provided in the same general locality as shown on Figure 3A above.

3.12 Management plans, monitoring and consultative decision making

[215] In POTL's closing submissions, a suite of new and refined conditions was proposed to address integrated management of the implementation of the proposal through a collaborative approach between POTL and tangata whenua. These included input into detailed design, monitoring and management of effects on birds, sea mammals, kaimoana and natural processes particularly focused on Te Awanui, and cultural relationships. These were developed as a result of issues raised during the hearing but without specific input from tangata whenua.

Part 4 The Consent Application Process

[216] POTL initially applied to the Regional Council for the necessary resource consents for this project. A number of requests for further information under s 92 of the RMA were made by the Regional Council. As POTL considered urgency to proceed increased, it applied for the consents to be referred first under the Shovel Ready and then the Covid-19 Recovery (Fast Track Consenting) Act 2020. When these applications were declined, POTL sought and was granted direct referral to the Environment Court.

[217] This Part 4 provides an overview of the process only, with further details included in Appendix 3.

4.1 Consents applied for

[218] The following resource consents are required under the RMA and the RCEP: [84]

84 JWS Planning agreed by all planners.

> "(a) under ss 12(1) and 15(1) of the RMA and rule PZ 10 of the RCEP for the capital dredging as a Restricted Discretionary Activity (**RDA**);
> (b) under ss 12(1) and 15(1) of the RMA and rule PZ 5 of the RCEP for the maintenance dredging as a Controlled Activity; and
> (c) under ss 12(1) and 15(1) of the RMA and rules PZ8 and PZ11 of the RCEP for the structures and reclamations respectively as RDAs."

4.2 Adequacy of the consent application documentation

[219] Ms Bennett referred to the content of the Council's website relating to the assessment of cultural effects, quoting: [85]

85 Ms Bennett, updated EIC at 118, with the following footnote: https://www.boprc.govt.nz/environment/resource-consents/engaging-with-tangata-whenua - accessed 16 Nov 2020.

> " … anyone wanting to carry out an activity that may have an effect on these values needs to consult tangata whenua about their proposed activity and address the potential effects within their resource consent application; specifically within the Assessment of Environmental Effects (AEE)."

[220] She went on to say:

> "The application does not meet this test. Cultural effects seem to be the after consideration, again. This is not acceptable yet in our experience has become the acceptable standard. Notwithstanding the BOPRC's own advice on their website to the contrary."

[221] As noted in Part 1.9 of this decision, the Whareroa Marae Trust opposed the application because it does not consider the full range of adverse effects associated with the proposed activities on the Marae and its residents and has the potential to cause significant adverse effects on them. Some other submitters criticised the adequacy of the documentation.

[222] While we acknowledge the matters raised by the submitters, ultimately, from the Court's perspective, it is the adequacy of the evidence before us at the conclusion of the hearing that we have to use as the basis of our decision. We return to this later

4.3 The consultation process

[223] In closing submissions, Ms Hamm submitted that:

> "As evidenced throughout the hearing, there is an enormous amount of complexity in developing relationships in Tauranga Moana with 27 hapū, three iwi and multiple mandated entities within the iwi framework, all of which hold their own mana and individual relationships. POTL is on a long journey with the hope to build a meaningful relationship with iwi, hapū and other mandated entities. Some may think it is debatable if this is working, but certainly from POTL, the intent is genuine."

[224] We consider Ms Hamm fairly described the complexity of consulting with tangata whenua in Tauranga Moana. We acknowledge that it is extremely challenging for any applicant in POTL's position. As Ms Hamm noted, that is particularly so when the parties being consulted are fundamentally opposed to the application.

[225] Different tangata whenua parties saw the process differently, some being sharply critical and others less so. Tangata whenua consider POTL has had a long history of non-existing or ineffective consultation, evincing an inability to build relationships and an apparent unwillingness to give any serious consideration to the views of tangata whenua. As a result, the evidence shows there is now a significant level of distrust of POTL and reservations about whether further consultation could result in any different outcomes.

[226] We comment on this in more detail later in our decision but consider as positive the work undertaken in leading POTL's consultation by Mr Kneebone and Mr Johnstone and, since his appointment, by Mr Sampson the Chief Executive. This has contributed to the building of better personal relationships between individuals but we have not seen evidence that this will translate into a more effective relationship between tangata whenua and POTL as a corporate entity.

[227] Ms Bennett acknowledged that " … people have been a little bit critical of the engagement process and that's their right … but I didn't find it that bad." She considered the resourcing by POTL to enable tangata whenua to engage Mr Carlyon was really helpful, but also that the biggest part of the shortfall in the process of engagement was the lack of responsiveness from POTL. [86]

86 NOE at page 1481.

[228] Mr Johnstone stated that from October 2020 Ngāi Te Rangi, Ngāti Kuku, Ngāi Tukairangi, Ngāti Tapu and Whareroa Residents worked as a collective with the assistance of Mr Carlyon to co-ordinate a response. [87]

87 Mr Johnstone, EIC at 72.

It was clear from the evidence that Mr Carlyon played a significant role in assisting tangata whenua. [88]

88 Mr Carlyon, EIC at 1.10 and section 5.

He presented evidence at the hearing on behalf of Te Rūnanga o Ngāi Te Rangi Iwi Trust, Ngā Hapū o Ngā Moutere Trust, Ngāti Hē, Ngāti Kaahu a Tamapahore Trust, Ngāti Kuku Hapū, Ngāti Tapu, and Whareroa Marae Trust. He summarised the comprehensive engagement process with POTL, including:

> "a. An open offer by PoTL for Te Rūnanga (on behalf of hapū and marae) to design an engagement process and engage on the Application.
>
> …
>
> c. Obtaining independent planning support to Te Rūnanga
>
> …
>
> e. Significant ongoing engagement with PoTL staff (in particular Mr Kneebone and Mr Johnston) to address issues associated with the engagement process.
>
> …
>
> h. Direct engagement with senior leadership for Te Rūnanga, hapū, and PoTL for the purposes of improved understanding of effects and resolution where possible."

[229] However, these positive signs of themselves can only be considered as a starting point and there have been other actions by POTL over the last five to 10 years that have put back some of the relationship building initiatives. We return to this in Part 7.6 of this decision. The true test will be in the extent of development of relationships between POTL as a corporate entity and hapū to address tangata whenua concerns.

[230] Some of these concerns cannot be addressed under the RMA but could be offered by POTL as the basis of side agreements to any consent. There are others that can be addressed under the RMA and need much more serious further consideration by POTL than was evident during the hearing. We acknowledge that there are relevant matters which POTL proposes to address outside of the resource consent process. While that may be appropriate, we consider that tangata whenua need to be provided with certainty as part of this consent process that they can rely on any agreed outcomes being delivered.

4.4 The Council process

[231] The notification of the application was determined for the Regional Council by an independent commissioner. It is clear that tangata whenua had serious concerns about the determination. Ms Bennett's view was that the extent of notification should not have been limited, stating: [89]

89 Ms Bennett, updated EIC at 130 and 131.

> "Ngāi Te Rangi do not agree with the section 95 decision on notification. We had originally seriously considered a Judicial Review of the notification determination because it got it so wrong. This kind of approach makes it very difficult for Ngāi Te Rangi to look past. …
>
> This proposal is one of high public interest and importance. Much like the dredging campaign, the process should have allowed the public to participate. The PTL should have allowed that, and the Regional Council should have insisted on it."

[232] In the Council's s 87F Report, the reporting officer, Mr Greaves, concluded that:

> "As has been identified in the submissions from the tangata whenua parties, there is some uncertainty as to the scale of cultural effect resulting. In my opinion, this matter remains outstanding. It is anticipated that further clarification will be provided by the submitters at or before the hearing."

[233] The Court had no involvement in this process.

4.5 Applications for referral to fast-track processes

[234] POTL applied for consideration under the Government's "shovel ready" [90]

90 By executive action of the Ministers of Finance, Infrastructure and Regional Economic Development.

and "fast track" [91]

91 Under the COVID-19 Recovery (Fast-track Consenting) Act 2020.

consenting programmes in 2020. In our view, the way in which it raised this with affected parties was likely to have seriously worked against any goodwill that might have been starting to form.

[235] POTL advised Ms Bennett by email on 28 July 2020 that "We would like to lodge our resource consent application with the Bay of Plenty Regional Council by the end of September". On 3 September 2020, approximately five weeks later, POTL sent Ms Bennett and 10 other tangata whenua recipients an email advising that it still intended to lodge its resource consent application by the end of September and "We intend to make use of the new Covid-19 Recovery Fast Track Consenting option to streamline our application." [92]

92 Mr Johnstone, reply evidence at Appendices 5 and 6.

[236] When advised of this application, Ms Bennett stated "This approach changes everything because it limits our options significantly and forces us into an adversarial position which will not be good for relationships, among other things." She also stated, "We were unaware that you were going to make the fast-track application and I think this is going to - you're making this application as eroding trust that we have in the port." [93]

93 NOE at page 89 and 502.

[237] Both applications were declined. [94]

94 Mr Kneebone, EIC at 40 and 41.

[238] The officers' recommendation report relating to the fast-track application [95]

95 FTC 44 Application for referred project under the Covid-19 Recovery (Fast Track Consenting) Act - Joint Stage 2 decision on: Application 2020-29- Port of Tauranga Limited for Ports of Tauranga Stella Passage Wharves and Dredging Project, Memorandum dated 4 March 2021.

included the following statements:

> " … as we anticipate there will be a high level of public and tangata whenua interest in the project. … it is our view that it is more appropriate for the Project to go through the standard consenting process under the Resource management Act (RMA). This could include investigating Direct Referral to the Environment Court under section 87D of the RMA.
>
> … We consider that referring the Project may undermine the redress (which includes the acknowledgements and apologies) and commitments in these settlements regarding the full participation of iwi authorities in RMA consenting.
>
> BOPRC state the community is concerned about a wide range of issues relating to the Port which include air quality and the impact industrial activities have on Whareroa Marae and residential areas."

4.6 Direct referral to the Environment Court

[239] POTL lodged a s87G notice of motion for direct referral with the Court on 15 December 2021. Following the normal process for such applications under the RMA, the case was set down for a hearing which was scheduled to start on 11 July 2022.

[240] On the evening of 10 July 2022, the Ngāi Te Rangi parties advised the Court that as a result of attending a pre-hearing hui on 5 and 6 July, a significant number of witnesses had tested positive for Covid or were close contacts of those who had. An urgent meeting of counsel and legal representatives was arranged for 10 a.m. the next morning, at which it was agreed that under the circumstances the hearing should be adjourned.

[241] By email dated 15 July 2022, the presiding Judge advised parties that " … the Court is most concerned not to delay the hearing more than absolutely necessary." Parties were directed to confirm their availability for the reconvening of the hearing in the weeks of 3, 10, and 17 October 2022. [96]

96 Court email dated 15 July 2022.

A hearing on these dates proved unachievable and, ultimately, the hearing was rescheduled to start on 27 February 2023 and continued until 17 March 2023.

[242] Seven days of the hearing were held at Whareroa Marae. The Court is appreciative of the warm welcome and the generous hospitality shown by the Whareroa community to all participants throughout that part of the hearing.

4.7 Process for response to the further amended proposal

[243] A further amended proposal was included by POTL with its counsel's closing submissions. To provide an opportunity for other parties to respond to this, the Court directed the parties to provide their views, focussed on the procedural matters raised and for the purpose of setting a timetable for this process, by 28 April 2023.

[244] POTL did not consider a further process was required to enable the Court to evaluate the revised proposals as they were either squarely raised during the course of the hearing or responded to the totality of the evidence from the section 274 party witnesses. However, it then went on to propose a process following which the Court would issue either an interim or a final decision, without the need for further evidence.

[245] A joint response was received on behalf of the Whareroa Marae Reservation Trust and Ngāti Kuku Hapū, Ngā Hapū o Ngā Moutere Trust and Te Runanga O Ngāi Te Rangi Iwi Trust (**the** Ngāi Te Rangi **parties**). This stated:

> "In short, the Ngāi Te Rangi Parties strongly oppose any further process in these proceedings. POTL has had multiple opportunities to put its case and evidence forward, and it should not be afforded a further indulgence to shore up its application and put a better offer forward. If the Court finds the new elements proposed by POTL to be too uncertain or otherwise unenforceable, then it must disregard them or give them very little weight as adding anything of benefit in favour of POTL's case.
>
> To put the Ngāi Te Rangi Parties (if not others) to the additional burden of a further process in these proceedings is highly prejudicial, given the time and cost that will take (in terms of both human capital as well as financial cost). This is in the context where the Ngāi Te Rangi Parties have already had to invest significantly in the process to date, diverting time, energy and finances, away from other projects of importance to them. To do so at this late stage does create natural justice issues, in particular, absence of opportunity for comment by the tangata whenua parties on what is now proposed, and absence of opportunity for cross-examination."

[246] The Ngāi Te Rangi parties also referred to POTL's opening submissions and the evidence of Mr Kneebone, which stated that the proposed offer of mitigation at the start of the hearing was its best offer. Despite their strong opposition to a further process, they stated that if the Court considered such a process was necessary, they: " … will of course participate." They proposed a judicial conference.

[247] A joint response was received from Ngāti Ranginui Iwi Society Inc and Ngāti Ranginui Fisheries Trust (Ngāti Ranginui). They stated:

> "Ngāti Ranginui's instructions to counsel is to seek a robust process that facilitates an informed and considered response to the Port's revised proposal by the tangata whenua parties. This would involve, for example, the facilitation of hui at which clarity on the revised proposals can be gained, followed by a focused hearing and ability to present evidence on the new elements."

[248] Both submissions raised serious concerns about resourcing and the continuing cost of the process, with Ngāti Ranginui stating it:

> " … believes that adequate resourcing to the tangata whenua parties who wish to participate further needs to be put in place to support them in any process as directed. The Port can decide whether to address that issue directly to avoid any further delay in awaiting the outcome of further Environmental Legal Assistance funding rounds, for example.
>
> If adequate resourcing is not available to the tangata whenua parties, Ngāti Ranginui consider that there is no other option than to adopt the Ngai Te Rangi parties' position that there be no further process in these

proceedings and that the new elements of the Port's revised proposal be excluded or given little weight only for the reasons outlined in their response."

[249] We considered all of the submissions as part of our overall evaluation.

Part 5 The Planning Framework

5.1 Introduction

[250] As the evidence was laid out during the hearing, it was clear to the Court that the case is primarily about the effects of the proposed activities on Maori cultural values.

[251] We reviewed the planning evidence, the s87F report provided by the Regional Council and the planning experts' joint witness statement (**JWS**) and briefly summarise the experts' positions in Part 5.2. We undertook our own reading of the provisions highlighted by these witnesses but do not cover them all in detail. However, we consider that Mr Carlyon helpfully provided a thorough analysis of the statutory framework.

[252] We set out earlier in Part 4.1 of this decision the consents required by the proposal. Overall, the proposal falls to be considered as a restricted discretionary activity. We note that the while most of the matters to which the Regional Council has restricted its discretion are limited to biophysical effects, consideration of site specific historical or cultural values under ss 6(e) and 7 (a) of the RMA are potentially wide-ranging.

[253] The exercise of a discretion, whether full or restricted, must be done on a principled basis. Under the RMA, statutory planning documents are to be prepared to identify the most appropriate ways to achieve the purpose of the Act [97]

97 Section 32 RMA.

and must give effect to higher order documents, [98]

98 Environmental Defence Society v New Zealand King Salmon Ltd [2014] NZSC 38.

while applications for resource consent must be considered, subject to Part 2 of the RMA, having regard to numerous things, including relevant provisions of such documents. [99]

99 Section 104 RMA; R J Davidson Family Trust v Marlborough District Council [2018] NZCA 316.

We must therefore understand the objectives and policies that are the basis for the rules of a plan. We take some time to summarise that context in Part 5.3 of this decision because, as will become clear, the evidence has demonstrated that there are issues with the proposal that do not align well with the relevant plan provisions and the statutory framework for them.

5.2 Planning evidence

[254] All of the planning expert witnesses agreed that the most relevant statutory planning documents to this case are the New Zealand Coastal Policy Statement (**NZCPS**), the RPS and the RCEP. They also agreed that the planning documents give sufficient weight to Part 2 of the RMA and so there is no need for recourse to those provisions in order to consider the application. The identified iwi management plans and in particular the Tauranga Moana Iwi Management Plan (**TMIMP**) are also relevant other matters for our consideration.

[255] The existing environment is that which lawfully exists at the time the consent authority, or this Court on appeal, considers the effects of the proposal. This environment includes its future state as modified by permitted activities under a relevant plan and by the exercise of resource consents which have been or are likely to be implemented but does not include effects from the exercise of possible future resource consents. [100]

100 Queenstown-Lakes District Council v Hawthorn Estate Ltd [2006] NZRMA 424 at [84].

[256] The planning witnesses all agreed that the Port and its operations form part of the existing environment. Further, the witnesses agreed that:

> " … .decision makers must disregard an effect that is not listed as a matter of discretion in the RDA rules pursuant to s 95D(c) of the RMA. This is relevant as all planners agree that the policy framework is that the port development is appropriate subject to the management of adverse effects. All agree that in managing adverse effects, the matters of discretion guide what is to be assessed along with the relevant effects hierarchy established in the plan provisions related to those matters of discretion."

[257] An important policy in this context is Policy IW 2 of the RCEP:

> "Avoid and where avoidance is not practicable remedy or mitigate adverse effects on resources or areas of spiritual, historical or cultural significance to tangata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS. Where adverse effects cannot be avoided, remedied or mitigated, it may be possible to provide positive effects that offset the effects of the activity"

[258] Mr Carlyon opined that the evidence of mana whenua is not binary and there have been workshops to identify responses which address the policy direction which he presented in table format to the court; albeit that we heard POTL has not fully addressed these. We address the planning framework in further detail below.

[259] While all of the planning witnesses agreed that cumulative effects include those that may be individually insignificant but, when considered in relation to wider activities and development, may reach a threshold or "tipping point" where their combined effects are significant, Mr Carlyon's additional position as set out in the JWS of the planners is as follows:

> "GC considers that the baseline for the consideration of cumulative effects needs to be broadly applied and account for impacts beyond the current proposal. He particularly notes the current state of environment which is acknowledged by experts to be degraded with impacts on the environment resulting in a remnant populations of threatened species, representative examples of aquatic biota and mana whenua relegated to reservations with customary connections to the moana and whenua severed.
>
> GC considers that the cumulative cultural effects as stated in mana whenua evidence do form the tipping point for significant effects."

[260] Ms Loomb, the expert planning witness called by POTL considered that POTL has:

> "recognised and provided for the relationship of iwi and hapū with the harbour (an area of recognised significance) through their engagement in the preparation of the application and in the offered mitigation and conditions of consent."

[261] She considered that POTL has taken on board the results of the consultation and adjusted the application in response to concerns raised by iwi and: [101]

101 Ms Loomb, EIC at 286, reply evidence at 10 and supplementary evidence at 8.

> " … that the additive effects of this development on the bio-physical and physical matters assessed will not cause a significant cumulative effect and that effects will be contained within the Port Zone, an area identified in the RCEP for such development."

[262] Mr Greaves, planning advisor to the Regional Council, considered that as the proposal stood in its original form, there was uncertainty regarding the nature and scale of cultural effects resulting from the proposal and whether these effects are able to be appropriately avoided, remedied or mitigated. His evidence noted: [102]

102 Mr Greaves, EIC at 22 and reply evidence at 9.17 to 9.19.

> "I have had an opportunity to review the draft reply evidence of the Applicant, which proposes a substantial suite of mitigation and compensation measures, which directly respond to the projects and initiatives contained in Mr Carlyon's evidence.
>
> … in my opinion the Applicant has engaged with the options and proposals raised by the s 274 parties and has either agreed to accommodate them, or provided a reasonable explanation as to why they cannot be accommodated. In my opinion this is consistent with the policy intent of IW2.
>
> … there is not a clear priority between the competing values associated with the development of the PoT versus recognising and addressing cultural relationships and values. Rather there is a requirement to reconcile the competing interests and values to the extent possible, provided that any effects which cannot be avoided are remedied, mitigated, compensated for or offset by positive effects or benefits. In my opinion the proposal aims to strike this balance and therefore is generally consistent with the policy direction."

[263] Under re-examination, he confirmed his final position as being as stated in paragraph 8.14 of his reply evidence: [103]

103 NOE at page 853

> "In my opinion it's not possible to avoid or mitigate all of the diverse and deeply felt cultural effects short of declining the proposal. The Court will therefore need to consider whether the proposed mitigation and compensation package is appropriate and acceptable when weighed against the positive effects of the proposed development as outlined in the applicant's evidence."

[264] Mr Carlyon concluded: [104]

104 Mr Carlyon, EIC at part 8.

> "It is recognised that there is a functional requirement for the existing port to be located at this site within the CMA, and that port expansion is generally most appropriate at the site.
>
> The evidence of mana whenua and expert witnesses for the 274 parties identifies significant adverse effects on the environment which are not addressed within the effects management hierarchy. Those effects are not limited to cultural matters, however there is an inseparable connection between biophysical and cultural values, which has not been adequately addressed within the application.
>
> The mana whenua evidence before the Court is unambiguous in respect of both effects and impacts on hapū and whānau at place. In my opinion, there is a pathway available to the Applicant which recognises and provides for the matters of national interest highlighted in evidence, and accordingly enables elements of the Application.
>
> Having considered the relevant matters under section 104-104D of the RMA, it is my opinion that the granting of resource consents for this activity is not consistent with the provisions of the relevant planning documents and Part 2 of the Act."

[265] During cross examination, Mr Carlyon expressed his opinion about the consideration of s 6(e) of the RMA in these circumstances. Based on the submissions and evidence he had heard over the three weeks of the hearing, he observed: [105]

105 NOE at page 1522.

> "I think to draw the conclusion that the matters associated with section 6(e) are narrow in scope or are an exercise that is as straightforward as a number of other of those matters of discretion, is incorrect.
>
> … I think the scope of that is wide-ranging and that's clear from the evidence that has been brought by mana whenua."

[266] He did not agree that s 6(e) focusses on Te Awanui as the key taonga to be considered but agreed that the relationship and the challenges inherent in that are a significant factor. However, the evidence he heard identified there are significant adverse effects on cultural values which in his opinion are not addressed by the application. He considered the cumulative effects of previous activities were such that a tipping point had been passed.

5.3 The planning framework

[267] The relevant provisions of the RCEP in this case require consideration of a wide range of matters including, in no particular order:

> "(a) The compatibility of the structure and its intended use with the purpose of the Port Zone;

(b) The finished visual appearance when viewed from a public place;
(c) The effects of glare and lighting;
(d) Structural integrity;
(e) Effects on the hydrodynamic and geomorphic regime of the harbour and open coastline;
(f) Effects during construction on other harbour users, aviation, navigation and public safety;
(g) Compliance monitoring;
(h) The quantity, location and timing of discharge;
(i) Coastal water quality including the provisions of Section 3 - Coastal Discharges and Schedule 13 to the Plan;
(j) The area, quantity, location and timing of any disturbance or deposition;
(k) The materials deposited;
(l) Site specific historical or cultural values under ss 6(e) or 7(a) of the RMA;
(m) Construction of the Sulphur Point North End Berth and Shipping Channel;
(n) Construction of the Sulphur Point Wharf Extension South Sitting Basin and Shipping Channel;
(o) Deepening of the Sulphur Point Town Reach;
(p) The Mount Maunganui Wharfs Future Berth Deepening as shown on Plan 270-25B;
(q) Effects on marine life and ecosystems; and
(r) The release and spread of harmful aquatic organisms."

[268] Additionally, and particular to reclamations in the Port Zone, the following matters are listed in Policy PZ 13:

"(a) The potential effects on the site of climate change, including sea level rise, over no less than 100 years,
(b) The shape of the reclamation, and, where appropriate, whether the materials used are visually and aesthetically compatible with the adjoining coast
(c) The use of materials in the reclamation, including avoiding the use of contaminated materials that could significantly adversely affect water quality, aquatic ecosystems and indigenous biodiversity in the coastal marine area,
(d) The ability to remedy, mitigate or off-set significant adverse effects on the coastal environment,
(e) Whether the proposed activity will affect sites of significance to Ngati Ranginui, Ngāi Te Rangi and Ngati Pukenga, and
(f) The ability to avoid consequential erosion and accretion, and other natural hazards."

[269] Of note is that the Council restricts its discretion to "site specific" historical or cultural values under ss 6(e) and 7(a) of the RMA. While at first blush there might be some constraints implicit in the term "site specific", the site in this case is the Port and the Port is located in Te Awanui, and the effects of the activities arising from the proposed works are wider in scope than those in the immediate vicinity of new structures.

[270] Section 6 of the RMA lists matters of national importance which all persons exercising functions and powers under the RMA, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for, including:

"(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga."

[271] Section 7 of the RMA lists "Other Matters" which all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to, including (a) kaitiakitanga which is defined in s 2 of the RMA as:

> "**kaitiakitanga** means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship"

[272] The context of the cultural evidence we heard was squarely focused on ss 6(e) and 7(a), which we need to address in detail.

[273] The planners considered that we could rely on the RCEP as having implemented the higher order documents. While we accept that and have focused on the RCEP in reaching our decision, we have borne in mind the higher order statutory planning instruments and also the relevant matters in Part 2 of the RMA.

[274] By way of introduction and to put things in perspective, the RCEP contains the following explanation:

> "Regional councils are required by the RMA to prepare a regional plan for the coastal marine area - the 'wet' part of the coastal environment. However, important values and issues for the coastal marine area such as natural heritage, water quality, cultural values, public access and natural coastal hazards cannot be effectively managed in isolation from the land component of the coastal environment.
>
> Accordingly this Plan deals with resource management issues that cross the land/water divide and includes objectives, policies and methods that apply to both the sea and land areas of the coast. The RMA allows for such an approach by empowering regional councils to develop objectives, policies and methods to achieve the integrated management of natural or physical resources.
>
> The Regional Council cannot make rules that apply on land to provide for public access or historic or cultural heritage. These matters are regulated by district plans. Section 30(ga) of the RMA does allow the Regional Council to make rules to protect indigenous biodiversity on land; however, Policy IR 8C of the Regional Policy Statement directs that city and district councils are responsible for controlling the use of land to protect indigenous biodiversity (except in the coastal marine area and freshwater bodies). Therefore, this Plan uses rules only in the coastal marine area, and includes other methods (such as advocacy) with regard to the landward part."

[275] As we understand it, the objectives and policies of the RCEP are not set out in a hierarchical manner but do appear to go from the more general to the particular. We have read them in their entirety, noting that some are more relevant than others. For instance, the objective relating to integrated management in section 2.1 is to achieve integrated management of the coastal environment by, among other things, enabling the exercise of kaitiakitanga and planning for and managing cumulative effects. In relation to natural heritage in section 2.2, objective 3 includes to safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems in certain ways. Apart from protecting and in some cases maintaining identified indigenous biological diversity areas, Objective 3 promotes the maintenance of indigenous biodiversity in general as well as seeking to enhance or restore indigenous biodiversity where appropriate.

[276] Further, Objective 4 is to prevent the further loss of the quality and extent of rare and threatened habitats in the coastal environment. Objective 5 is to enable the restoration and rehabilitation of the natural heritage of the coastal environment, including kaimoana resources and degraded cultural sites which tangata whenua wish to restore for natural heritage and cultural reasons.

[277] In section 2.3 on water quality, the objectives include in Objective 6 the development and implementation of a framework designed to lead to an enhancement of coastal water quality where it has deteriorated so that it is having a significant adverse effect on ecosystems or natural habitats or is restricting existing uses (including cultural activities). Objective 8 seeks that discharges of contaminants to the coastal marine area are managed to meet a series of goals including that discharges of contaminants occur in a manner that recognises and provides for the cultural values of mana whenua acknowledged for that area.

[278] The objectives for Iwi Resource Management at 2.4 include:

> "a) Objective 13 to take into account the principles of the Treaty of Waitangi and provide for partnerships with the active involvement of tangata whenua in management of the coastal environment when activities may affect their taonga, interests and values.
> b) Objective 14 that tangata whenua are able to undertake customary activities in the coastal marine area, and that access to sites used for cultural practices, gathering kaimoana, mahinga mātaitai and areas of cultural significance is maintained or enhanced.
> c) Objective 15 is the recognition and protection of those taonga, sites, areas, features, resources, attributes or values of the coastal environment which are either of significance or special value to tangata whenua (where these are known).
> d) Objective 16 is for restoration or rehabilitation of areas of cultural significance, including significant cultural landscape features and culturally sensitive landforms, mahinga mātaitai, and the mauri of coastal waters, where customary activities or the ability to collect healthy kaimoana are restricted or compromised.
> e) Objective 17 is, where appropriate, cultural health indicators are used that recognise and express Māori values, and tangata whenua are involved in monitoring the state of the coastal environment and impacts of consented activities.
> f) Objective 18 is appropriate mitigation or remediation is undertaken when activities have an adverse effect on the mauri of the coastal environment, areas of cultural significance to tangata whenua or the relationship of tangata whenua and their customs and traditions with the coastal environment."

[279] Also to be considered with those objectives are those relating to activities in the coastal marine area at section 2.8. In particular:

> "a) Objective 25 is for exclusive occupation of parts of the common marine and coastal area is provided for in appropriate locations (recognising the positional requirements of some activities) for temporary or permanent activities that have a functional need to be in the coastal marine area and are incompatible with other activities;
> b) Objective 27 is for activities and structures that depend upon the use of natural and physical resources in the coastal marine area, or have a functional need to be located in the coastal marine area are recognised and provided for in appropriate locations, recognising the positional requirements of some activities.

c) Objective 28 is for the operation, maintenance and upgrade of existing regionally significant infrastructure, and transportation infrastructure that provides access to and from islands, is recognised and enabled in appropriate circumstances to meet the needs of future and present generations.

d) Objective 29 is for establishment of new regionally significant infrastructure, and transportation infrastructure that provides access to and from islands, is provided for in appropriate locations, recognising the positional requirements of such activities, and any technical or operational constraints.

e) Objective 30 is that activities and structures in the coastal marine area are located, designed and undertaken in a manner that is appropriate given the values and existing uses of their location.

f) There are specific objectives relating to the Harbour Development Zone and the Port Zone. Of particular relevance is the Port Zone for which there are two objectives. Objective 52 is that the current operational needs of the Port of Tauranga are provided for as a matter of priority while avoiding, remedying or mitigating the effects of those activities on cultural values and the environment. Objective 53 is that the future expansion and operational needs of the Port of Tauranga and its shipping channels are provided for in appropriate locations, having regard to the potential adverse effects on the environment."

[280] These sets of objectives are provisions which offer some certainty for existing port development but require careful assessment for new development.

[281] Part three of the RCEP sets out resource management policies to achieve integrated management and relevantly includes policies under the headings of Integrated Management, Natural Heritage and Iwi Resource Management. While the planning witnesses referenced a significant number of objectives and policies in their evidence and particularly in the Objectives and Policies Matrix attached to their JWS, we only set out those that are most relevant to our decision. Importantly, while the Port Zone provisions contain some cross-references to certain policies in the RCEP, it is clear, when the RCEP is read as a whole, that other management policies are also relevant to this case, particularly those concerning Iwi and Integrated Management.

[282] The planning witnesses identified twelve policies relating to Iwi Resource Management in Section 4 of Part Three as being relevant, being Policies 1 to 11 and policy 15.

[283] Briefly, Policy IW1 provides that proposals which may affect the relationship of Māori and their culture, traditions and taonga must recognise and provide for, among other things:

"a) traditional Māori uses, practices and customary activities relating to natural and physical resources in accordance with tikanga Māori;

b) the role and mana of tangata whenua as kaitiaki and the practical demonstration and exercise of kaitiakitanga;

c) the right of tangata whenua to express their own preferences and exhibit mātauranga Māori in coastal management;

d) areas of significant cultural value identified in Schedule 6 to the RCEP and other areas or sites of significant cultural value identified by Statutory Acknowledgements, Iwi and Hapū Resource Management Plans or by evidence produced by tangata whenua and substantiated by pukenga, kuia and/or kaumatua; and

e) The importance of Māori cultural and heritage values through methods such as historic heritage, landscape and cultural impact assessments."

[284] There are outstanding natural features and landscapes (**ONFL**) and areas of significant cultural value (**ASCV**) in the vicinity of the Port's operations. However, these overlays do not encompass the Port's development area and thus are not directly applicable to the proposed works, except as outlined below.

[285] That does not mean other areas or sites of significant cultural value are not present. The figures below are from Maps 11a and 11b in the RCEP. Figure 6 demonstrates how the Port is located alongside ONFL 3. Figure 7 shows how the Port sits near ASCV 4, being Te Awanui and affects part of ASCV 4A, being Te Paritaha o Te Awanui. The Whareroa Marae adjoins ONFL3 and the ASCV. Plainly, the area is likely to be sensitive to Māori cultural concerns.

Figure 6 - Outstanding Natural Features and Landscapes (ONFL)

Figure 7 - Areas of Significant Cultural Value (ASCV)

[286] The RCEP states in relation to these ASCVs:

> "Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana iwi - Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Hapū of the Tauranga Moana iwi maintain strong local communities which are dependent on maintenance of the life-supporting capacity of the harbour and surrounding land. Maintenance of kaimoana and coastal water quality is particularly important.
>
> …
>
> Te Paritaha o Te Awanui is the largest pipi bed within Te Awanui (Tauranga Harbour), and is renowned for its abundant supply of pipi. The bed has been a customary harvesting ground for many generations and is still an important harvesting area today for the whanau and hapū of Ngāti Ranginui, Ngai Te Rangi and Ngāti Pūkenga. Te Paritaha is one of the few remaining sustainable shellfish beds within the harbour.
>
> Te Paritaha is a taonga and a key source of sustenance for whānau, hapū and iwi of Tauranga Moana. Tauranga Moana whānau, hapū and iwi have a duty to protect the sustaining qualities of Paritaha. It is essential to protect the mauri of Paritaha to ensure that intertribal cultural practices of old will continue into the future.
>
> …

> Te Paritaha is said to be the source of mauri for all other pipi beds in Te Awanui. The role of whānau hapū and iwi as kaitiaki is to protect the mauri of Paritaha. Mauri in this regard refers to the integrity, form, functioning (including natural biological and ecological processes), resilience, physical and spiritual characteristics &qualities, mana-atua, mana-tangata, tapu life principle, tikanga and kawa practices, connectedness & interdependency and accessibility. This involves ensuring that the full physical extent of the integrity of Paritaha is acknowledged. In this way, the kaimoana that Paritaha supports is also protected."

[287] We received evidence that Te Paritaha falls within the Mauao Mataitai Reserve, but not what the significance of that is. For that reason, we referred to the following conclusions reached by the Environment Court in its 2011 Decision: [106]

106 Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402 at [231] and [232].

> "[231] The mataitai, Mr Koning submitted, *has its own legal status as an expression of the Crown's continuing treaty obligations* to Tauranga Moana iwi. We agree with this position and we note that section 10 of the Treaty of Waitangi (Fishing Claims) Settlement Act 1992 and the Fisheries (Kaimoana Customary Fishing) Regulations 1998 record that the Crown agreed in 1992 to recognise and provide for customary food gathering and the special relationship between tangata whenua and places of importance for customary food gathering (including Tauranga ika and mahinga mataitai). It was established after the Minister of Fisheries was satisfied, inter alia, that there was a special relationship between tangata whenua and the proposed mataitai reserve. In addition he needed to be satisfied that the mataitai reserve was an identified traditional fishing ground and of a size appropriate to effective management by tangata whenua. The Mauao Mataitai Reserve is managed in practice by tangata kaitiaki, and no person may engage in commercial fishing in the reserve.
>
> [232] We consider that the law on mataitai reserves clearly reflects the interests of the Crown and Maori to provide for customary food gathering and the special relationship between tangata whenua and places of customary food gathering importance such as Te Paritaha o te Awanui, Mauao, and the general area within the shipping channel captured within the boundary of the reserve. Thus we reject Ms Hamm's argument that the reserve is predominantly about addressing the sustainability of the fishing resource in areas of significance to iwi for customary food gathering. Rather, the mataitai reserve was established to recognise and provide for the special relationship tangata whenua have with this area."

[288] Part Four of the RCEP contains activity-based policies and rules which are specific to various activities which take place in the CMA, including Port Zone activities. These provisions also include policies in other parts of the plan which may apply in certain circumstances in the Port Zone. Relevant to these applications are the following:

> "(a) In Part Three, section 1, on Integrated Resource Management:
>
> > 'Policy IR 1 Recognise the potential social, cultural and economic benefits that arise from use and development of the coastal environment and the constraints to future use and development.

> Policy IR 2 Provide for activities that have a functional need to locate in the coastal marine area in appropriate locations (recognising the positional requirements of some activities), by decision-making, zoning or use of other spatial mechanisms.
>
> (b) In Part Four, Section 2, on Disturbance, Deposition and Extraction, policies DD 7, DD 11 and DD 12 address how activities that disturb the foreshore and seabed should be undertaken. This includes, so as to avoid significant effects and remedy or mitigate other adverse effects on indigenous fauna and indigenous ecosystems and habitats, including habitats of indigenous species that are important for recreational, commercial, cultural or traditional purposes, including traditional Māori gathering, collection or harvest of kaimoana.
> (c) In Part Four, Section 3, on Coastal discharges, all the policies are relevant.
> (d) In Part Four, Section 5, on Taking, using, damming or diversion of coastal water, all the policies are relevant.
> (e) In Part Four, Section 7 on Biosecurity, all the policies are relevant.

[289] In addition to those policies, there are fourteen policies in Part Four, Section 9, which apply in the Port Zone. These include in Policies PZ1 and PZ2 recognition of the importance of the Port of Tauranga to the regional and national economies and that provision for development of additional shipping capacity, including capital dredging, in appropriate locations is important to the continued efficient operation of the Port.

[290] Policy PZ3 recognises that the structures and capital dredging identified in Schedule 9 of the Plan, which contains an outline development port plan, are appropriate in the Port Zone "subject to appropriate management of adverse effects".

[291] Policy PZ 5 provides for activities that are consistent with the purpose of the Port Zone, which is to:

> "(a) Enable efficient use of existing port area, so that the regional community may meet its social and economic needs;
> (b) Concentrate major new structural development in an area already modified, so that development is guided away from other coastal areas of higher natural character, natural landscape, recreational value, and cultural value;
> (c) Minimise potential conflict between port activities or port related activities and other activities; and
> (d) … … …
>
> Activities that will significantly conflict with the achievement of the purpose or compromise Port operations should be avoided."

[292] Policy PZ6, which has some significance in this case as it relates to the retention of the boat ramp which enables cargo deliveries to and from the islands, reads:

> "Provide for the use and development of existing port-related activities where these do not significantly conflict with the achievement of the purpose set out in Policy PZ 5 or compromise the operation of the Port of Tauranga or Port activities."

[293] Fundamental to the cases presented by tangata whenua is Policy PZ 11, which provides:

> "Consultation and engagement with the iwi of Ngati Ranginui, Ngaiterangi and Ngati Pūkenga and hapū groups that have a recognised relationship with Tauranga Harbour (Te Awanui) shall be undertaken during development of any proposals that involve capital works, other than any structure or building, excluding the Sulphur Point North End Berth shown on Map 270-27C contained in Schedule 9 to this Plan, within the area that the Port of Tauranga Limited has been granted a section 384A occupation permit."

[294] Policies PZ 12 and PZ13 address the Outline Plan and any reclamation identified in it. These signal the appropriateness of the activity in terms of Policy 10 of the NZCPS, subject to adverse effects being appropriately managed, and matters which the Consent Authority should have particular regard to in the design of reclamation (PZ13), including climate change, shape, materials, and visual and aesthetic compatibility with the adjoining coast.

[295] Policy PZ 13 requires particular regard to be had to several matters, including:

> "(d) The ability to remedy, mitigate or off-set significant adverse effects on the coastal environment,
> (e) Whether the proposed activity will affect sites of significance to Ngāti Ranginui, Ngāi Te Rangi and Ngati Pukenga, and
> (f) The ability to avoid consequential erosion and accretion, and other natural hazards."

[296] Policy PZ14 addresses the proximity of the Port to an area of significant conservation value, ASCV 4, and the need for recognition that:

> "a) ASCV 4A and the shipping channels overlap, and that the extent of the shipping channel shown on ASCV 4A is the toe line and that the batter slopes formed will be within Te Paritaha O Te Awanui as will the necessary channel markers; and
> b) Te Paritaha O Te Awanui is situated in a natural dynamic environment that changes and shifts over time."

5.4 Iwi Management Plans

[297] Mr Carlyon stated that the relevant Iwi Management Plans are the Tauranga Moana Iwi Management Plan 2016-2026 (**TMIMP**) and the Matakana and Rangiwaea Islands Hapū Management Plan (**MRIHMP**) October 2012. [107]

[107] Mr Carlyon EIC page 53 [6.42]

[298] The TMIMP is a Joint Environmental Plan for Ngāti Ranginui, Ngāi Te Rangi and Ngāti Pūkenga, which includes the following whakataukī:

"Ko Takitimu me Mataatua ngā waka

Ko Mauao te Maunga

Ko Te Awanui te Moana

Ko Ngāti Ranginui, Ngāi Te Rangi me Ngāti Pūkenga nga Iwi"

[299] Its purpose is to articulate the collective vision and aspirations of the Iwi in relation to Tauranga Moana. It describes Tauranga Moana as a taonga, a source of identity, a life source and food bowl for our people. It is the collective voice of the three iwi with a Vision that "Tauranga Moana Iwi and hapū work together and are actively involved in restoring and enhancing the mauri of Tauranga Moana". Part 6.4 addresses coastal water.

[300] The objectives for coastal waters are:

"1 The mauri of Te Awanui (Tauranga Harbour) and coastal areas is restored and protected
2 Tauranga Moana Iwi and hapū are empowered and provided with opportunities to be actively involved in coastal management, planning and decision making."

[301] Particularly relevant policies are:

"7 Ensure an holistic and integrated management approach to restoring the health and wellbeing of coastal water within Tauranga Moana (including Te Awanui / Tauranga Harbour)"
9 Avoid further degradation of water quality within Tauranga Moana
10 Reduce the impacts of sediment on Te Awanui (Tauranga Harbour)
12 Maintain and enhance relationship with Port of Tauranga
14 Avoid further reclamation of the foreshore and seabed
15 Manage the effects of coastal structures (including moorings and jetties) and infrastructure in Tauranga Moana
16 Ensure that dredging activities do not adversely affect the mauri of Tauranga Moana"

[302] The MRIHMP is a different type of Plan to the TMIMP. This Hapū Management Plan is a response of the five hapū "to identify the cultural, heritage, social, ecological and economic matters that are important to us as ahi ka roa and kaitiaki of Matakana and Rangiwaea Island". As such it covers more than purely environmental matters.

[303] The primary purpose of the MRIHMP is to serve as a reference and a guide. It provides contact details for the five hapū and asks that businesses check the Plan to see if their activity is discussed. A process for consultation and engagement is set out differentiating from minor through to major resource consents. Issues and the hapū positions in relation to them are clearly identified. Relevantly, these include positions relative to shipping channels, kaimoana, water quality and cultural practices.

[304] The MRIHMP is island-focused but also addresses the wider harbour which is potentially affected by port operations. It seeks that coastal restoration and reparation projects be implemented, that kaimoana is sustainably managed by delegated hapū members and tikanga and kaitiakitanga practices are adhered to.

[305] Ms Loomb stated there are other Iwi management plans prepared for those iwi and hapū with a recognised interest over the site of the proposed works. She considers that the TMIMP generally covers the main matters of concern related to the proposal provided in all of the plans available to be reviewed. As part of our own review we noted the following policies listed by Ms Bennett from the Ngāi Te Rangi Iwi Resource Management Plan (1995):

> "(a) only essential dredging.
> (b) sand dredging's being made available for restoration and maintenance of estuarine beaches.
> (c) natural physical appearance to be retained; and
> (d) future plans having regard to protection and maintenance of Te Awanui."

[306] For completeness, we also reviewed the Cultural Impact Assessment prepared for the Tauranga Moana Iwi Customary Fisheries Trust, noting that we received evidence that the content of the assessment was not accepted by some tangata whenua.

5.5 Overview summary of the planning framework

[307] Against this framework the Port Zone activity provisions in the RCEP, including the outline development plan in Schedule 9, require assessment against a broad range of environmental and cultural matters. The physical scope of that development is defined by the outline development plan. However, there are limitations and caveats provided by the Port Zone provisions, supported by the framework of the RCEP and all the relevant objectives and policies that we have either set out here or more generally referred to. This is important because Schedule 9 is not a "fait accompli" as the proposed expansion is not a permitted activity under the RCEP.

Part 6 Assessment of Environmental Effects

6.1 Assessment approach

[308] The Port of Tauranga is the largest export port in New Zealand. The Port cannot relocate from its current location and its continued operation and incremental growth is of national significance. As noted in Part 5.3, Objective 53 of the RCEP is that the future expansion and operational needs of the Port of Tauranga and its shipping channels are provided for in appropriate locations, having regard to the potential adverse effects on the environment.

[309] However, expansion of the Port is a restricted discretionary activity under the RCEP, not a permitted activity. The Council has reserved the discretion to grant or decline consent in accordance with s 87A(3) of the RMA. The primary matter of discretion of relevance to the applications is site specific historical or cultural values under ss 6(e) or 7(a) of the RMA. This requires consideration through a wide lens for the reasons stated earlier and requires us to evaluate potential adverse effects accordingly.

[310] We start our assessment by considering the positive effects of the Port before considering actual and potential adverse effects.

6.2 Positive effects

[311] The primary focus of the Port's evidence related to measures proposed to address potential cultural and other effects on the environment. The extent of evidence we received on positive effects was brief, largely leaving us to assess them in some other way.

[312] Mr Kneebone told us that the Port is New Zealand's largest and most efficient port, handling more than 25 million tonnes of cargo per annum. He also provided evidence on current and future demand and explained how the proposal would address anticipated capacity constraints. In terms of specific positive effects, he stated that: [108]

108 EIC at 6 and from 45

> "(a) 40 additional employees will be based at the Port to handle the increased volume, with a total wage bill of $3.2 million, or 2.24 million after tax; and
> (b) Estimated extra container revenue of $110 million (2020 dollars) at full capacity."

[313] He concluded that the development will have significant benefits for the local, regional and national economy and will also make a significant contribution to local employment. While he attached a report to his evidence from a consultant economist which projected a range of other positive effects, the author of the report was not called by POTL to give evidence. That meant the report was untested and can be given limited weight as a result.

[314] Nevertheless, we accept that the construction phase could result in several hundred jobs across New Zealand, which could include around 60 locally. We also accept that there could be increased employment nationally in addition to the 40 referred to above, once the proposed works are operational, and there will be significantly increased revenue. We accept Mr Kneebone's conclusion that development will have significant benefits for the local, regional and national economies and will also make a significant contribution to local employment. We can draw no further conclusions based on our inability to test the limited economic evidence included as an attachment to Mr Kneebone's evidence.

[315] Further works required to complete, extend and/or upgrade the wharfs, berth areas and navigation channels are set out in Schedule 9 of the RCEP - Outline Development Plan for the Port of Tauranga. These works are designed to provide for growth and more efficient use of the existing port area, consistent with RPS Policy CE 14B. [109]

109 RCEP, Issue 60.

Policy PZ 3 requires recognition that the structures, and capital dredging identified in Schedule 9 are appropriate within the Port Zone, but is clear that these are subject to appropriate management of adverse effects.

[316] As noted earlier, no party to the proceedings questioned the consistency of the proposal with the Outline Development Plan.

[317] The proposal provides for additional shipping capacity, including capital dredging, which is important to the continued efficient operation of the Port of Tauranga. [110]

110 RCEP Policy PZ2.

It will also address capacity constraints on both imports and exports for the foreseeable future.

[318] It is self-evident that New Zealand is dependent on trade for its prosperity. We accept that the Port is pivotal to the regional economy and is a significant component of the national economy. Its continued operation is of national significance. [111]

111 RCEP Policy PZ1.

[319] As noted in Part 1.2 of this decision, Mr Carlyon stated that throughout discussions between Te Rūnanga and mana whenua and the applicant, the need for expansion of the Port was not challenged with respect to the need to provide for the shipment of domestic and international goods. The evidence of Mr Ngatai confirmed a specific positive effect of the Port, when he stated: [112]

112 NOE at page 1545.

> "I think it goes without saying that Tauranga Moana iwi and hapū are not opposed to having a port, and in fact Joel in his testimony said exactly that, it's not that we want the port to go away, we just want them to be better neighbours and better custodians of our tāonga."

[320] We accept that POTL offered increasing levels of mitigation as the hearing progressed. These could have been offered much sooner as part of the consultation process but were not. The further mitigation measures proposed in POTL's closing submissions were not discussed with tangata whenua before being proposed and there was resistance from POTL to the Court providing the opportunity for tangata whenua to comment on them prior to making our decision. We accept that the latest proposals go significantly further towards mitigating adverse effects on cultural values in accordance with ss 6(e) and 7(a) than earlier proposals. However, they remain insufficiently defined to enable us to make a properly informed decision on the basis of them. It is our hope and expectation that POTL will have been consulting further with tangata whenua to progress the matter.

6.3 Actual and potential adverse effects

[321] This case is primarily about the adverse effects of the proposed development and associated activities on the cultural values of the environment, including those of people and communities. RCEP Policy IW 6 identifies tangata whenua that may be affected by a proposal as including those that have mana moana or mana whenua over an affected area, those that are ahi kā, and those that are landowners. In accordance with this policy, and based on the evidence presented to us, we have most specifically considered effects on the cultural values of Te Awanui, Whareroa Marae and the traditional maritime practices of the five hapū of Matakana Island, together with other matters raised by tangata whenua.

[322] We start this part of our decision by setting out the evidence relating to those values and other matters that we must consider in our assessment of cultural effects. We then turn to the assessment of different adverse or potentially adverse effects. In doing so, we considered existing effects as far as they can be determined, as that is the baseline against which we must assess the predicted future effects of the proposal, both of themselves and cumulatively with other effects. When assessing existing effects, we considered the extent to which existing effects were caused by Port activities and those that were caused by or contributed to by other activities and factors, as far as it is possible to do so.

[323] We set out our assessments under the following headings:

> "(a) The significance of Te Awanui to tangata whenua
> (b) The extent to which tangata whenua have been able to exercise their role as kaitiaki
> (c) Effects on tangata whenua of participation in consent processes
> (d) Effects on the relationship of Maori with their ancestral taonga
> (e) Effects identified as being of concern to all tangata whenua
> (f) Other effects specific to Ngā Hapū o Ngā Moutere Trust
> (g) Other Effects specific to Whareroa Marae

(h) Effects on marine water quality, ecosystems and kaimoana resources
(i) Effects of dredging and reclamation on the harbour
(j) Effects of construction and operations on other harbour users
(k) Effects arising from the release and spread of harmful aquatic organisms
(l) Effects on the mauri of air and human health
(m) Effects on birds
(n) Effects on marine mammals
(o) Effects of construction noise on Whareroa Marae
(p) Landscape effects
(q) Effects not contributing to cumulative effects
(r) Overall assessment of effects"

6.4 The significance of Te Awanui to tangata whenua

[324] We are required to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga under s 6(e) of the RMA. One of the matters to which our discretion whether to grant or refuse consent in this case is restricted is site specific historical or cultural values under this provision.

[325] In their evidence, many witnesses called by the s 274 parties used the saying "Ko au te moana, ko te moana ko au" which may be translated into English as "I am the sea, the sea is me." Mr C W Tawhiao, who has been Chairperson of Te Runanga O Ngai Te Rangi Iwi Trust since 2008, explained that it is an expression that is used by Ngāi Te Rangi as a tribal identifier and is based in a whole sense of indivisibility.

[326] Te Runanga o Ngāi Te Rangi Iwi Trust's submission objecting to the applications stated that:

> "We of Tauranga Moana are defined by our location and environment - Tauranga Moana (the sea) and Tauranga whenua (the land). We are inextricably bound to the entire Tauranga Harbour catchment area to such an extent that we are identified by it and known as Tauranga Moana.
>
> We belong to the landscapes in which our whakapapa embeds us. Our ancestral landscapes are those places made sacred by the lives and deaths of our ancestors. As moana-centric people our association with the sea is unique, even compared with other indigenous peoples' standards.
>
> Ngāi Te Rangi sees Te Awanui as one of the most critical environmental issues affecting tangata whenua in Tauranga Moana."

[327] We had extensive evidence about the significance of Te Awanui to tangata whenua. This was illustrated in the evidence of Mr Tawhiao who stated: [113]

113 Mr Tawhio, EIC at 8 and Appendix A at 18, 43 to 45 and 50.

> "Our permanency, our rangatiratanga, our mana Motuhake and kaitiakitanga depends on our connection to Te Awanui.
>
> Eating food from Te Awanui is an essential part of being able to identify who we are.

Intrinsic to Te Awanui is mauri both spiritually and physically.

… our connection with Te Awanui is part of the 'life force' that sustains us as an iwi and people.

… the degradation of the mauri of Te Awanui has a consequent and significant impact on our mana as Ngāi Te Rangi and as individuals. The status of our iwi and people is a reflection of the health and wellbeing of Te Awanui.

… we can contribute to a better future by protecting and preserving what we do have today. Therefore, while the mauri of Te Awanui may be diminished, we will do our utmost to preserve it and make a stand against any further attempts to denigrate the mana and mauri of Te Awanui and Ngāi Te Rangi."

[328] Ms Bennett stated: [114]

114 Ms Bennett, Updated EIC at 62 to 64, 71, 107, 188, 197.

"Te Awanui is a significant taonga that Ngāi Te Rangi peoples' have intrinsic and profound relationships with. The mana and integrity of Te Awanui is an obligation that we, who are ahikaa, are charged with upholding."

[329] The 1997 Report [115]

115 1997 Report, fn 44.

provided an account of the traditional and customary relationship, use and management of the Tauranga Harbour, its estuaries and environs and covers much of the same ground covered in evidence before this Court by tangata whenua witnesses 25 years later. Many issues identified in the report remain today, based on the evidence before the Court, including: [116]

116 1997 Report, fn 44 at page 6, page 0229 of the Evidence Bundle.

"The Harbour is a taonga and, like the landscape marker of Mauao, anchors the identity and the social and cultural well-being of all three iwi.

The Harbour is, as it has always been, an integral part of the spiritual, cultural and social well-being of all the iwi, hapu and whanau of the Tauranga District. [117]

117 1997 Report, fn 44 at page 7, page 0230 of the Evidence Bundle.

The traditional and customary relationship the three iwi have with the Harbour, stems from:

- their whakapapa links with Te Whanau o Ranginui raua ko Papatuanuku;
- the role of tangata kaitiaki which is derived from that whakapapa; and
- using the Harbour as a Kete Kai and Moana Hoehoe Waka."

[330] POTL accepted that Te Awanui is a resource of spiritual, historical or cultural significance to Ngāi Te Rangi, Ngāti Ranginui, and Ngāti Pukenga. [118]

118 Ms Hamm, opening submissions at 69.

[331] The Environment Court found in its 2011 decision that: [119]

119 Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402 at [228], [239], and [237].

> "[228] The undisputed evidence before the Court is that Mauao and Te Awanui and their surrounds are iconic lands and waters of great historic and cultural significance to the tribes of Tauranga Moana. We also understand that their relationship with these features including Te Paritaha o te Awanui, Panepane Point and Mauao including Tanea Shelf, is an ancestral and historical one that extends back to settling of Aotearoa by their ancestors from Hawaiki, and for Ngai Te Rangi after arriving in the Tauranga region from the East Coast.
>
> [229] We note that the appellants consider that Mauao and Te Awanui are indivisible and inextricably linked thus any effect on any aspect of these features, will affect the whole. From their perspective, there are cultural effects that flow from dredging, deepening and widening the shipping channel that will impact on all of Tauranga Moana. Thus they have identified a number of cultural effects that relate to the entire harbour and its oceanic surrounds.
>
> …
>
> [237] In terms of Section 6(e) and (f) of the Act, we find that Mauao, Te Awanui and their surrounds are the ancestral lands and waters of the tribes of Tauranga Moana and their respective hapu. Their relationship and their culture and traditions with this land and waters and associated taonga such as the fisheries, turns on their historic, spiritual and cultural associations and values. We also find these features form part of their historical heritage. … "

[332] The evidence before us in the current application strongly reinforces the Court's earlier decision and we adopt its findings in relation to the significance of Te Awanui to tangata whenua, including in relation to cultural matters.

6.5 The extent to which tangata whenua have been able to exercise their role as kaitiaki

[333] The 1997 Report [120]

120 1997 Report, fn 44.

explained that whakapapa binds Ngāti Ranginui, Ngāi Te Rangi, Ngāti Pūkenga together, including through a culturally founded belief that Maori are the descendants of the Atua who were the first kaitiaki of the different domains of the natural world, saying: [121]

121 1997 Report, fn 44, at 3.1, pages 0233-4 of the Evidence Bundle.

> "At a deep cultural and spiritual level, the customary belief is that iwi are descended from Te Whanau a Ranginui raua ko Papatuanuku, and iwi must assume there are obligations which follow from claiming such a whakapapa. It forms the fundamental foundation for establishing the customary relationship Ngai Te Rangi, Ngati Ranginui and Ngati Pukenga have with the Harbour, as one of the domains (taonga) over

which kaitiakitanga is necessarily exercised by the three iwi on behalf of Te Whanau a Ranginui raua ko Papatuanuku."

[334] The Environment Court found in its 2011 Decision that: [122]

122 Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402 at [239].

> "[239] There is no dispute that the Tauranga Moana tribes and their hapu are the kaitiaki of these features in terms of Section 7 and thus we must have regard to their kaitiakitanga."

[335] We agree with that finding but note that the conditions of the 2011 consent that were intended to enable the exercise of kaitiakitanga did not achieve the desired outcomes. In a practical sense, tangata whenua have been unable to exercise kaitiakitanga to any meaningful extent in areas of Te Awanui affected by Port operations.

6.6 Effects on tangata whenua of participation in consent processes

[336] The effects of participation in consent processes are not normally an effect that would be considered in an assessment of effects on the environment. The framework of planning and resource management legislation in New Zealand emphasises its participatory nature as a public good. In this case, however, it is a significant effect in the context of the relationship of tangata whenua with Te Awanui and the apparent continuing disregard for that relationship. The evidence of tangata whenua witnesses is that their views have been largely ignored in the history of Port development and associated consent processes which have enabled that development. For this reason, the demands which the process puts on tangata whenua is an effect that is relevant to our assessment of cumulative effects.

Relevant history

[337] Most of the major Port development was completed before POTL was established in 1985, including dredging of the entrance channel, deepening and widening of Tanea Shelf and construction of the majority of the Mount Maunganui wharves. Reclamation of Sulphur Point and the associated dredging commenced in 1969 and was completed in 1989 and construction of 600 m of the Sulphur Point Wharf was completed in 1991. [123]

123 Dr De Lange, supplementary evidence at Appendix A.

While POTL completed the last of these works, decisions to proceed with them were made by the Bay of Plenty Harbour Board before POTL was established.

[338] The change of corporate structure did not change the effects of the works, either in a physical sense or in relation to matters of concern to tangata whenua, but we consider it is relevant to our assessment of existing and cumulative effects.

[339] The 1997 Report to the Waitangi Tribunal stated as follows: [124]

124 1997 Report, fn 44, at 5.1.3, page 0275 of the Evidence Bundle.

> "Development of the Port of Tauranga is a major issue for all of the iwi of the Tauranga District, and is a particularly sore point for Ngai Te Rangi. From humble beginnings the Port has developed to become one of

> the major ports for the country. Ngai Te Rangi views this development and growth as being very much at the expense of their hapu, particularly as the Port is situated within their hapu rohe."

[340] The alienation of lands in the Mount Maunganui area from their tribal land holders and the first sales of land in that area to Pakeha settlers occurred in 1888. [125]

125 1997 Report, fn 44, at 5.1.1, page 0264 of the Evidence Bundle.

The effects of the development of the Mount Maunganui wharves on Ngāi Te Rāngi was " … especially dramatic", [126]

126 1997 Report, fn 44, at 5.1.3, page 0272 of the Evidence Bundle.

particularly for Whareroa Marae:

> "For them, the development and growth of the Port has occurred at the expense of the traditional and customary relationship they had formerly enjoyed with the Harbour. The impact of the Port development on the Harbour eco-systems and the ability of those systems to support the cultural values and lore of Ngai Te Rangi was particularly severe."

[341] As already noted, the 1997 Report referred to the development of the new deep-water port at Mount Maunganui, with construction starting in 1953 and subsequent extension of the wharves from Pilot Bay (Waikorire), to Whareroa. The report stated that "During this period, Maori interests were ignored." and "The Crown and Harbour Board's predisposition to ignore the will of the iwi and hapu of Tauranga continued throughout the extensive Port developments. Indeed their behaviour remained not only arrogant, but also insulting as the construction of the Port itself was undertaken." [127]

127 1997 Report, fn 44, at 5.1.3, page 0271 of the Evidence Bundle.

[342] A constant theme throughout the evidence presented in the hearing before this Court was one of dysfunctional relationships between POTL and tangata whenua. One way in which the views of tangata whenua can be summarised is that however many times they explain what is important to them, they are ignored and nothing changes. As a consequence, they say they have lost trust in POTL as a corporate entity.

[343] Mr Palmer stated: [128]

128 Mr Palmer, NOE at page 1094 and EIC at 13 and 18.

> "We have been to hearings ever since the pre-port time and the messages have all been the same. It's kind of a repeat of repeats of repeats and we have said that our local knowledge in mātauranga Māori and the Western science have pitted together against each other. And I'd have to say also that the decision of the Court has always leaned towards the economics versus the tikanga and the economics have always come out in front. And so it went from a time of nobody listening to things Māori, nobody bothering about things Māori in the decision making process to now taking a little bit of notice of what things Māori represent.
>
> Our hapū were not even considered at the time the Port authorities began their constructions. There was no consultation as far as I am aware. The Sulphur Point reclamation went right on top of our shellfish beds, some of the best providing tāhuna in the whole of the harbour.

In the early 90s was the first time I am aware of the Port seeking Māori consent for their development plans and that was when they were seeking to widen the harbour entrance between Mauao and Panepane. One thing that I can remember very clearly being said at the time was, 'give these Māori fullas a good feed and they will agree to anything'. That really annoyed me. And that was what happened, the Port handpicked a select group of elders from Tauranga and took them for a feed."

[344] Mr Tawhiao stated: [129]

129 Mr Tawiao, EIC at 2 to 6, 27 and 61.

"I am hōhā (*annoyed/angry*) to be back in front of this Court, doing the same thing and saying the same thing I did about 10 years ago. The same thing our kaumatua said 30 years ago. The same thing our ancestors said in their time. …

I can't get past the fact that if the message hasn't been received by now, then how is our repeating it yet again going to make a difference? This is about our identity as Tauranga Moana and how, bit by bit, our Moana is diminished in the name of progress. And bit by bit our identity is being extinguished.

What's the point of our striving for better outcomes if nothing ever changes?

It is worthy to note that as in the 2011 case, we once again find ourselves protesting at the modifications to our moana. Modifications that have a profound impact on our moana and therefore on us as Ngāi Te Rangi.

There comes a time when one has to wonder whether we have already pushed our moana beyond its capacity to absorb the changes that are being imposed upon it. This then begs the question as to when 'enough is enough!'"

[345] The Environment Court recorded in its 2011 Decision that: [130]

130 Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402 at [40] - [41], [45] and [314] - [318].

"[40] This application did not have an auspicious beginning. The Port, for unexplained reasons, decided to repeat the dredging application, updating for the new width and depth, they had made in 1989 prior to the enactment of the Resource Management Act 1991. Around one month prior to the hearing of the application before the Council, the Port was advised that it needed to at least consult with tangata whenua.

[41] Unsurprisingly, tangata whenua were both surprised and disappointed at the way in which the Port consulted well after the application was filed.

…

[45] That the Port would file an application without any prior consultation with iwi tends to reinforce perceptions, currently raw because of the Treaty of Waitangi process, of ignoring the legitimate cultural concerns of local iwi in pursuit of economic outcomes. It has been a general theme of this case that the Port does not deny the cultural concerns of iwi, but simply reiterates the

economic importance of their application being granted. Given the minimal amount of mitigation/ compensation originally proposed, it seemed to be assumed by the Port that the economic benefits would outweigh, or trump, any concerns under Sections 6, 7 and 8 of the Act in relation to Maori cultural values in this case.

…

[314] We recognise the deep insult to the mana of some kaumatua from the way in which this application came to their notice. This was clearly seen as hurtful and disrespecting of their rangatiratanga. Seen from their perspective, it was yet another slap in the history of offence, rehearsed so recently before the Waitangi Tribunal. The Port appears to have been oblivious to the effect and interpretation of their actions when applying for their consents. …

[315] This case highlights to us the yawning chasm in cultural insight sometimes displayed by major infrastructural companies. The Port should have a Cultural Liaison Officer, or such persons, on retainer. This position would never have arisen if the Port had sought early cultural advice. …

[316] … Some 20 years after the enactment of the Resource Management Act, it is surprising that an infrastructural company of the size of the Port would not have been aware of its obligations in terms of the Regional Coastal Environment Plan, the New Zealand Coastal Policy Statement 2010 and the Act.

[317] During the course of this hearing, the Port has done a great deal to try and address this situation. However, we feel obliged to note that further examples of applications made without proper approach and consideration of the requirements of the relevant national and regional documents could lead to refusals of applications for consent.

[318] Put simply, a publicly listed company working in a highly sensitive area identified in all relevant national and regional documents, cannot purport that it has no obligation to consider tangata whenua issues or consult with the relevant parties. This is not the case of a small business having no specific provisions and regional plans relating to it. This is the case of a major infrastructural company which has been dealing with these issues constantly for the last 50 to 60 years since its inception, and prior to that, the Harbour Board. To pretend that these matters are not being addressed through the Waitangi Tribunal (and having repercussions to on-going operations), is not in our view a reasonable position to take."

Tangata whenua participation in resource consent processes generally

[346] Mr James stated Ngāti Kukū are burdened with an average of approximately 25-30 resource consents a month which are funnelled through a generic distribution list from the City and Regional Councils on a weekly basis. Ironically, Ngāti Kukū was not notified of the current Port resource consent applications because of an administrative error. [131]

131 Mr James, EIC at 16 and 18.

[347] He explained the difficulties in responding which this presented for Ngāti Kukū, who manage resource consent applications as a collective. It is clearly an impossible expectation that any hapū can respond meaningfully to so many requests, particularly when they are generally in the form of emails, presumably with limited or no prior consultation and limited if any human resources or funding assistance. Ngāti Kukū is one of 26 hapū and three iwi in Tauranga Moana and there are various mandated iwi authorities. This raises serious issues of practicability, efficiency, effectiveness and equity for both proponents and those responding to proposals.

[348] Ms A K P Ngātuere stated that in the time she had been a member of the Ngāti Kuku Board, they had been inundated with resource consent applications from industries who simply don't care about their social responsibility to the wellbeing of her community. Her evidence highlighted a perverse dichotomy where industry adversely affects Whareroa Marae but there is an expectation from industry that the Marae will continue to respond to consultation

requests in relation to resource consent applications in the knowledge that their responses have no influence on, and are effectively ignored in relation to, resource consent outcomes.

Effects of the current applications on tangata whenua

[349] Ms Ngātuere explained why Ngati Kuku "absolutely oppose" the consent application as follows: [132]

132 NOE from page 1038.

> " … what I do want to make clear is what we do oppose is these things, which are the ongoing disregard to our priorities and traumas associated with our environment and our experiences.
>
> What we do oppose is the ongoing attempts by big industry, by the Crown, by anyone, even if it is our own tribe, to minimise the impacts on us as tangata whenua and as ahi kā.
>
> What we do oppose is the irresponsible behaviour that disregards the health and wellbeing of my people and attempts to put it into the hard basket and therefore minimise my experiences.
>
> What we do oppose is being treated with disrespect, being taken for granted, engaging with anybody that doesn't take responsibility for one's role in the managed destruction of their, according to their development historically, presently and in the future.
>
> What we do oppose is the complete and constant disregard to the important fact that these issues have compounded over the years. The port has been significant to that and the constant reminder that people don't care and they don't acknowledge their part that they play in terms of the bigger picture.
>
> How can we build a meaningful enduring relationship because I know that's been coming through quite clearly in the evidence when people are wanting to engage with us but only on their terms? We simply can't do that.
>
> … we've struggled to engage in this process when simply the applicant has not valued the relationship, has not understood and recognised the impacts historically upon us as Whareroa uri presently, nor do they care about what the future that we'd like to build for Whareroa and our people. And so I would describe it as been forced into a process.
>
> … However, to be forced into a conversation that requires me to relive the impacts that I have had and continue to do that on repeat, your Honour, is if I could use an analogy 'death via a thousand cuts'. Just to even think about that and then having to drive around into my ancestral home to be reminded that we're in not a very good position, your Honour. So, yes we engaged in that process.
>
> Was it difficult? It was a gruelling experience and then I'm also forced and my family and my people are forced to think about what relief might look like. How can we think about these solutions when the very people that are asking to get this across the line, so that they can continue on the destruction in our moana and which impacts my home here, that was really tough."

[350] Mr Stanley stated: [133]

133 NOE at page 1340.

> "This case has destroyed our RMU (Resource Management Unit) unit because the person working on it is Pia Bennett, she's been tied up with this intricately. I mean, just on wages alone, that's roughly about 150K to 170K, but it's not the money, it's the fact that we got paralysed because our central team member is here helping hapū and everybody else to fight this case. The port doesn't have that, they don't have that problem. They can call on a mega amount of resources to deal with this. This is consistent amongst our people, 15 throughout hapū, something comes up, we have to hire specialists to deal with it. The port can have them on hand really quickly. We've got to find them, we've got to find money to pay for them and it grinds us down."

[351] Counsel for Ngāi Te Rangi described the role played by Ms Bennett further as follows: [134]

134 NOE at page 1408.

> "But the skill of Ms Bennett has been in bringing all of these mātauranga Māori, these fonts of mātauranga Māori together, bringing them and getting them to be able to express themselves. She is also - well and she wouldn't be an independent expert because she would be absolutely biased in her views in terms of Ngāi Te Rangi, but she is very good at being able to explain how those sorts of things - and she sits as a key interface. And I guess the importance of Ms Bennett and her role here was reflected on by Mr Stanley when he said for the last two years our most important resource within our resource management unit has been tied up on the engagement and the processes around these."

[352] We were told that hapū collectively put hundreds of hours into developing tables of possible mitigation measures that might go some way to addressing their concerns. Mr Ngātuere stated that Whareroa and Ngāti Kuku went down to the Port and met with POTL. When the options were put on the table, " … they were taken off, they were pretty much taken off from the Port as "we're not prepared to entertain any of those". He went on to say: [135]

135 NOE at page 1007.

> "I ask myself is it genuine when as part of this process our marae, our hapū and all of the other hapū input and hundreds and hundreds of hours to try and get something to move forward, but then it's totally disregarded. And then to have something come back that has - is it insulting when what's been, especially in light of what's being asked?"

[353] We have already summarised tangata whenua's responses to POTL's amended proposal in its closing submissions in Part 4.7 of this decision. Briefly, the Ngāi Te Rangi parties strongly opposed any further process as POTL has had multiple opportunities to put its case and it should not be afforded a further indulgence to shore up its application and put a better offer forward. Other parties stated they shared the Ngāi Te Rangi parties' concerns about the substantial financial and personal cost to the tangata whenua parties that the Port's application and direct referral process has already had. While they were willing to engage further, if adequate resourcing was not available, their position would be that there be no further process and that the new elements of the Port's revised proposal be excluded or given little weight.

[354] In response to a question from counsel for POTL about a possible relationship agreement between POTL and the Whareroa Marae Trust, Mr Gear replied: [136]

136 NOE at page 950.

> "I think it could be an option in time but once discussions I've had with my whānau in terms of trust, and the way in which this consent was handled and the experiences with it, that trust would need to be I guess remediated or ameliorated before something of this nature, some document of this nature is entered into."

[355] In response to a question from the Court, counsel for Ngāi Te Rangi considered that POTL was not: [137]

137 NOE at page 905.

> " … adequately informed on cultural matters as it developed its application and its application it was deficient in that regard. And if I have to point to anything that highlights that lack of information, and it's kinder to say it this way, that the form of mitigation that has been offered is reflective of either a failure to understand the cultural matters or, at worst, a wilful disregard of them, especially in terms of the unique identities that come here before this Court."

[356] We conclude this part of our assessment by recording that Mr Kneebone addressed the proposed mitigation measures in his supplementary evidence, [138]

138 Mr Kneebone, reply evidence at 56.

outlining proposals to the value of $3.75 million over the 35-year term of consent sought or just over $100,000 a year. For context, we note that projected Group net profit for the 10-year period ranged from $120 million in 2023 to more than $200 million in 2032. [139]

139 Mr Kneeebone, supplementary evidence at Appendix B.

Mr Kneebone explained that he had no mandate to agree to matters relating to economic return for tangata whenua as " … the business finds it very difficult to reconcile this with the legislative mandate that the principal objective of every port company shall be to operate as a successful business."

[357] We record here that any successful business must comply with its legal obligations, which include those under the RMA and which may require further consideration by POTL as to how it does that. The objective to operate as a successful business should not be based on success coming at the expense of those affected by its operations and whose concerns have historically been largely ignored.

Conclusions on effects on tangata whenua of participation in consent processes

[358] We summarise the consultation process undertaken by POTL in Appendix 3. While POTL accepted that it needed to improve consultation from the way it was undertaken in relation to the 2011 dredging consent, the outcomes of the current consultation process has achieved little in terms of assisting the Court in understanding what specific remediation, mitigation or restoration is proposed to address what specific effects on cultural values.

[359] The evidence of tangata whenua was strongly that while positive relationships are being built up with Mr Kneebone, Mr Johnstone and Mr Sampson at a personal level, there remains a high level of distrust of POTL as a corporate entity. This arises from the perception that POTL does not respect tangata whenua, does not respond to tangata whenua proposals, engages only on matters POTL wants to engage on and does not engage meaningfully on other hard issues of concern to tangata whenua. It appears to have little or no appreciation of the overall costs involved for tangata whenua personally, collectively as iwi and hapū and financially.

[360] The general principles of good practice consultation are well established. They include going into the consultation process with an open mind, giving the other party every opportunity to state what information they want and to put forward any matter they wish, holding meetings with the other party, providing the other party with relevant information and with such further information as they request, entering the meetings with an open mind, taking due notice of what is said, and waiting until the other party has had their say before making a decision. [140]

140 Wellington International Airport Ltd v Air New Zealand Ltd [1993] 1 NZLR 671, 683 - 684 (CA).

It is a process underlain by an overall duty on the part of both parties to act reasonably and in good faith, because consultation is not a one-sided process.

[361] The principles of effective consultation with tangata whenua are consistent with those general principles. They are based on recognition of mana whenua, kaitiakitanga and rangatiratanga and include kanohi ki te kanohi or face to face meetings, mana to mana and rangatira to rangatira or a meeting of equals. In our view, POTL has not acted in accordance with these principles. Since the 2011 consent decision, POTL has had more than 10 years to build relationships with tangata whenua and appears to have made little real progress, only doing so now because it is going through another resource consent process.

[362] We consider the effects of the current application process on tangata whenua have been particularly adverse. This is partly as a result of this lack of progress and partly because of the lack of openness and respect by POTL. It is also because of the demands on time and their personal lives that take them away from their whanau and other responsibilities and leave a feeling of helplessness as to how they can provide meaningfully for their tamariki and mokopuna. As previously noted, Mr Ngatai stated: [141]

141 NOE at page 1545.

> "I think it goes without saying that Tauranga Moana iwi and hapū are not opposed to having a port, and in fact Joel in his testimony said exactly that, it's not that we want the port to go away, we just want them to be better neighbours and better custodians of our tāonga."

[363] As noted in Part 1.2, Mr Carlyon stated that throughout discussions between Te Rūnanga and mana whenua and the applicant, the need for expansion of the Port was not challenged with respect to the need to provide for domestic and international goods.

[364] In Mr Ngātuere's words: [142]

142 Mr Ngātuere, EIC at 53

> "Whareroa marae, our kaumātua, our whānau, our tamariki, and our wider community do not seek special privilege. We are merely fighting for our survival and basic human rights. We want to raise our families and practice our culture without fear of new attacks to our health and wellbeing coming from powerful corporate players, who say they want enduring relationships with mana whenua while justifying the poisoning of the same people and their culture for economic growth."

[365] Ms Taingahue expressed another view that appears to be shared by at least some tangata whenua that: [143]

143 Ms Taingahue, EIC at 53.

> "The hapū would like to forge an institutional relationship with POT based on mutual respect and care for our environment. This is a big ask in the current climate, but we have to start somewhere. Without it, we cannot see how the POT application should be able to proceed."

[366] We find this is a cumulative effect of the proposal that is more than significant and has not been considered by POTL.

6.7 Effects on the relationship of Māori with their ancestral taonga

[367] We discussed the significance of Te Awanui in Part 6.2. It is a taonga and tupuna of tangata whenua, which in a Te Ao Māori worldview cannot be separated into discrete compartments when assessing effects on cultural values. It must be viewed as an integrated whole, where an effect on one part of Te Awanui has effects on other parts and the whole. As Ms Bennett stated, [144]

144 Ms Bennett, updated EIC at 69.

assessment of cultural effects cannot be constrained by lines on a map defining Port zones or areas requiring special protection. Cultural values start from whakapapa and are based on traditional associations with the whenua and the moana that have been in place for generations.

[368] Ms Loomb agreed that when addressing RCEP matter of discretion "site-specific historical or cultural values" under ss 6(e) or 7(a) of the RMA, a holistic approach is enabled allowing consideration of the entirety of Te Awanui and how it is affected by the proposal. [145]

145 NOE at page 601.

[369] The evidence of the degradation of Te Awanui is extensive and unchallenged. We discuss existing effects under the relevant topic headings below. We make the following high-level comments.

[370] In its Treaty settlements with Ngāi Te Rangi, Ngā Potiki and Ngāti Ranginui, the Crown acknowledged that the development of the Port has resulted in environmental degradation of Tauranga Moana and reduction of biodiversity and food resources. [146]

146 As referred to in the deeds of settlement which are the subjects of the Ngāi Te Rangi and Ngā Pōtiki Claims Settlement Bill and the Tauranga Moana Iwi Collective Redress and Ngā Hapū o Ngāti Ranginui Claims Settlement Bill presently before Parliament.

[371] The RPS states that the declining water quality of Te Awanui is one of the two most important issues for the region to address in the next 10 years. The RCEP identifies that sedimentation, stormwater discharges, nutrients and faecal microbial contamination from land use in the contributing catchment impact the water quality of Te Awanui, contributing to cumulative effects. [147]

147 RPS at s 2.9 and RCEP, Issue 15.

When the effects of climate change are taken into account in addition, there is a need to consider carefully what contribution the Port is making to the undisputed degradation of Te Awanui that is occurring.

[372] While the areal extent of further dredging included in the proposal over and above that already consented is less than 5 ha, compared to the 303 ha dredged in the capital dredging project [148]

148 Mr Kneebone, reply evidence at 62.

, it will add to the effects on cultural values resulting from existing Port activities.

[373] Counsel for Ngāti Kuku and Whareroa Marae Trustees referred us to the decision of the Environment Court in Tainui Hapu v Waikato District Council and TV3 Services [149]

149 *Tainui Hapu v Waikato District Council and TV3 Services* Decision A75/96 at p. 8 - 9.

relating to a proposal to locate a television translator on ancestral land, where the Court said:

> "Tangata whenua have a cultural and traditional relationship with the land on which the translator site is located; that it is ancestral land; and that the land generally contains sites of cultural and spiritual significance to them which are waahi tapu. We find that the installation of the translator pole would have only minimal disturbance to the ground, much less than normal farming activities permitted there; and that the precise site is not known or identified as containing any archaeological remains or as specifically being a place of spiritual or cultural significance. However we also find that because of the long history of occupation of Horea generally by ancestors of the tangata whenua, the whole area is closely associated with deep respect for their ancestors and the places where they lived, fought, and were buried, and that any disturbance of the ground for the translator would be regarded by them as a desecration."

[374] On appeal the High Court upheld that decision, quoting that passage with approval and noting that such an approach did not amount to a veto or a *per se* objection. Rather, the High Court held that a rule of reason approach must prevail, asking whether, objectively, the particular activity for which consent is required is intrinsically offensive to the relevant cultural considerations and finding that the Environment Court reached a conclusion that was available to it on the evidence and within the scope of the relevant planning provisions. [150]

150 TV3 Network Services v Waikato District Council [1998] 1 NZLR 360, 371; [1997] NZRMA 539, 548-9 (HC).

[375] Prior to 2011, the evidence shows that historical development of the Port did not recognise or provide for the relationship in accordance with s 6(e) of the RMA. We have found that in a practical sense, tangata whenua have been unable to exercise kaitiakitanga to any meaningful extent in areas of Te Awanui affected by Port operations. While the 2011 dredging consent included conditions aimed at meeting the requirements of both sections of the Act, subsequent experience has shown that was not achieved to any meaningful extent.

[376] The POTL evidence before us appears to have been prepared to reflect RCEP Policy IW 5 that only tangata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. As a result, POTL's evidence did not define specific effects on the relationship that need to be avoided, remedied or mitigated, or whether the effects were of equal concern to all or just some tangata whenua.

[377] A key component of the proposed conditions was that sums of money would be made available to tangata whenua who can decide for themselves how they use them. As presented in the opening submissions of its counsel, the proposed sums were " … not intended as a starting point, particularly in terms of the modifications to its application and its proposals for funding which are proposed with respect to the application as a whole." They were also not expressed in terms of what they are intended to achieve or supported by any evidence as to how they have been calculated or otherwise arrived at. There is therefore no basis on which the Court can determine what environmental outcomes are to be achieved by them.

[378] We received extensive evidence on the degradation of Te Awanui and other effects on the environment, and tangata whenua concerns about what additional effects further development will cause. We record a very small snapshot of that evidence here, noting that many other witnesses raised similar issues.

[379] Mr Tawhiao stated: [151]

151 Mr Tawhiao, EIC at 4 and 6.

> "Over the last 10 years, we have witnessed the impacts and like our taonga, Te Awanui, we have experienced the injurious affections. We testified before this Court about our concerns and the range of impacts we considered would eventuate. I am left thinking what more can we do.
>
> What's the point of our striving for better outcomes if nothing ever changes? Why lose sleep trying to come up with different ways of saying the same thing? Why invest our limited resources, resources intended to derive benefits for our people, on a losing battle? We are not senseless. So, why do we do it?"

[380] Ms Bennett described kaimoana depletion as having devastating impacts. [152]

152 Ms Bennett, EIC at 104.

She described how 10 years ago, it was possible to anchor almost anywhere around Paritaha and for a boat of three people to fill a fish bin in an hour, whereas now it takes four people two hours. [153]

153 Ms Bennett, supplementary evidence at 2.7.

[381] When Mr M T Sydney, an uri of Te Whānau a Tauwhao and Te Ngare of Rangiwaea Island, and Ngāi Tūwhiwhia at Matakana Island, was young, there was roughly over two hours of time to comfortably collect kaimoana from Te Paritaha until the next oncoming tide came in. Today, there is a bare 45-minute window until the tide turns and covers the bank, restricting time to collect kaimoana. He has also noticed a change in size of Pipi in the area and that it is decreasing as time goes on.

[382] Mr Bidois quoted reports from kaitiaki and whanau who regularly gather kaimoana from Paritaha, who all say the same thing, that the pipi have diminished or things have changed.

[383] Ms Kuka, who is and uri of Ngāi Tūwhiwhia hapū and lives at their papakainga on Matakana Island, stated that the Opureora Marae is in danger of toppling into the sea due to the ever-increasing rapid tidal flows. While recognising the impacts of climate change, she considers erosion is happening more frequently due to the man-made aggressive works of development within Te Awanui.

[384] Mr Hayden Murray's main role on Matakana Island is to protect and maintain the coastal foreshore, which stretches 24 kilometres in length. He looks after the native animals, plants and habitats along the foreshore and drives up and down the island every day. [154]

154 Mr H Murray, EIC at 4.

He described the erosion along parts of the foreshore and acknowledged there are a number of contributing causes linked to human activity but considered the erosion at Panepane results from the Port's dredging. He stated that before the reclamation of Sulphur Point there were large areas of sand banks for migratory birds to roost on and estuaries to feed in. The Hakakao (bar tailed godwit) now have limited places to land.

[385] Ms N L Taingahue, who lives on Rangiwaea Island with her whanau and is "a servant of her people", considered that what happens at the Port end of the harbour impacts directly on where they live at Rangiwaea and Matakana Islands. She stated that channels at Rangiwaea are silted up with sedimentation and the barge can only access the channel at three quarters to full tide. She also stated that "The harbour is already in a degraded state, and it cannot be left to escalate further as we will never get it back to what it used to be. "Enough is enough POT, this is a crisis of money versus mauri".

[386] Mr R E T W Rolleston, a kaumatua born on Matakana Island, stated:

> "Our current infrastructure cannot accommodate our communities in the Bay of Plenty as it is today. The proposed Port expansion will mean more ships, therefore more trucks, trains and other transport to cargo materials to and from the wharf. There will be more container sites around the moana. Already our infrastructure cannot accommodate our communities in the Bay of Plenty as it is today. This is evidenced by the many traffic jams. Travelling to and from Omokoroa is a nightmare."

[387] Mr Hori Murray, who was born and bred on Matakana Island, expressed concerns about the safety of the school boat travelling into Tauranga from Panepane wharf due to increased Port activity in the harbour. Mr B Taingahue, who lives on Rangiwaea Island, identified the effect of introduced species as being attributed to the ships discharging bilge water into our coastal seas.

[388] As noted by Mr Kneebone, "There were some that simply said they didn't want any further port development and we respected that position and understood it." [155]

155 NOE at 504.

[389] We accept all of the above evidence based on the lived experience of those giving it. However, we have to consider the extent to which the effects were caused by the Port, which we return to later.

6.8 Effects identified as being of concern to all tangata whenua

[390] The primary concern of all tangata whenua is that there is no more degradation of Te Awanui as a result of Port operations, including any expansion of them, and that a start is made to restore it. There is no practical way in which

the actual effects of historical and proposed Port activities can be differentiated from the effects of other activities, so an element of pragmatism is required.

[391] We consider the Southern Te Awanui Harbour Health Plan proposed by POTL in closing submissions could go some way to addressing concerns about the relationships of tangata whenua with their taonga, but we consider that much greater definition is needed of what is proposed. As a starting point, we direct POTL to provide the Court, within six months of the date of this decision, a detailed scope of that plan prepared in partnership with tangata whenua (subject to their willingness to participate) and the Regional Council. A final plan would be required within two years of the date of our final decision.

[392] Either as part of that plan or separately, we direct POTL to propose details of a meaningful kaitiaki role for tangata whenua to promote the objectives and policies of the Bay of Plenty Regional Coastal Environment Plan including in relation to planning, implementing and reviewing monitoring programmes and contributing to management decisions arising from implementation of these programmes. These details should include a management structure which recognises the relationships between POTL and tangata whenua and how the implementation of the plan is to be funded. A collaborative approach is highly desirable, recognising the strength of tangata whenua's view that they should determine how their involvement will best be incorporated.

[393] These arrangements ought to be entered into as a basis for seeking the best outcome in the interests of all parties and, most particularly, the environment of Te Awanui.

6.9 Other effects specific to Ngā Hapū o Ngā Moutere Trust

[394] In addition to effects of concern to all tangata whenua, the Ngā Hapū o Ngā Moutere Trust identified the need for certainty as to whether POTL intends to retain the existing boat ramp within the Port area for use by vessels travelling to and from Matakana. POTL stated at the hearing that retention of the boat ramp or an equivalent replacement is proposed, "so long as there remains a need for cargo to be transferred from Matakana and Rangiwaea Island to the Port of Tauranga". This is now provided for in proposed condition of consent 7.2. This will avoid an adverse effect on accessibility that would arise otherwise for cargo movement but we are not clear of whether this addresses the concern identified by tangata whenua.

[395] We do not consider the proposal will result in any other cumulative effects specific to Matakana hapū represented by the Trust.

6.10 Other Effects specific to Whareroa Marae

[396] Cumulative adverse effects on Whareroa Marae from surrounding activities are already at such a level that the people and communities of the Marae are unable to provide for their social, economic, and cultural well-being and for their health and safety.

[397] Activities other than the Port contribute to these effects, but a catalyst for those activities being located where they are is primarily the existence of the Port. Further, POTL has landholdings in close proximity to the marae. Not only does POTL have the ability and duty to manage its own effects on the environment, it is in a position to at least influence if not require those undertaking activities using Port owned land or facilities to do the same.

[398] POTL acknowledged that Ngāti Kuku and the Whareroa Marae in particular have borne a heavy burden from urbanisation over a long period of time, including the fertiliser works, the wider industrial precinct and the Port of Tauranga, the Tauranga airport, and the harbour bridge. Counsel for POTL also acknowledged that Whareroa Marae and Ngāi Tūkairangi and Ngāti Kuku hapū are the most affected by this proposal due to proximity. [156]

156 Ms Hamm, opening submissions at 46.

[399] While some historical decisions about land use have been made which practicably cannot be reversed, there is the opportunity to ensure that land use management moving forward addresses Māori cultural issues and environmental sustainability. The proposal has the potential to result in cumulative effects on a sensitive and already degraded environment and where Māori culture, practices and taonga have been compromised, especially for the people of Whareroa Marae.

[400] As noted earlier, the Regional Council stated that "the community is concerned about a wide range of issues relating to the Port which include air quality and the impact industrial activities have on Whareroa Marae and residential areas." [157]

157 FTC 44 Application for referred project under the Covid-19 Recovery (Fast Track Consenting) Act - Joint Stage 2 decision on: Application 2020-29- Port of Tauranga Limited for Ports of Tauranga Stella Passage Wharves and Dredging Project, Memorandum dated 4 March 2021.

[401] Mr M Ngatai, who is caretaker of the Marae grounds as well as the Chairperson of the Whareroa Marae Trust, talked about "the squeeze, the noise & the smell", going on to explain: [158]

158 Mr M Ngatai, EIC from 35.

> "What follows when industry establishes itself so close to residents and community is that you then have harmful activities that impact on the health of our environment and us as a people.
>
> I am talking about chemical contaminants in the air, in the ground, in our waterways. I am talking about contaminants, that can't be seen with the naked eye as well other discharges like dust. But even the dust is so small that it gets into your lungs without you knowing. These chemicals or contaminants they get into our homes, into our soils, they get into our groundwater.
>
> We cannot hang our washing on the line and leave it out without our washing being covered in fine particle dust matter. Our vehicles get covered in it. It even gets into our homes. I am not sure what it is but when it settles on metal objects, it must react and it binds itself to the object and it stays there. These are just some examples of how the industry that sprung up around us, impacts us.
>
> The air around us is not safe. We had visitors recently on the marae all day and they could smell the stench and the odour in the air.
>
> Sometimes the odour is so strong that everyone goes inside. I mean, it could be the sweltering hot middle of summer and the odour is so bad that everyone goes inside, shuts their windows and turns their air conditioning on. We had to get the air conditioners installed because of the odour in summer. All of the kaumatua flats have air conditioners now.
>
> Sometimes when we have visitors they will say: oh what's that terrible smell? And sometimes I just can't smell it anymore, it has become another daily thing to me that I have learnt to put up with.
>
> Noise has always been an issue, noise comes from the big trucks, the beeping of the vehicles that move freight around the Port, the movement of ships, the clanging of containers etc. The activities at the container terminal make the ground shake. Imagine how loud the noise is to be able to shake the ground.

> …
>
> None of the contamination surrounding Whareroa can be attributed to anything that the whanau has done. Everything that has happened and is happening now is a consequence of the industrial activities that have been allowed to establish and allowed to operate. Given licenses to pollute, to harm, our whenua, and our people."

[402] Other evidence strongly supported what Mr Ngatai said.

[403] Adverse effects on health were raised by several witnesses. As one example, Ms V Edwards, who is the lead kaiako (teacher) at Te Kōhanga Reo o Whareroa, stated:

> "My observations over the years here at Te Kōhanga Reo o Whareroa are that we have high rates of asthma-like symptoms, and breathing difficulty related illnesses amongst our tamariki. There also seems to be a lot of allergies or sensitivities to certain sometimes unknown substances.
>
> …
>
> The rates and severity among our tamariki are too great for there to not be any corelation with the poor air quality that Whareroa has.
>
> There are times when tamariki have arrived at kōhanga happy and healthy (no runny nose nor any known underlying illness), and have, in a very short space of time (sometimes minutes), been so severely affected by asthma symptoms that they have had difficulty breathing. This has led me to believe that there is something 'rotten' in the air. It honestly has left me shaken at times.
>
> Not only is it tamariki that have been affected. I myself often have to take an antihistamine, which I now keep handy, just to get through the day without my eyes weeping or itching. I have also had visitors who start displaying hay fever like symptoms (sneezing, watering and itchy eyes) within minutes of arriving."

[404] Ms Ngātuere is a direct descendant of Taiaho Hori Ngatai. She was born at Whareroa Marae and moved back there with her husband in around 2014, so that their tamariki could be raised on their whenua. In 2020 they "were forced to uplift our children off their whenua due to the discharges from heavy industry and the stress associated with fighting for our survival on a daily basis." For those present at the hearing, it was incontrovertible that this was a devastating and heart-breaking experience for Mr and Mrs Ngātuere. [159]

159 Ms Ngātuere, EIC at 5, Mr Ngātuere, EIC from 11 and NOE at page 1023.

[405] Ms N Ngatai, who lives and works at Whareroa, spoke about having to take her three-year old tamariki to Accident and Emergency when his inhaler and medicines were not helping and he was found to have a chest infection, bronchitis, and his asthma was worsening. [160]

160 Ms Ngatai, EIC at 8 and 9.

[406] When asked if she had noticed any difference in terms of effects on her children, Ms Edwards replied:

> "If by 'improvements' you mean that most of the time it's not stink between nine and three, yes, the air quality has improved. But after three, I'm sure you guys noticed yesterday, come 4 o'clock, 5 o'clock or if you turn up early in the morning, say 7 am, 7.30 am, you will smell the pollution, you'd actually think that you were in a terrible stink area. You can feel it in your throat, you can feel it in your nostrils, you can feel it in your watery eyes. So when they say 'improved', not really. They've been able to disguise the pollution, that's all. [161]
>
> [161] NOE at page 975.
>
> "

[407] We experienced for ourselves the significant odours in and around the Marae locality over the seven days when the hearing was held at Whareroa. When the noise from the airport is added on top, which required the giving of evidence at the hearing to stop at times until people could hear what a witness was saying, there comes a time when enough must be enough and consideration needs to be given to restoration, not adding further cumulative effects.

[408] Based on this evidence, we are satisfied that in this location there are significant issues to be addressed in terms of the purpose of the RMA, the nationally important matter of the relationship of Māori with their ancestral taonga in s 6(e) and the matter of katiakitanga in s 7(a).

[409] The Marae has historically been seriously adversely affected by visual enclosure by the Port and associated activities. It was implied by witnesses called for POTL that there will be no further enclosure as a result of the proposed Port activities on the Mount Maunganui side, but this has not been demonstrated on any appropriate evidential basis. Only assertions have been made.

[410] The acceptability of any further visual enclosure of the Marae by activities on the Sulphur Point side requires an evidential basis, taking into account that extension of the wharf and associated berthing of large vessels alongside is not a permitted activity. "Before and after" visual simulations will be necessary to demonstrate the full extent of increased visual enclosure that would result, including by structures, vessels and stacked containers on the Sulphur Point side, and any changes from the proposed development on the Mount Maunganui side. Conditions will need to be drafted to ensure that enclosure effects and encroachment above the existing skyline are avoided, remedied or mitigated.

[411] The undisputed adverse effects of historical Port activities on Ngāti Kuku's and the Marae's relationship with Te Awanui are also serious. We consider there will be cumulative adverse effects on that relationship resulting from any increase in the already consented dredged area to the extent that will facilitate more and larger ships and more onshore structures both temporary and permanent. We acknowledge that the effects will be small in comparison to existing effects. Any further expansion of the Port on the Mount Maunganui side, even if it is only one additional large vessel berth located closer to the Marae as now proposed, will adversely affect the relationship of Ngati Kuku and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. They will be unable to be avoided and the evidence provides no clear assurance that they will be remedied, mitigated or compensated for.

[412] Based on all the evidence, the adverse effects of the current proposal on Ngāti Kuku and Whareroa Marae, considered on their own and cumulatively with the effects of existing Port activities, are significantly adverse. There appear to be many options available to POTL to address these and there is a strong case for POTL to look again at the mitigation options proposed by Ngāti Kuku and the Marae.

[413] Until existing adverse effects are avoided, remedied or mitigated appropriately, authorising new activities that would result in any further cumulative effects could be contrary to the purpose of the Act. Any cumulative adverse effects arising from further activities on the Mount Maunganui side, beyond those which are *de minimis*, on nearby sensitive activities such as the homes and the school at the Marae would be unacceptable. Any cumulative effects arising from further and more distant activities on the Sulphur Point side could potentially be acceptable provided they have been avoided, remedied, or mitigated appropriately.

[414] We find that the adverse effects from existing activities at the Port are cumulatively unacceptable now and consider that it would be inappropriate to grant consent to an activity which will add to that situation without those effects being addressed in some meaningful way. Before we can determine the applications for works beyond Sulphur Point Stage 1, POTL must provide further evidence to demonstrate that the extent and degree of recognition of and provision for the relationship of Ngāti Kuku and Whareroa Marae with their ancestral taonga is appropriate, noting that:

> "(a) any proposed mitigation measure should be reviewed to ensure it is adequately based on the specific effects to be mitigated;
> (b) a condition requiring a payment by one party to another is, in the absence of agreement between the parties, an insufficient measure to recognise and provide for the relationship identified in s 6(e) of the RMA; and
> (c) the burden on tangata whenua of participation in another party's consenting processes where a matter of national importance is at stake should be recognised."

[415] We express measured confidence that a collaborative approach to the design and management of Port facilities is capable of producing an acceptable solution to address the issues affecting tangata whenua and provide for the future of the POTL.

6.11 Effects on marine water quality, ecosystems and kaimoana resources

[416] We received expert evidence on behalf of POTL from Professor Battershill. The focus of his current work is on the Bay of Plenty region in general and Te Awanui in particular. He was responsible for creating a marine research centre in Tauranga.

[417] We also took into account evidence from a number of tangata whenua witnesses, which is summarised in Part 6.6. We consider tangata whenua concerns in a more holistic way in Part 6.8.

[418] The Regional Council commissioned Mr D Morrisey, a senior coastal scientist at Cawthron Institute to undertake an assessment of ecological matters, which included an analysis of the potential effects on seagrass habitat, kaimoana habitat (pipi and tuangi), hard structure habitat, soft benthic habitat, benthic sediments chemical *(sic)* and fish ecosystem habitat. [162]

162 Section 87F Report at 5.13.

We note from Mr Morrisey's letter report dated 2 June 2021 that his assessment was limited to the proposed area to be dredged and the effects of the dredging.

[419] We start by noting the following observations of the existing environment in and around Stella Passage from the executive summary of Professor Battershill's evidence-in-chief:

"(a) Of significance is the very low level of incursion of potentially invasive species, significantly lower than other commercial ports throughout the country.

(b) The seagrass bed in closest proximity to the area of interest is in good health and is now stable despite a decline from original condition in the early 1990s.

(c) Rocky hard shore margins, rip-rap and wharf piling surfaces are covered with a good diversity of native encrusting species and the channel floor is in good health … ;

(d) The Stella Passage channel floor adjacent to the Bridge Marina and running south toward the Tauranga Strand, is in good condition as evidenced by well-established horse-mussel beds and associated benthic fauna and flora."

[420] We have noted that the additional area of dredging in the proposal that is not already consented amounts to 4.65 ha. [163]

163 10.55 ha compared to the 5.9 ha authorised by existing Permit 62920.

In relation to the predicted effects of the proposal, he stated that:

"(a) The proposed dredging campaign will have some immediate effect on the channel floor benthos in the dredge area and down current, due to the physical disturbance caused by the dredge on the seabed and subsequent fall-out of fine materials. From past collective experience, it is clear that this effect is moderate in extent and short-lived with restoration of benthic habitat occurring over short time frames due to the presence of reproductive propagules of appropriate benthic species aided by the high current regime.

(b) Based on findings from review work on the hydrology of the harbour and expected plume creation, the effects on other habitats such as the adjacent seagrass bed in Waipu Bay, Whareroa, will be minimal. No cumulative effects either over time within the vicinity of the operations, or the adjacent estuarine systems are anticipated.

(c) The main effect on water quality is the immediate increase in turbidity experienced during dredging operations. … this effect is transient and evidence suggests that the environmental effects are negligible based on previous capital dredging campaigns. Chemical analyses of the sediments that are likely to be dredged and disturbed during the campaign show that in almost all cases, metal levels lie below ANZECC concentrations of concern, and have remained so over a period of time since relevant sampling efforts were conducted in 1994.

(d) … overall, there would be negligible contamination of water quality due to heavy metals in disturbed sediments, even during dredging activity. … the longer-term effects on water quality will be negligible. No cumulative effects associated with development in the area generally are anticipated.

(e) The fact that after a number of capital dredging events, there remains only a very low incidence of invasive species incursion into the active Port areas attests to a resilient environment even at times of disturbance (as occurs during dredging operations)"

[421] Professor Battershill stated that the metal content of benthic sediments was examined at three locations, two representing the core of a working harbour precinct and an additional location adjacent to the Bridge Marina to represent a less "ship active" affected location. [164]

164 Professor Battershill, EIC at 72.

Across all metals examined, the highest concentrations were well below DGV thresholds (Australian Government, 2019a,b). [165]

165 Australian Government (2019b) Toxicant Default Guideline Values for Sediment Quality. Accessed Feb 8, 2020 from: https://www.waterquality.gov.au/anz-guidelines/guideline-values/default/sediment-quality-toxicants

He also stated it appeared that most metals were similar or lower in concentrations as sampled during this exercise as compared to the survey carried out by Healy et al. (2009) indicating that further Port development has not resulted in increases in metal concentrations.

[422] Professor Battershill stated: [166]

166 Dr Battershill, EIC at 19 and reply evidence at 25.

> "Considering all elements of the environmental effects assessment herein, and based on the hydrodynamic and geomorphological studies carried out in response to the proposed dredging and wharf extension work, I consider marine environmental effects will be minor in the short term and negligible long term.
>
> … the current proposal in my view, will not worsen the situation with regard to the marine ecology of Stella Passage, intertidal systems adjacent to Whareroa Marae and Te Paritaha in the longer term."

[423] From our more detailed review of the evidence of Professor Battershill and Dr De Lange, together with the evidence of tangata whenua witnesses, we consider the lack of a robust baseline understanding of kaimoana resources in areas of Te Awanui affected by Port activities to be a serious gap in POTL's case. As we have already noted, we have no ability to assess the effects of historical dredging against the experts' predictions at the 2011 hearing, which is relevant to our assessment of the reliance we can place on current predictions. Second, there is no baseline against which to monitor the effects of the current proposal.

[424] The reason for this is that POTL did not undertake the annual monitoring required as a condition of consent for seven consecutive years. We do not accept there is any justification for this, nor any justification for the Regional Council not to have enforced compliance with the conditions of consent for the same period.

[425] We note that in his reply evidence, Professor Battershill considered that a comprehensive and repeatable survey needs to be established accompanied by sedimentary and current monitoring components to examine the shift in dynamics around Te Paritaha. In response to Court questions, he outlined the type of survey he considered would be required and expressed the view that it should be tangata whenua led. [167]

167 NOE from page 566.

[426] He considered that, given the importance of Te Paritaha, it would be advantageous to have a number of comprehensive surveys done over a relatively short timeframe because pipi beds can move around very quickly, and repeated seasonally. He recommended a two-year programme, after which he considered it would be possible to say something quite sensible about the whole physical and biological drivers that are maintaining that population on the reef.

[427] He indicated that in addition to pipi, the inclusion of other species in the surveys should be determined by tangata whenua. He considered there would be merit in coordinating any surveys with other research being undertaken in Te

Awanui. There would be a need for on-going reviews, with wananga follow-up, which could identify any requirements for mitigation or restoration.

[428] As noted earlier, he considered causes other than the Port were likely to be the main reasons Te Awanui was degraded and stressed the need for in-catchment management solutions.

[429] After receiving further information, Mr Morrisey concluded in his peer review that: [168]

168 S 87F Report from 5.15.

> "(a) effects on seagrass beds are likely to be negligible;
> (b) the proposed area of dredging is unlikely to contain contaminants that would result in adverse effects should they be disturbed during the dredging process;
> (c) the potential effects on the distribution of fish populations in the Stella Passage are unlikely to be more than minor;
> (d) the benthic fauna and flora of the seabed and adjacent hard substrata (wharf structures, rip-rap, etc.) are not of particular ecological or conservation value;"

[430] Overall, Mr Morrisey concluded that the magnitude of effect of the proposal would range from minor to negligible.

[431] Evaluating the evidence, we consider the answer to the question of whether Stella Passage is in good condition or degraded depends on what basis of comparison is used. When discussing cumulative effects of the proposal, Professor Battershill stated "Te Awanui and the area of development is in good health, with rich assemblages, multitude of fish species using the area and seagrass beds which are growing in the Port's vicinity." [169]

169 Professor Battershill, EIC at 87.

It would have assisted us if the baseline for comparison had been more clearly stated, as there is wide acknowledgement that Te Awanui is degraded and not in good condition.

[432] In relation to previous Port dredging, Professor Battershill stated: [170]

170 Professor Battershill, supplementary evidence from 15.

> "The very first dredging campaigns will have removed any Hururoa and Tipa (horse mussel and scallop beds) from the channel floor (between Pilot Bay and the Bridge Marina). Subsequent maintenance dredging will have precluded re-establishment of these shellfish populations although it appears that Huhuroa recruit from time to time in the shallower reaches of Stella Passage and throughout Pilot Bay.
>
> While there have been some historic impacts of port development on kai moana shellfish through physical losses caused by dredging and reclamations, in my opinion the changes to shellfish demographics over time are driven by the sedimentary and nutrient profile of the harbour ecosystem rather than port development."

[433] We have some difficulty accepting that Stella Passage is in good condition, including for the reasons in the above paragraph. Professor Battershill acknowledged that cockles have declined in abundance throughout Tauranga Moana. He stated that pipi increased in abundance throughout Tauranga Moana between 2011-2016 at most sites, but this

was largely due to greater numbers of smaller individuals. He agreed that the population of pipi has reduced for the most part from pre-1995. [171]

171 NOE at page 521.

He also acknowledged that the status of Tauranga Moana shellfish habitat reflects the collective influence of the wider catchment which is now substantially modified from "pre-development" condition. [172]

172 Professor Battershill, supplementary evidence at 11 and 23.

[434] In terms of effects on marine water quality, ecosystems and kaimoana resources from a western science perspective, and put simply, we do not accept the statement that Te Awanui is in good health. The evidence demonstrates otherwise. We make our findings relating to the overall adverse effects of the proposal on Te Awanui's resources or areas of spiritual, historical or cultural significance to tangata whenua later in our decision.

[435] We accept Professor Battershill's evidence, which is supported by Mr Morrisey's peer review findings, that from a traditional western science perspective, the effects of the proposal are expected to be minor in the short term and negligible in the long term. However, in terms of RCEP Policy IW 2, the proposal does not avoid adverse effects on resources or areas of spiritual, historical or cultural significance to tangata whenua. We return to the extent to which these adverse effects, overall, are proposed to be remedied or mitigated later in our evaluation.

[436] We consider it essential that prior to our final decision on the application, a comprehensive survey of kaimoana at Te Paritaha is undertaken, taking into account Professor Battershill's recommendations and tangata whenua input on mātauranga Māori. The survey should also assess the extent to which the kaimoana is safe to eat under differing environmental conditions, as this was of concern to some tangata whenua. The work can be staged to avoid the need to wait more than two years for results, which is the timeframe Professor Battershill recommends.

[437] A comprehensive state of the environment report identifying the current baseline is required before we make our final decision, taking into account the survey and the views of tangata whenua prior to and after the survey of kaimoana at Te Paritaha is undertaken. The report needs to include all effects of Port operations on Te Awanui and extend to all areas affected by Port operations.

[438] We have concluded that it would be appropriate and useful to convene a wananga for POTL, tangata whenua and the Regional Council to discuss the outcomes of these directions report findings, and in the event of disagreement between POTL and tangata whenua, the Regional Council would be best placed to resolve the disagreement.

6.12 Effects of dredging and reclamation on the harbour

[439] The effects of dredging and associated erosion and accretion on the hydrodynamic and geomorphic regime of the harbour were major concerns for tangata whenua and we considered them in considerable detail, seeking clarifications on many aspects from Dr De Lange, who gave western science evidence on behalf of POTL. [173]

173 NOE from page 264.

We also received evidence based on observations of erosion and accretion effects from a number of of tangata whenua witnesses, as summarised in Part 6.7.

[440] Mr R Reinen-Hamill of Tonkin and Taylor, an expert in the field of hydrodynamic and geomorphic effects, was engaged by the Regional Council to provide an independent peer review of Dr De Lange's work at the application documents stage. We set out his findings at the end of this part.

[441] Dr De Lange explained that the catchment draining to Te Awanui is relatively small, meaning sediment loads are also relatively small compared to other estuaries in the Bay of Plenty region. The finer catchment-derived sediment entering the harbour gets transported as far north as the Tauranga Harbour Bridge. In addition, sand-sized sediment from marine sources is carried by tidal flows as far south as Stella Passage and the Harbour Bridge.

[442] Sediment is also derived from sources inside the harbour, predominantly as far as Dr De Lange can determine, by erosion of the cliffs around the shoreline with a relatively small contribution from the rivers, with the Wairoa River being the largest. However, due to the structures that are on that river, like the dam at McLaren Falls, a lot of that sediment supply has been cut off. Fine sediments from stormwater systems in the urban area do enter Stella Passage and in flood events, fine sediments from the catchment also enter Stella Passage. Dr De Lange discussed landslips occurring in the catchment in his EIC but stated that they do not contribute to cumulative effects in Stella Passage.

[443] We raised the issue of accretion that is occurring at Paritaha with Dr De Lange. His evidence indicated that accretion could possibly have been accelerated by dredging of the Cutter Channel in 1968 and the Entrance Channel in 1971. He agreed that if this continues at current rates, the area round Paritaha could become shallower by around 400 mm over a 35-year period, the possible maximum term of a consent. However, he stated that Te Paritaha is not only rising but it is also expanding westwards, and he considered that kaimoana would move sideways if the depth reduces to the specific depth range they prefer.

[444] He did not consider the proposed further dredging in Stella Passage will have any effects on the currents around Te Paritaha because it is too far away. We accept that evidence. He considered that if the already consented dredging of the turning circle goes ahead in the future, there could be further effects on Paritaha, which he could not expand on in any detail but stated that they were addressed at the time of the 2011 consent.

[445] We asked why he had not suggested possible restoration of Paritaha and he replied " … there is no restoration that would be applicable." He then explained that Te Paritaha is the ebb-tidal delta, which means that the sediment is highly mobile. The kaimoana that live there have adapted to the highly varying tidal cycle.

[446] We asked Professor Battershill about the same issue. [174]

174 NOE from page 566.

He considered there is a likelihood that there would be a shift in the pipi populations. Based on the evidence of tangata whenua there appears to be an attrition of pipi on the western edge where some of the fine sediments are accreting, which is a matter of concern. As discussed above, this indicates the need for a robust survey which is repeated regularly for the whole of Te Paritaha.

[447] We were satisfied from Dr De Lange's evidence and responses to our questions that the erosion of Whareroa Beach results from accelerated flows in the vicinity following construction of the Harbour Bridge and causeway. He said that western science evidence is conclusive that the Port dredging has had no effect, based on his own studies and previous studies by Tonkin and Taylor and Professor Terry Healy. He considered that the groynes that have been installed are not functioning as intended and it is the beach nourishment that is restoring the beach. He considered that this should continue as it maintains the aesthetics of the beach and that there would be merit in planting vegetation such as Spinifex to stabilise the upper part of the beach.

[448] We questioned Dr De Lange about the likely effects of sea level rise on Whareroa Marae. He confirmed that sea water levels will increase and become an issue independent of any effects of Port operations. We questioned him further on whether the proposed dredging would do anything to exacerbate the effects of sea level rise and, in particular, we explored with him how confident he was with his modelling results.

[449] He was candid in his acknowledgement that models have limitations but based on modelling of the harbour he has undertaken since the 1980s, he was "reasonably confident" that the modelling is providing sensible results and we accept that. Somewhat ironically, he confirmed that the causeway from the Harbour Bridge is likely to provide some mitigation of sea level rise effects because it will reduce the storm surge component.

[450] We explored the erosion at Panepane with Dr De Lange in some detail, as it was a particular concern of tangata whenua. He explained that erosion and accretion occur naturally, with erosion occurring under La Nina conditions, when sand moves offshore during north-easterly wind conditions, and accretion occurring under El Nino conditions, when sand moves onshore during south westerly conditions. He stated that currently there had been three years of La Nina conditions in a row, accounting for the increased erosion over that period. This has occurred on dunes on the top part of the beach as a result of wave action, but the migration reduces with depth, where the erosion is influenced by tidal currents. Dr De Lange said that surveys show the deeper parts are not moving, within the margin of errors of the surveys.

[451] He stated the current extent of erosion is close to the trigger point where consent conditions require restoration of the beach. If conditions turn to El Nino, he does not consider this will be necessary, however, he considers it may be desirable to remediate the area before the trigger is met because he understands the navigational aids are also threatened. We note here that any decision about the need for restoration rests with POTL and the Regional Council.

[452] Dr De Lange's opinion is clear that the erosion effects are wave-driven and that dredging affects tidal currents, not waves. He had seen no correlation between tidal changes and erosion but could see benefit in doing further work to investigate this further. He confirmed that the natural materials at five-metre depth in the main channel are harder than those at the surface and that the widening and deepening of the channel has reduced the channel flows rather than increased them, which further supports his opinion that the erosion is purely natural as opposed to any result of the dredging.

[453] Mr Hayden Murray explained how the erosion at Panepane was now up to the line of pine trees, which he considered is due to the stronger currents resulting from the dredging of the channel. Interestingly, he observed that in the last three or four years, a big sand pile had formed off Panepane Point, which could possibly be linked to the timeframe when the erosion of the Point occurred based on Dr De Lange's evidence. Mr Murray stated that two cyclones went through and sped up the erosion process. [175]

175 NOE from page 1149.

This is again consistent with Dr De Lange's evidence.

[454] Mr Jason Murray stated that in 1988, Cyclone Bola resulted in scouring of all the banks along Matakana, including at the northern end. He considered that Panepane Point was quite stable 15 years ago, noting that the sand moves with storms. He referred to $150,000 worth of planting having been put in, which was eroded away in the last seven or eight years, which he stated was "definitely after the dredging". [176]

176 NOE from page 1203.

[455] Based on both western science and mātauranga Māori evidence, storms are a major contributor to erosion at Panepane and elsewhere on the ocean coastline of Matakana. In terms of the effects of dredging, the cross-sectional area of the channel was increased, meaning the same volume of water would flow through it at a slower rate than before dredging, not at an increased rate. It is clear that increased erosion has occurred since the dredging was undertaken, but it could not have been caused by increased current flows when the channel area was enlarged.

[456] We next turned to the siltation in the Rangiwaea and Hautapu Channels. Dr De Lange agreed with earlier findings by NIWA that the only reasonable explanation is that the source is fine sediments from the Wairoa River under flood discharge conditions. He did not see any potential for the source to be fine sediments from the dredging proposed in the current applications to have any cumulative effects on what is occurring in those channel areas at the moment. His reason is that the proposed conditions will almost completely eliminate the discharge of fine sediment into the harbour and when it did occur, it would be on an ebb tide and discharge out to sea. We accept that evidence.

[457] In response to concerns raised about Port dredging having increased erosion on the seaward side of Opureroa Marae on Matakana Island, putting it at risk, Dr De Lange agreed that the area is eroding. An investigation was undertaken, which found that the erosion is caused:

> " … as a result of being located on Matua Group sediments that are prone to fail when we have heavy rainfall. Tauranga has a long history, it's one of the locations in New Zealand that has the most intense rainfall over 10 minutes, and those sorts of rainfall events cause failures in the Matua Group landslides."

[458] By way of clarification, he stated that the erosion was driven first of all by land-based events as a result of rainfall. He also explained that he had visited the marae to listen to the concerns. He observed they had a practice of directing the stormwater runoff from their roofs into soakage pits, on the top of the cliff, which was not good practice, noting that this adds to the pore water pressures in the soils and contributes to erosion. He concluded by saying the issue is predominantly a slope management issue.

[459] Concerns about increased tidal currents were raised by a number of tangata whenua witnesses. Under cross examination, Dr De Lange confirmed that after the Cutter Channel was dredged, flows were focused into that area of the harbour and increased currents did result. He went on to say:

> "But overall, the effect of dredging is to increase the cross-sectional area of the channels, and so we're having the same volume of water going through, it goes through a larger area so that tends to reduce it. In terms of onto Paritaha, because it's getting shallower, we have the issue in the opposite sense that more water is trying to get through a smaller cross-sectional area, and so there is some evidence that on parts of Paritaha on a flood tide, the velocity has increased."

[460] He stated that the proposed channel dredging is not going to increase the tidal current outside of the area of dredging, and only there by moving the location at which flood tidal currents go from deep water to shallow water at the very end of Stella Passage where the dredging stopped. By moving the limit of dredging further to the south, the locally increased tidal current will occur at the revised limit of dredging. There would be no change in velocities, they would simply be in a different location. Dr De Lange stated that based on measurements undertaken following several stages of dredging since 1982, there is no evidence to show that the effects go beyond that sharp break point. We accept that evidence.

[461] It appeared to us that there was an element of common ground between the evidence of Mr T W T K Thatcher, who is a master of Micronesian traditional navigation called by tangata whenua, and that of Dr De Lange on some aspects of changes in currents. In our view, there could be real benefit in the two experts exploring this further. The same could apply to experts sharing knowledge relating to erosion of Panepane Point and many other aspects of the management of Te Awanui.

[462] Mr Reinen-Hamill's independent peer review conclusions in relation to the proposal included: [177]

177 Section 87F Report at 5.11.

> "(a) Water elevation changes are likely to be negligible both in terms of elevation and timing,
>
> …
>
> (b) Changes in flow are limited to the deepened channel in the Stella Passage with no significant changes beyond the extent of the channel. … Local hydrodynamic changes are unlikely to result in consequent adverse impacts elsewhere.
>
> …
>
> (c) There are localised changes in sediment transport resulting from the proposed development within the project area with likely negligible impacts outside the project area."

[463] Overall, we consider it is likely that changes to Te Paritaha have resulted at least in part from historical dredging associated with Port operations. From a western science perspective, we consider the current proposal is unlikely to result in any significant hydrodynamic and geomorphic effects on Te Awanui, if any at all, for the reasons given by Dr De Lange.

[464] Again, based on Dr De Lange's evidence, we were unable to find any direct causal link between effects of historical Port operations on erosion and sedimentation in the other areas of Te Awanui discussed above. We accept it is not possible to rule out some contribution in some areas and for that reason, we consider the topic should be included as part of the proposed Southern Te Awanui Harbour Health Plan, with opportunities for mātauranga Māori and western science experts to work together.

[465] We consider the potential for the additional area of proposed dredging, over and above existing consented areas, to result in physical cumulative effects on areas of Te Awanui, including Paritaha to be negligible based on Dr De Lange's evidence, taking into account the relative localities and limited area of additional dredging. However, we return later to the potential adverse effects on resources or areas of spiritual, historical or cultural significance to tangata whenua as part of our assessment of the extent to which such adverse effects, overall, are proposed to be remedied or mitigated.

6.13 Effects of construction and operations on other harbour users

[466] We addressed this aspect of POTL's proposal in Part 3.9. We are satisfied that compliance with the Marine Safety Regulations, the relevant Regional Council by-law and the requirements of the Civil Aviation Authority and Tauranga Airport will ensure the above effects will be appropriately managed.

6.14 Effects arising from the release and spread of harmful aquatic organisms

[467] We addressed this aspect of POTL's proposal in Part 3.10.

[468] Professor Battershill stated [178]

178 Professor Battershill, EIC from 40.

> that like most harbours in New Zealand, there is evidence of a number of invasive species in the upper reaches of Stella Passage. He considered that regular surveillance resourced by POTL and intervention has kept Te Awanui relatively free of infestation compared to most other ports in New Zealand. The Asian paddle crab is known to appear in the harbour and is the subject of a regular surveillance programme led by Tauranga moana iwi in collaboration with the Regional Council.

[469] To mitigate against any spillage of dredged material containing paddle crabs on the way to the dump site, he considered it would be prudent to schedule regular surveys of invasive species prior to the proposed dredging campaign. He also considered that any effects associated with additional ships entering the harbour and additional hard structures such as wharves can be described as *de minimis*.

[470] We acknowledge that invasive species are present in Te Awanui and that this is of concern to tangata whenua. However, in view of the Ministry of Primary Industries responsibilities under the Biosecurity Act 1993 and the Regional Council's functions relating to pest management in the Bay of Plenty region under the same Act and its marine biosecurity dive surveillance programme around Tauranga Harbour, we are satisfied that risks associated with invasive species are being appropriately managed in accordance with relevant legislative requirements.

[471] Based on Professor Battershill's evidence, we find that any additional effects of the proposal on biodiversity will be at a very low level and will be appropriately managed in accordance with the Biosecurity Act.

6.15 Effects on the mauri of air and human health

[472] We summarised the evidence relating to the existing air quality environment and associated air quality effects on Whareroa Marae in Part 6.10. While we can consider these effects as part of our overall assessment of cumulative effects, their effective management rests with the Regional Council under the Regional Air Plan and associated plan changes. In our view, the poor air quality in the vicinity of Whareroa Marae and in the Mount Maunganui Airshed more generally needs to be addressed by the health authorities and the Regional Council as a matter of priority.

[473] In relation to the effects arising from the current proposal, the Court requested further information as to whether potential adverse effects on human health, and particularly on children's health, which were issues of concern for Whareroa Marae, may be increased by the proposal and what mitigation of existing or future effects might be implemented. [179]

179 Minute dated 21 July 2022.

Ms Simpson, an expert in air quality and Dr Dennison, a human health risk assessment expert, were engaged by POTL to respond to the request.

[474] Ms Simpson's overall conclusions included that: [180]

180 Ms Simpson, supplementary evidence at 23.

> "The air quality effects of the reconfigured proposal are so small they are unlikely to be discernible in air quality measurements at Whareroa Marae.
>
> It is very unlikely that an individual harbour user would be exposed to levels of NO_2 or SO_2 that would exceed the ambient air quality standards."

[475] Under cross examination, Ms Simpson was asked why she had not considered odour effects of the proposal on Whareroa Marae. She explained that ships do not cause odour.

[476] Dr Dennison concluded that:

> " … the incremental risks from the increase in the number and size of ships using the expanded wharfs at Sulphur Point and the Mt Maunganui are within acceptable risk levels established by national and international regulatory agencies and in many cases below negligible risk criteria."

[477] When cross examined on concerns arising because the WHO guidelines there are no safe levels for contaminants such as PM_{10}, $PM_{2.5}$, SO_2 and NO_2, Dr Dennison replied: [181]

181 NOE at page 354.

> "I can understand that they would be concerned with any increase in risk but if it falls within what the WHO, USEPA and other regulatory agencies consider as being negligible or acceptable risk levels, then that is what's used in guidance internationally around whether the risk is going to have significant adverse effects or not. I think it's important to note too that adverse effects are defined by medical authorities such as the American Thoracic Society, the British equivalent of that, and they have very clear guidelines of what is an adverse effect in relation to air pollution."

[478] In response to a question from the Court about how much of an error would there need to be in the health risk assessment before the risk would move from an "acceptable" to an "unacceptable" risk category, she replied it would require a 10-fold increase. [182]

182 NOE at page 357.

[479] The Court and counsel asked Dr Dennison questions about existing human health risks that are present at Whareroa Marae and she discussed a number of ways in which they could be assessed, noting that for the purposes of the current application, her assessment was based on any incremental increase in risk. This is matter for the health authorities and the Regional Council, but the Port could also need to be a participant as a significant emitter of contaminants to air in the locality.

[480] We consider the following evidence of Dr Dennison to be particularly relevant:

> "(a) Obtaining further information would not change the outcome of her evidence 'as the increase in shipping is not going to make a significant difference.'
> (b) The relevant WHO and New Zealand health standards and/or guidelines are measures of acceptable air quality standards."

[481] We accept the evidence of tangata whenua about the existing effects of low air quality on their health and amenity values. We consider these need to be addressed by the health authorities and the Regional Council as a matter of priority.

[482] The only evidence we received on the effects of the proposal was given by Ms Simpson and Dr Dennison in terms of western science. Dr Dennison's evidence did not demonstrate there would be no effects on air quality at Whareroa Marae as a result of the proposal, but rather that any increased effects would not result in unacceptable effects on human health. While we accept the veracity of the evidence from a western science perspective, it must be balanced

against the consistent evidence of people living at the Marae, which indicates there are ongoing adverse effects on health.

[483] Under these circumstances, any increased adverse effects on air quality, the mauri of air and effects on human health that are not adequately compensated for are matters of concern that need to be considered in terms of s 6(e) and the purpose of the RMA. We return to these matters below.

6.16 Effects on birds

[484] We described the areas where threatened bird species nest or roost within the Port operational area in Part 3.11 and how they are intended to be incorporated in the proposed works. The areas are the sand pile on the Sulphur Point side and the red-billed gull nesting area of the Mount Maunganui side.

[485] We received evidence from Dr D G Bennet for POTL and Mr J G Heaphy, who is a Department of Conservation Biodiversity Ranger, gave evidence on behalf of Te Rūnanga o Ngāi Te Rangi Iwi Trust. The Council engaged Dr G Don to undertake a peer review of the work undertaken by Dr Bennet.

[486] Our understanding is that no Indigenous Biological Diversity Area scheduled area (**IBDA**) lies within the Port area/ Stella Passage but IBDA-B are identified around the Waipu Bay southern margins (IBDA-B: B44, and B24) and others further up the estuary basin as well as all around Te Awanui. However, irrespective of there being no such notation on the planning maps, there are policies which reflect the requirements of the NZCPS which seek to protect IBDA, provide no net loss, and protect ecological interconnectedness of ecological features. These include Policies NH8, 10, 11, 12 and 13). In addition, Policy NH 14 addresses the Maori cultural relationship with natural heritage as follows:

> "Recognise and provide for Maori cultural values and traditions when assessing the effects of a proposal on natural heritage, including by:
>
> (a) Avoiding significant adverse effects, and avoiding, remedying, mitigating or offsetting other effects, on habitats of indigenous species that are important for traditional or cultural purposes; and on cultural and spiritual values associated with natural features and natural landscapes;
> (b) Avoiding, remedying or mitigating cumulative adverse effects on the cultural landscape;
> (c) Assessing whether restoration of cultural landscape features can be enabled; and
> (d) Applying the relevant Iwi Resource Management policies from this Plan and the RPS"

[487] Among other provisions of the NZCPS which we have already referenced, and which the planning experts accepted are reflected in the RCEP, there is policy direction to protect indigenous biological diversity in the coastal environment by avoiding adverse effects of activities on indigenous taxa that are listed as threatened or at risk in the New Zealand.

[488] Based on his personal observations, Mr Heaphy identified avian species that are protected by the Wildlife Act 1953 and use the Stella Passage locality. Three are classed as Threatened, thirteen as At Risk, and six species as Not Threatened, based on updated 2021 threat categories. [183]

183 Mr Heaphy, EIC at 24 and 25.

[489] Mr Heaphy stated that previous Port developments have progressively removed avian habitats from the port environs and he has personally observed the resulting detrimental impacts. These include red billed gulls and white fronted terns having been forced to move locations.

[490] Aerial photographs suggest the reduction in the sand pile area over the last 10 years has been in the order of 75%, which has reduced the number of birds that can use the site. He stated that this location was historically, and still is, a regionally significant nesting and roosting site used by birds all year round. He also stated that if the proposed development goes ahead and any proposed mitigation measures are not successful, several 1000's of birds may need to relocate somewhere else to nest and roost. [184]

184 Mr Heaphy, EIC at 26, 27 and 51.

[491] In his opinion, given the rapid industrial and residential development of not only the POTL land but also of the neighbouring Mt Maunganui and Sulphur Point areas, it is imperative to protect what little wildlife habitat remains for future generations before it is too late. [185]

185 Mr Heaphy, EIC at 68.

[492] Dr Bennet stated that the sand pile is heavily used by a range of At Risk and Threatened coastal birds. She also stated that the sand pile will continue to be moved and altered outside of the breeding season, as it currently is, which does not affect the use of the sand pile by birds. She considered that by leaving the sand pile to operate as it currently does, effects on the birds that use the sand pile will be avoided. [186]

186 Dr Bennet, EIC at 16.

[493] Mr Heaphy disagreed with allowing ongoing management of the site in winter because a suite of different bird species use “that small area.” He referred to an over-wintering flock of maybe 400 to 500 godwit in southern Te Awanui that would potentially be displaced through winter works at that site and potentially have nowhere else to go. [187]

187 NOE at page 1414.

[494] Dr Bennet described red-billed gulls as At Risk-Declining and stated that the colony on the Mount Maunganui wharf side is a large breeding colony each spring and summer. She stated there will be no net loss of available coastal roosting sites within the Port area for the gulls. She considered that adverse effects will be avoided provided that the steps proposed in the Blue Penguin and Avian Management Plan (**BPAMP**) she had prepared are implemented. Mr Heaphy indicated he would be comfortable if 200 metres was provided further along the wharf and that he is looking for an equivalent area to what is there now. [188]

188 NOE at pages 1423 and 1436.

[495] Dr Bennet indicated that a number of Little Blue Penguins (Kororā) [189]

189 A survey in August 2019 found 16 indications of kororā/penguin presence within the Mount Maunganui Wharf rock wall area that will be deconstructed as part of the proposed wharf extensions

were to be relocated to a site near Butters Landing. She also considered that the adverse effects of relocation will be avoided provided that the steps proposed in BPAMP are implemented. Mr Heaphy supported artificial nesting boxes being installed within the secure Port area, ideally sited away from the operational wharves.

[496] In the s 87F report, Mr Greaves stated: [190]

190 S 87F Report at page 46.

> "Mr Don has reviewed the proposed mitigation measures and is of the opinion that, if successful, they will be appropriate to avoid adverse effects in accordance with Policy 11(a). I understand however that there is some risk that the relocation and creation of habitat may not be successful, which would not avoid effect and therefore be inconsistent with the policy. However, I note that Mr Don concludes that through the imposition of conditions the management of effects is achievable and will likely result in a nett positive effect."

[497] Based on the evidence, there is sufficient uncertainty as to the extent to which adverse effects of the proposal on indigenous taxa that are listed as threatened or at risk in the New Zealand will be avoided to make additional safeguards to those recommended by Ms Bennet necessary. While she considered the effects will be avoided if the guidance set out in her BPAMP is followed, the BPAMP was not provided to the Department of Conservation for review, nor to tangata whenua, who could provide mātauranga Māori input.

[498] We consider that stringent conditions will be required if avoidance is to be achieved and must include mātauranga Māori input and review by the Department of Conservation. We conclude that some restoration of the area of the sand pile towards the area available at the time of the 2011 consent is necessary to provide a precautionary approach to managing these potential adverse effects in view of the scientific uncertainty.

6.17 Effects on marine mammals

[499] We received evidence from Ms H M McConnell for POTL and from Dr R E S O Stewart and Mr Heaphy for Te Rūnanga O Ngāi Te Rangi Iwi Trust as expert witnesses. We also received evidence from tangata whenua witnesses. The Council engaged Dr S Childerhouse of Cawthron to undertake a peer review of the work undertaken by Ms McConnell.

[500] Ms McConnell stated that bottlenose dolphins, killer whales and New Zealand fur seals are likely to occur on an occasional basis within Te Awanui but sighting rates inside the harbour are low. She did not consider that Te Awanui constitutes important habitat for any marine mammal species. She considered that by implementing measures set out in her Draft Marine Management Plan, effects of the proposal on NZCPS Policy 11(a) species can be avoided. [191]

191 Ms McConnell, EIC at 16 and 20.

[501] Mr Heaphy and two other DOC staff reviewed the Marine Mammal Management Plan at the request of Ms McConnell. In his opinion, "the biggest risk to marine mammals by any proposed port development construction works is if animals pass through the Stella Passage overnight into the upper south-eastern end, and subsequently become entrapped up there by daytime piling noise. There is then a greater risk of behavioural disturbance, stress, and potential strandings. [192]

192 Mr Heaphy, EIC at 60.

Ms McConnell made several improvements to the Plan as a result of comments received from DOC. [193]

193 Ms McConnell, reply evidence at 24.

[502] Dr Stewart, a tohunga tohorā, agreed with Ms McConnell that marine mammals are unlikely to enter into the harbour due to the present state of that environment which does not support a healthy estuarine ecosystem. She considered that marine mammals historically used the harbour in greater numbers and, but for anthropogenic effects, they would likely still be using the harbour. [194]

194 Dr Stewart, EIC at 32 and 33.

[503] Counsel for Ngāi Te Rangi accepted that marine mammal visits to Te Awanui were rare. [195]

195 NOE at page 460.

[504] We note that concerns were raised about effects on white pointer sharks and green turtles in the JWS for marine mammals. Ms McConnell considered that the management plan sets out the best practice mitigations around avoiding effects on marine mammals and without significant evidence to suggest that Tauranga Harbour was a highly significant habitat for a threatened species, her conclusions and suggested mitigations would not change. [196]

196 NOE at page 471.

[505] Dr Childerhouse's peer review concluded that the AEE provided a thorough assessment of the full range of potential impacts on marine mammals likely to be in the vicinity of the proposal and is based on the best available data. Based on that conclusion, the Council reporting officer was of the opinion that, through the imposition of consent conditions as proposed, the proposal is appropriate in the context of the Site. [197]

197 S87F Report at 5.23.

[506] We acknowledge evidence of tangata whenua of the local sightings which appear to have been not included in official records but we are satisfied based on the evidence of Dr Stewart and others that the likelihood of marine mammals entering Te Awanui is low. We note that Dr Stewart's opinion is that this is due to the present state of the environment, as a result of anthropogenic effects, which does not support a healthy estuarine ecosystem. We also accept the proposed procedures for managing effects on any that do enter are appropriate.

6.18 Effects of construction noise on Whareroa Marae

[507] The Court requested a site-specific assessment of construction noise effects on Whareroa Marae. [198]

198 Minute dated 21 July 2022.

POTL engaged Mr N I Hegley, an acoustic engineer, to undertake the assessment. He stated that the main construction noise will be from piling and, when piling, there will not be any perceptible cumulative noise effects from other construction activities that may occur at the same time. To optimise the accuracy of the noise predictions, his assessment of driving steel piles was based on field measurements of piling through similar material to that expected on site.

[508] Rule 4E.2.14 of the Tauranga City Plan sets the requirements for construction noise as:

> "Construction noise from a site in any zone within the City shall not exceed the limits recommended in, and shall be measured and assessed in accordance with, NZS 6803:1999 Acoustics Construction Noise."

[509] NZS 6802:2008 Acoustic - Environmental Noise states with respect to health and amenity:

> "As a guideline for the reasonable protection of health and amenity associated with use of land for residential purposes, the noise limits in table 3 should generally not be exceeded at any point within the boundary of a residential site, for example, at any point within the notional boundary of a rural dwelling."

[510] Based on his assessment, Mr Hegley stated that the noise from piling will be well within the recommendations of NZS6803. [199]

199 NZS 6803 1999: Acoustics - Construction noise.

The noise will also be within the recommendations of NZS6802 for an ongoing activity and will not exceed 55dB LAeq(15min) during the daytime period.

[511] Proposed conditions 11.10 and 11.11 address piling operations. They are drafted as follows:

> "11.10 Piling operations and other significant noise emitting activities shall not be undertaken on Sundays and Public Holidays; and shall only be performed between the following times subject to the further limitation set out in condition 16.8 where daylight hours are shorter than the hours listed below:
>
> a) Monday to Friday 7.30am to 8.00pm
>
> b) Saturday 9.00am to 7.00pm
>
> 11.11 Piling at the Butters Landing/Bunker wharf area will be suspended for 3 days where piling noise is above 50dB LAeq and when the Port has been advised 24 hours in advance of a Tangihanga at the Whareroa Marae."

[512] Further, specific controls in the proposed conditions for the management of effects on marine mammals address the effects of piling and include a Marine Mammal Observation Zone (MMOZ) and Shutdown Zone (SZ) during all pile driving activities. Pile driving is to cease or not commence in the presence of marine mammals and is limited to daylight hours only.

[513] Construction noise will comply with the requirements of Rule PZ 1 of the RCEP. Under cross examination, Mr Hegley stated that noise from any extension of the works will be below the background level created by the highway. [200]

200 NOE at page 307.

[514] He concluded that:

> "Noise from the proposed construction works will be at or below the existing noise environment for all dwellings within the Marae. When coupled with the proposal to suspend piling (when working at the southern end of the port area at the Bunker Barge Jetty and Butters Landing) where piling noise is above 50dB LAeq during a Tangihanga at the Marae, the effects of the proposed construction work are considered to be negligible for anyone on the Marae."

[515] As noted by Ms Hamm in closing, it became apparent during questioning of Mr Hegley that the proposed consent condition requiring piling to cease during Tangihanga was not clear as to when piling can recommence after being

suspended. Ms Hamm confirmed that POTL agrees that it would be appropriate for piling to be suspended for the full three-day period where piling noise levels exceed 50 dB LAeq. [201]

201 Ms Hamm, closing submissions at 82.

[516] Mr Hegley's evidence was unchallenged and we accept his conclusion.

6.19 Landscape effects

[517] We received expert landscape evidence from Mr S K Brown on behalf of POTL, Ms D J Lucas on behalf of Te Rūnanga o Ngāi Te Rangi Trust, the related Ngāi Te Rangi hapū, and Whareroa Marae Reservation Trust, and Mr B T Coombes, who undertook a peer review on behalf of the Regional Council. We also received evidence on cultural landscape values from tangata whenua witnesses.

[518] Particularly relevant matters of discretion and control under the RCEP include:

PZ 8(b) The finished visual appearance of "other buildings and structures" when viewed from a public place.
PZ 8(e) The effects of glare and lighting.
PZ 8(o) Site specific historical or cultural values under ss 6(e) or 7(a) of the RMA. [202]

202 This is also a matter of discretion in relation to other rules relevant to the current applications.

[519] The landscape experts agreed that Te Tangi a te Manu, the guidelines for landscape assessment published by the New Zealand Institute of Landscape Architects, is the principal guiding document for their landscape assessment. [203]

203 JWS Landscape.

We understand its purpose is to improve methods of landscape assessment within a statutory planning context. The guidelines provide a framework for assessing landscapes from both Te Ao Māori and the Western perspective, stating: [204]

204 Te Tangi a te Manu at page 51.

> "In Aotearoa New Zealand, being informed on landscape matters includes awareness of Te Ao Maori and having regard to tangata whenua matters. Such matters are integral to Aotearoa's landscapes."

[520] Other guidance provided includes:

> "3.22 Te Ao Māori is a term for an indigenous world view within Aotearoa. Te Ao Māori comprises Te Reo Māori, tikanga Māori, values, beliefs, and histories: collectively framing a world view by which tangata whenua in Aotearoa can engage with, and make sense of, the world.
>
> 4.14 … while 'landscape' has Western origins, it is now a shared concept. Professional landscape assessment should therefore also pay attention to tangata whenua matters which enrich understanding and appreciation of the landscape. Such matters may include:
>
> - tangata whenua pūrākau, tikanga, and whakapapa associated with a landscape (including creation and origin narratives)
> - the significance and meaning of place names and landscape features
> - metaphysical concepts such as wairua and mauri

- landscape stewardship concepts such as kaitiakitanga and mātauranga
- customary activities associated with places
- legal recognition of certain features as having the legal status of a person (Whanganui River, Te Urewera, Taranaki maunga).

4.15 Remember that tangata whenua have a holistic relationship with whenua that integrates physical, associative, and perceptual dimensions.

4.43 Cultural landscapes important to tangata whenua warrant recognition both for landscape assessment in general and specifically as a matter of national importance under s 6(e) RMA. … the relationship of Maori and their culture and traditions with their ancestral landscape, water, sites, waahi tapu, and other taonga.

5.41 A landscape architect would not normally speak for tangata whenua unless delegated to do so."

[521] The s 87(f) Report included a submission dated 2 November made to the Council by Te Runanga o Ngāi Te Rangi Iwi Trust. The submission stated:

> "We belong to the landscapes in which our whakapapa embeds us. Our ancestral landscapes are those places made sacred by the lives and deaths of our ancestors. As moana-centric people our association with the sea is unique, even compared with other indigenous peoples' standards."

[522] Mr Brown described the existing landscape from a physical dimension, stating:

> " … most of the Stella Passage, around both the existing Port of Tauranga and the proposed extensions to its current berthage areas, as being a heavily modified, in places, industrialised, environment."

[523] He acknowledged that he did not have specific heritage and cultural expertise to address cultural values and he did not address associative or perceptual dimensions. He referred to the Te Paritaha Area of Significant Cultural Value being located north of Sulphur Point, noting that the RCEP specifically excludes Stella Passage from areas of Outstanding Natural Feature and Landscape. [205]

205 Mr Brown, EIC at 7, 27, 38 and 39.

[524] Mr Brown assessed the existing environment as highly modified and industrial in nature where the Port expansion is proposed to occur; and having a depauperate state " … in terms of natural character values, with very little in the way of natural landforms, vegetation, water bodies or processes evident within and around it." He referred to 100 m high cranes being permitted at the Sulphur point wharves and stated that it is anticipated that a mixture of container ships, log carriers, general cargo vessels, cruise ships and petroleum tankers will conceivably line most of Stella Passage - in accordance with the relevant plan provisions.

[525] Ms Lucas based her evidence on the premise that tangata whenua values are not merely a separate factor to be addressed as an associative value, a clip-on, instead they variously inform multiple dimensions of physical, associative and perceptual factors. She had direct engagement with tangata whenua of Tauranga Moana to inform her landscape understanding and assessments, something neither of the other experts had. She considered the existing landscape through the much wider lens of the three factors listed above, both in terms of the existing and future landscape.

[526] However, she gave limited acknowledgement of and in some cases appeared to take no notice of the effects assessed through a Western lens by experts engaged by POTL and the Regional Council. Just as she was critical of the lack of consideration of landscape effects other than physical by the other experts, we noted she was equally remiss in not addressing the full spectrum of relevant information available to her in her evidence.

[527] Essentially, none of the experts provided a landscape assessment in accordance with Te Tangi a te Manu, which made our own assessment more difficult than it should have been. While landscape experts would not normally speak for tangata whenua unless delegated to do so, there are a number of ways in which they can gain an understanding of how tangata whenua view their landscape. Ways that were available to all experts were a review of Iwi Management Plans and direct consultation. In some cases too, we are aware that there are published histories which assist understanding of relationships and important features. This required a more investigative approach that that adopted by Mr Brown and Mr Coombes, but which was evident in Ms Lucas' evidence.

[528] Based on the available sources, the experts could have explained their understanding and their assessment of effects arising from the proposal. That could then have been tested at a hearing. Landscape evidence that makes no attempt to consider cultural landscapes significantly reduces its assistance to the Court.

[529] As Ms Bennett stated, assessment of cultural effects cannot be constrained by lines on a map defining Port zones or areas requiring special protection. We viewed Ms Lucas' evidence through that lens but tempered it to include consideration of a Western interpretation as an integral part of the whole.

[530] The three landscape experts agreed that there is heightened sensitivity associated with the Whareroa Marae and kainga. [206]

206 JWS Landscape

They provided no assistance to the Court as to what they meant by heightened sensitivity or the significance of it.

[531] Mr Brown assessed the effects on public places from “Viewpoint 13 - Whareroa Boat Ramp (next to Whareroa Marae Reserve)”. We consider this was appropriate in the context of views from public places.

[532] When considering effects on the Marae itself, he took into account the way in which most of the wharenui is enclosed by surrounding papakainga - with both the Marae and housing focusing more on Waipu Bay and for those reasons he did not select a viewpoint within the Marae. He acknowledged that awareness of both the Stella Passage and current Port is most marked near the edge of Waipu Bay, outside a line of pohutukawas and the margins of the papakainga which otherwise enclose the Marae, its waharoa, wharenui and ātea; but noted that the views out across Waipu Bay that are captured from both the Marae's coastal edge and the area around its wharenui are much more expansive. [207]

207 Mr Brown, EIC from 80.

[533] Mr Brown assessed the effects of transposing the proposed reclamations, shipping, container cranes and light towers into the Marae's more oblique views of Stella Passage. He acknowledged that there would be heightened awareness of the Port, with such exposure subtly amplified at times by lighting on and around both the container terminal and vessels berthed at it. On balance, taking into account the existing environment, he assessed that the effects of the proposed development would be of a low to moderate order. His opinion was that the additional level of incursion into views and the general outlook from the marae would be limited. However, he accepted that tangata whenua may well regard such effects as a further symptom of historic encroachment on the marae that adversely affects its integrity and values.

[534] We were concerned from our site visit that the views from the area near the shoreline of the marae were much more expansive than those from the neighbouring boat ramp. Following our full evaluation of the evidence, we are satisfied that Mr Brown assessed views from both viewpoints appropriately. However, in his statement of evidence in chief, which was prepared in relation to the original proposal, he stated that his assessment of effects overall in relation to Whareroa Marae reduced to a low level on the basis of the existing environment which takes into account the Port expansion accommodated by both the RCEP and the Tauranga District Plan. In cross-examination, he stated that he understood the outline development plan in Schedule 9 to the RCEP to indicate a permitted baseline. [208]

208 NOE at page 427.

As we discuss below, that is not the case.

[535] Mr Coombes considered the proposed reduction in the length of the wharf extension at the southern end of the Mount Maunganui wharves would allow for the enclosing effects on the Whareroa Marae to be avoided. "In this way the key cultural landscape effects of this enclosure articulated through the evidence of the s 274 parties are either avoided or appropriately remedied or mitigated." [209]

209 Mr Coombs, reply evidence at 41.

He did not address the enclosing effects of development on the Sulphur Point side on the Marae, which also require consideration.

[536] Ms Lucas considered that the current remnant connectivity via the Whareroa bridge "window" would be adversely affected by the scale and proximity of the proposed installations so that they encroach on the natural and cultural attributes of the Whareroa landscape. She assessed that the substantial extensions and their associated activity would significantly adversely affect the natural character of the coastal environment particularly as experienced at Whareroa and would adversely affect the connectivity, the relationship and integrity of Whareroa and the moana.

[537] She assessed that the fragile landscape integrity and multi-dimensional natural and cultural values enjoyed by Ngāi Te Rangi at Whareroa would be significantly adversely affected by the proposal. She assessed that the substantial incursion proposed nearby would have significant adverse effects on the ONL and HNC that continue to be enjoyed at Whareroa. In consideration of NZCPS Policies 13 and 15, she stated that significant adverse effects on the Whareroa ONL and HNC are to be avoided. [210]

210 Ms Lucas, EIC from 81.

[538] We note that Ms Lucas' evidence assessed the effects of the original proposal on the marae. When questioned about POTL having reduced the extent of development south of the existing tanker berth, she agreed that would be a significant improvement. She also agreed with Ms Hamm that if there is to be further modification, it's sensible to take place in the already heavily modified area. [211]

211 NOE at page 1470.

[539] In relation to viewshafts of cultural significance, Mr C J Rahiri, who is the Chair of Ngāti Ranginui Fisheries Trust, stated that: [212]

212 Mr Rahiri, supplementary evidence at 36.

> "Traditional viewshafts between Ngāti Ranginui urupā and marae are obstructed by the Port infrastructure. Motuopae and Otamtaha urupā are the closest Ngāti Ranginui urupāto the Port - the cultural viewshafts to and from Mauao are obstructed. As far away as the extremes of the Te Puna area, the Pirirakau hapū, and the Oikimoke, Poututerangi and Epiha Pā sites and burial grounds, the Port's lighting is heavily obtrusive to the cultural viewshaft of the akau (skyline) to Mauao and the interconnective viewshafts between these significant cultural sites. The backdrop of the Te Puna coastline sidled by Motuhoa Island acts as a natural amphitheatre and exasperates noise pollution from the Port's operations, especially in the evening. From a spiritual perspective, this has significant effects to the ara wairua our tipuna travel as they depart to Te Rerenga Wairua. These types of cultural effects have a critical bearing on Hononga and will be exacerbated by the proposed expansion of the Port."

[540] Ms A M August, a trustee of the Whareroa Marae Māori Reservation Trust, stated: [213]

213 Ms August EIC at 19.

> "We were accustomed to a beautiful view across the harbour. We had an unobstructed view to Otamataha, the Redoubt, where our tupuna, Taiaho Hori Ngatai, was buried in 1912. Over the last 30 yrs (sic/) we have lost more of our view of the harbour and other points."

[541] The loss of cultural viewshafts to Mauao was also raised by Te Rūnanga o Ngāi Te Rangi.

[542] In response to these concerns, POTL with the assistance of Ms Bennett made arrangements for landscape architects to visit different marae accompanied by Port representatives and Ms Bennett. Visits were made to Whareroa, Waikari, Hungahungatoroa, Maungatapu and Tamapahore Maraes, [214]

214 Mr Brown was unavailable for the visit to Maungatapu Marae.

and to Te Pā o Te Ariki.

[543] Mr Brown provided photographs and written evidence setting out his findings on the basis of those visits. He acknowledged the strong associations that local iwi have with Mauao, concluding that the majority of marae he visited would be little affected by the Port expansion. He considered this is also the case in relation to the public viewpoint from Ohauiti Road to Mauao. [215]

215 Mr Brown, EIC at 12.

Mr Coombs did not consider any of the locations visited were adversely affected in a visual way by the proposed expansion of the Port. [216]

216 NOE at page 811.

[544] We considered carefully the concerns raised by Mr Rahiri about lights and physical obstructions at the Port blocking the path the spirits take on their journey to Mauao. [217]

217 NOE at page 1252.

We do not dispute that there are effects from the existing activities, and while we noted Ms Lucas' evidence on viewshafts and other concerns raised in tangata whenua evidence and cross examination, we accept the findings of Mr Brown and Mr Coombs in the previous paragraph.

[545] We agree with Ms Hamm that views to the Kaimais from Whareroa Marae were not identified in evidence and should not assume significance in our determination. [218]

218 Ms Hamm, closing submissions at 85 and 86.

However, we consider there could remain an issue about the additional enclosure effect on Whareroa Marae, depending on the height to which containers are stored behind proposed new wharf structures at Sulphur Point. This can be addressed by way of conditions.

[546] In relation to the effects on views from public places, Mr Brown found that the proposed development would have a low to very low level of effect in relation to most viewing quarters and communities exposed to the Port. He also concluded that the proposals would have a low to very low level of effect on Tauranga and Mt Maunganui, more generally, and that the proposed reclamations and associated development would be acceptable from a landscape standpoint. [219]

219 Mr Brown, EIC at 10 and 14.

[547] In their JWS, Mr Coombs and Mr Brown agreed that the proposed Port expansion would generate landscape effects that are acceptable in relation to views from most of the public realm from both land and water. Ms Lucas disagreed because of the extensive and long-held associations with the natural and cultural attributes of Tauranga Moana which have been cumulatively affected by development to date such that the proposal would generate adverse landscape effects that are not acceptable.

[548] Ms Lucas stated that with the proposed Sulphur Point wharf and crane extension and associated ships, the view to Mauao would be screened for the whole length of the Harbour Bridge. [220]

220 Ms Lucas, EIC at 88.

That is not consistent with our own assessment of that view.

[549] In relation to the effects of lighting, including glare, Mr Brown explained that new light towers, together with lights on the three proposed container cranes and berthed ships, and headlight wash within the expanded area of Port operations would all contribute to a more “lit up” environment around Stella Passage. In relation to effects on Whareroa Marae, he stated that awareness of this increased lighting would still be limited by the physical presence and intervention of the Ballance fertiliser works, while Te Awanui Drive, the boat ramp car park and even the Marae grounds - which turn away from Stella Passage to address Taiaho Place - would all help to buffer the effects on the wharenui and nearby marae housing from the extended container terminal. Viewed over a distance of nearly 800m, the anticipated lighting would still appear quite remote and secondary to that around Te Awanui Drive.

[550] Mr Brown's overall conclusion in relation to night-time effects was that the proposed lighting would not give rise to any significant nuisance effects and would not appreciably alter or degrade the nature and intactness of Tauranga's night sky. [221]

221 Mr Brown, EIC at 73.

[551] Mr Coombes concluded that the effects of lighting arising from the proposal will be integrated into the existing portside urban environment and will be appropriate to the receiving environment. [222]

222 Mr Coombes, reply evidence at 22.

He considered them acceptable. He observed that the closest lighting to the boat ramp and to Whareroa Marae is along Te Awanui Drive and has a very bright yellow glow, which is far more visually prominent than any of the lighting on the Sulphur Point wharves. He generally agreed with Mr Brown's conclusions around the lighting. [223]

223 NOE at page 790.

[552] Ms Lucas was concerned about cumulative effects, including further encroachment and effects on the night sky and the limited assessment of effects of the proposed lighting changes. The three experts agreed that POTL should use modern technology to reduce light spill for all areas of proposed development and review existing lighting to minimise spill. [224]

224 JWS Landscape.

That process has already been agreed to by POTL and included in the proposed conditions of consent.

[553] The effects on the cultural landscape were not addressed by Mr Brown or Mr Coombs because they did not consider they had the relevant expertise. Ms Lucas concluded that: [225]

225 Ms Lucas, EIC at 102.

> "In my opinion the proposed works and resultant port activity, plus the potential consequential changes in the natural and cultural attributes of the Tauranga Harbour as an important estuarine system, would not necessarily avoid, remedy or mitigate effects on natural and cultural values and attributes as required under NZCPS Objectives and Policies, the RPS or the BOPRCEP. Also, the proposal would not protect the site specific historical or cultural values as required under s 6(e) or s 7(a). Contrary to Policy NH1, I assess that adverse effects would not be avoided."

[554] Mr Thatcher addressed effects on the Star Compass located near the marina on the western side of Sulphur Point, stating: [226]

226 Mr Thatcher, EIC at 28.

> "The Port has had a big effect on our night-time use of the Star Compass. We placed the star compass there to safeguard the launching place of Takitimu Waka. The waka was launched in readiness for the 150th Celebration of the signing of the Treaty of Waitangi in 1990. The star compass became a guardian for the Taunga Waka o Takitimu
>
> When we launched Takitimu all the rangatira of Tauranga Moana were there, and through their karakia they created 'he taunga waka' is basically a waahi tapu that gives mana to this place."

[555] Mr Thatcher explained that three months after the first stage of star compass was completed:

> " … the port went 24/7 on Sulphur Point and the lights went on and they never turned off. So totally obliterates the heavens, which isn't to say we still can't use the star compass. We just can't use it at night. There's no reason to because we can't see anything."

[556] Taking the foregoing matters into consideration, we turn to our evaluation of the landscape issues. We start by noting as we did above that in answers to questions in cross examination, Mr Brown agreed in essence that he understands the outline development in the RCEP is a permitted baseline. [227]

227 NOE at page 427.

That is not the case, as expansion of the Port in the RCEP is a restricted discretionary activity and not a permitted activity and so can be declined. Mr Brown's evidence was prepared on the basis that the proposed Sulphur Point wharf extension would be part of the existing environment with the consequence that large ships berthing there would not be an additional or cumulative effect of the proposal. Mr Coombs did not question the basis of Mr Brown's starting point, so their evidence did not provide an accurate assessment of the effects of the proposal.

[557] This error reduces significantly the weight we can place on the relevant opinions of these two witnesses, particularly in relation to the effects of the proposed expansion on Whareroa Marae, which Mr Brown considered would be of a low level overall. [228]

228 Mr Brown EIC at 13.

It is significant, in our view, that despite him stating he did not think it was for him to come along and act as some sort of interpreter of tangata whenua evidence, [229]

229 NOE at page 417.

he did state the following: [230]

230 Mr Brown, reply evidence at 50 and 51.

> "Consequently, even if one were to look well beyond just Stella Passage and Te Awanui, it is difficult to conceive of a location where there would be more synergy between the type of expansions currently proposed and the immediate receiving environment for that development, certainly in terms of aesthetic and visual character.
>
> The 'flip side' of this situation is the invidious position that Ngāti Kuku and Whareroa Marae are caught in, enclosed by a mixture of industrial and infrastructure development at a physical 'throttle point' between Tauranga and Mt Maunganui. Viewed through the lens of unending encroachment and cumulative effects, the port expansion therefore represents the 'straw that will break the camel's back', irrespective of the synergy described above."

[558] In our view that statement is powerful and responsive to the evidence we heard from Whareroa Marae witnesses.

[559] We previously noted that Ms Lucas' made limited acknowledgement of and in some cases appeared to take no notice of the effects as assessed by the landscape experts engaged by POTL and the Council through a Western lens. This omission significantly reduces the weight we can give to her evidence.

[560] This leaves the Court in a difficult position of having limited landscape evidence that provides a complete understanding of landscape effects in the way anticipated in Te Tangi a te Manu. Nevertheless, we accept that the amended proposal described in closing submissions will at least minimise if not avoid landscape effects of development on the Mount Maunganui side on Waheroa Marae, when viewed within a Western lens. However, the evidence did not enable us to assess if any cumulative effects will or could still arise.

[561] We have an insufficient evidential basis to enable us to evaluate the extent to which development on the Sulphur Point side will further enclose Whareroa Marae, when the new wharf and reclamation construction (as a new activity requiring resource consent), berthed large vessels and potentially increased container stacking heights behind are taken into consideration. This is relevant to our overall assessment of cumulative effects when looked at through both Te Ao Maori and a Western perspective, to which we return below.

6.20 Effects not contributing to cumulative effects

[562] Because they are of short duration and generally limited to construction areas, we are satisfied that the following effects of the amended proposal do not need to be considered in greater detail in our assessment of cumulative effects. The numbers in brackets refer to the relevant parts of our decision where we discuss these effects:

> "(a) Effects on marine water quality, ecosystems and kaimoana resources (6.11)
> (b) Effects of dredging and reclamation on the hydrodynamic and geomorphic regime of the harbour (6.12)
> (c) Effects of construction and operations on other harbour users, aviation, navigation and public safety (6.13)
> (d) Effects arising from the release and spread of harmful aquatic organisms (6.14)
> (e) Effects on marine mammals (6.17)
> (f) Effects of construction noise on Whareroa Marae (6.18)"

6.21 Further information required to enable an overall assessment of effects

[563] As will be clear from above analysis, we consider that the effects on ss 6(e) and 7(a) matters are not adequately addressed by the proposal. There are gaps in the evidence that must be addressed before we can make a final determination.

[564] We consider the time has passed when conditions of consent can be based on statements of intent as to what will be done at some time in the future. We will require greater certainty of what will occur, by when, what outcomes are to be achieved, who will be responsible and what enforcement mechanisms will be available.

[565] POTL's failure to comply with the monitoring requirements of its dredging consents means information critical to our decision is not available. We will require an up-to-date baseline survey of kaimoana to address this situation, reflecting species and localities set out in the consent conditions.

[566] A detailed baseline kaimoana survey plan is needed. The plan should be generally consistent with the evidence of Dr Battershill in response to questions from the Court. As an interim measure, a minimum of three surveys of Paritaha must be undertaken within six months of this decision unless some or all have been undertaken since the hearing. There will need to be follow-up surveys undertaken at intervals, taking into account advice from Dr Battershill and tangata whenua. Surveys of kaimoana in other parts of Te Awanui in accordance with consent conditions must also be undertaken within the two years recommended by Dr Battershill.. We will require a report of findings from these surveys before we could we make our final decision.

[567] We conclude that tangata whenua need the opportunity to provide mātauranga Māori input to plan preparation and implementation. In the event that such input to plan preparation is not provided within six months of this decision, POTL may submit the plan to the Court with details of the process used to seek tangata whenua input. The three surveys referred to in paragraph [566] must be completed in accordance with previous protocols if tangata whenua input is not provided.

[568] The surveys should be funded by POTL, including for any mātauranga Māori input. In the event that mātauranga Māori resources are not available to undertake actual monitoring for some reason, POTL should consult tangata whenua and the Regional Council to determine an appropriate alternative way of proceeding.

[569] POTL must prepare a comprehensive state of the environment report that addresses all effects of Port operations on the marine environment within six months of this decision. It appears to us that currently available information can form the basis of the report.

[570] In view of the amended proposal for ships to berth alongside the red-billed gull roosting area adjacent to the Mt Maunganui wharves, there is insufficient evidence to enable us to determine the likely effects of this in terms of Policy 11(a)(i) of the NZCPS, which directs the avoidance of adverse effects of activities on indigenous taxa that are listed as threatened or at risk in order to protect indigenous biological diversity in the coastal environment.

[571] To enable Stage 1 of the Sulphur Point Wharf extension to proceed, the use of the sand pile at the southern end of the wharf by birds should be protected on a year-round basis. This should include avoiding all use of the sand pile for port operational purposes and enlarging the area available for birds towards the area available at the time of the 2011 consent hearing.

[572] An updated Blue Penguin and Avian Management Plan will need to be prepared in consultation with the Department of Conservation and tangata whenua.

[573] There will need to be a revised landscape assessment, as outlined above, before we can assess the enclosure effects of Stage 2 of the Sulphur Point Wharf extension on Whareroa Marae.

[574] These processes will require collaboration by POTL with tangata whenua on a wide range of matters, including the design details. There should be opportunities to recognise and provide for matters of historic and cultural significance, as well as to provide for kaitiakitanga of these areas.

Part 7 Evaluation

7.1 The primary issues

[575] Essentially, the primary issues to be determined by the Court are:

> "(a) whether the proposal recognises and provides for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, which is a matter of national importance; and
> (b) how to have particular regard to kaitiakitanga in the circumstances of this case."

[576] In the first paragraph of its 2011 Decision, [231]

231 Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402 at [1].

the Court posed a question about how to integrate the competing interests of the Port while recognising and providing for the legitimate cultural concerns and relationship of relevant local iwi. Towards the end of the decision, the Court felt obliged to note that:

> " … further examples of applications made without proper approach and consideration of the requirements of the relevant national and regional documents could lead to refusals of applications for consent."

[577] It is clear from the evidence that POTL has responded positively to the need for an improved consultation approach, but that does not of itself answer the criticisms made by the Court in 2011, which remains equally valid in relation to the current case before the Court. The extent to which "recognising and providing for the legitimate cultural concerns and relationship of relevant local iwi" has been addressed appropriately, including consideration of consultation feedback, is a fundamental issue when determining the case.

[578] Before setting out our evaluation, we address a number of preliminary matters.

7.2 The activity class, type or status of the proposal

[579] Ms Hamm submitted in closing in relation to the framework of the RCEP and the positive signal which status as a RDA may give in relation to future Port expansion that:

> "23 It is clear from the RCEP that the Port Zone policies and restricted discretionary activity status send a strong signal that effects can be appropriately managed. The rules are for the purpose of achieving the objectives and policies of the RCEP. While a restricted discretionary activity can be declined, the Port Zone objectives and policies provide a strong signal that effects can be managed.
> 24. An integration of the Port Zone policies with the effects management hierarchy in Policy IW 2, means that the focus is not on whether the proposal can proceed at all, but on how identified adverse effects have been responded to. POTL's case is that its response is appropriate and acceptable."

[580] She had earlier submitted that the RCEP recently became operative (on 11 August 2021) and was prepared to give effect to the New Zealand Coastal Policy Statement and Part 2 of the RMA which includes s 6(e). That fails to reflect the fact that there was a lack of cultural values assessment at the RCEP development stage [232]

232 Opening submissions of the Regional Council

or that the Council restricted its discretion in relation to s 6(e) RMA, indicating matters relating to it still need to be considered on the merits of the application. Further, it does not acknowledge the equally strong signal given by the objectives and policies in the RCEP requiring Maori cultural values to be recognised and provided for.

[581] The RMA provides in both ss 87A(3)(a) and 104C that a consent authority may grant or refuse an application for an RDA. It also provides that the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted. When one matter of discretion relates to the relationship of Maori with their ancestral taonga under s 6(e) of the RMA, it is important there is clarity on its scope. We address that next.

[582] We do not accept that restricted discretionary activity status can be interpreted as giving any signal that consent should be granted. Every application for resource consent must be considered in light of all relevant considerations, including

the effects of the proposed activity on the environment in the context of the RMA and the relevant policy statements and plans made under that Act.

7.3 Scope of ancestral relationships in this case

[583] Policy IW 5 of the RCEP directs us to recognise that only tangata whenua can identify and substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Pūkenga, kuia and/or kaumātua substantiated those relationships in their evidence. For the avoidance of doubt, we consider many of the tangata whenua witnesses giving evidence to be pūkenga based on their specialist knowledge of and expertise in kaupapa Maori, including those whose evidence we have cited earlier in our decision and relied on to determine the scope of s 6(e) for the purposes of this decision.

[584] There is no dispute that Te Awanui is a taonga, that Whareroa Marae is ancestral land or that tangata whenua view their taiao holistically. Their culture and traditions are based on them being an integral part of and at one with their taiao, with an expectation that their ability to live sustainably is not compromised by adverse historical or future effects from the activities of other parties on the quality of land, air and water.

[585] For those reasons, we find that the matter of national importance identified under s 6(e) of the RMA must be considered as having a wide scope that encompasses all aspects of the environment that affect the relationship, including effects on land, water and air.

7.4 Uncertainties about future effects

[586] In the course of our evaluation of the evidence and the cases presented by the parties we have identified a number of uncertainties earlier in our decision. There are some others, including the following questions:

> "(a) It is not clear whether POTL intends at some stage in the future to proceed with the wharves and associated dredging along the northern edge of Sulphur Point and dredging of the turning circle, both of which are provided for in existing resource consents. Until such time as there is an up-to-date kaimoana monitoring survey of Te Paritaha, there can be no certainty that the effects of these developments would be as predicted in the evidence presented at the 2011 hearing. This is relevant to the consideration of cumulative effects.
>
> (b) It is not clear whether it is intended that the conditions in the existing resource consents, which expire in approximately four years, relating to such matters as restoration of Panepane and replenishment of the Whareroa beach will be offered in any future applications."

7.5 Integrated management of the coastal environment

[587] It is desirable that all dredging is undertaken in accordance with a single set of consent conditions. There are existing dredging consent conditions, which will expire in 2027, after which a new set of maintenance dredging conditions will apply. If the dredging referred to at [586](a) above has not been undertaken by that date, new consents will be required before it can be. Any dredging authorised in relation to the current application could be different again. If Objective 1 of the RCEP, "Achieve integrated management of the coastal environment", is to be achieved, a consistent approach to condition setting will be required for all future dredging consents.

7.6 POTL's interactions with tangata whenua since 2011

[588] The Court wants to avoid the difficulties that were experienced in the 2011 dredging consents relating to the achievement of appropriate resource management outcomes. In our view, these would have been avoided or minimised if relationships between POTL and tangata whenua had been different. Tangata whenua views were unequivocal in

terms of how they view relationships with POTL as a corporate body, involving a high level of distrust by many tangata whenua and one more explicitly referred to by one witness as abusive. [233]

233 NOE at 1040.

[589] Events that have or may have contributed to this loss of trust since the 2011 Decision include:

"(a) The following paragraph relating to the current application is the most recent example of POTL's approach to consent notification: [234]

234 Holland Beckett letter dated 28 May 2021 lodging applications.

> 'On the basis that the relevant rules of the RCEP preclude public notification, we do not consider that there is any basis for a decision to publicly notify the application. Further, as the application is for the activities which are recognised in Schedule 9 to the RCEP as being appropriate within the Port Zone subject to the management of adverse effects,2 we do not envisage any affected parties, or any special circumstances which would warrant the application being notified (either publicly or on a limited basis).

"(b) Mr Gear referred to the last paragraph of a report prepared in accordance with s 17 of the Covid-19 Recovery (Fast-track Consenting) Act 2020 which stated: [235]

235 Mr Gear, EIC at 67 and 68.

> 'The Minister for Treaty of Waitangi Negotiations and the Minister for Maori Crown Relations have requested that you require a panel to seek comment from representatives of Whareroa Marae.
>
> He said no comment was ever sought; and
>
> Worse, when this application was made to the Court, notwithstanding the request from both Ministers, the Port and the Council did not include Whareroa Marae in the list of those to be notified.

"(c) Initially proposing to bring large ships virtually to the marine doorstep of Whareroa Marae, adding even more to cumulative effects which are already at unsustainable levels.

(d) Leasing POTL land in close proximity to Whareroa Marae to Timaru Oil Services Limited in 2016 with the intended use of fuel storage, as described in Part 2.9.

(e) Being unwilling to support a 2020 application by the five hapū of Matakana Island for the return land taken from them under the Public Works Act and no longer required for the purpose taken, as discussed in Part 2.10.

(f) Notifying tangata whenua by email of its intention to make an application under the Covid-19 Recovery (Fast-track Consenting) Act 2020 less than six weeks after confirming, again by email, that it was continuing with its intention to make an application to the Regional Council. Tangata whenua were concerned, correctly and understandably, that this would put at risk their ability to be heard as effectively as though a normal resource consent process.

(g) Being unwilling when questioned by the Court to confirm that its decision to avoid large ships berthing south of the existing tanker berth was intended to be in perpetuity.

(h) Being unwilling to agree to conditions requiring retention of the Butters Landing wharf and sand pile, or alternatives, when first requested, even though it stated there was no intention to do away with them."

[590] Tangata whenua raised other matters relating to the way Port activities are carried out in in relation to the relevant provisions of the RMA. We note that in the event that they are not, it becomes an enforcement matter for the Regional Council, not for this Court in the first instance. The following examples were raised in evidence before us:

"(a) POTL operated without a comprehensive stormwater discharge consent for its Mount Maunganui wharves until 2019; and
(b) POTL has not undertaken annual kaimoana monitoring required under its dredging Permit 65806 since 2015/6."

[591] Associated with these matters are the concerns of tangata whenua in relation to adverse effects on human health resulting from the lack of effective controls on discharges to air from Port and related activities and consequent poor air quality in the vicinity of Whareroa Marae.

[592] It should be of concern to POTL and the Regional Council that the Court considers it necessary to restate the message of the Court in the 2011 decision: [236]

236 Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402 at [315].

"[315] This case highlights to us the yawning chasm in cultural insight sometimes displayed by major infrastructural companies. … "

7.7 Matters of concern to tangata whenua outside the scope of this decision

[593] A number of matters were raised during the hearing that are outside the jurisdiction of the Court. So that there is no misunderstanding or unrealistic expectation of what this decision does, the Court has no jurisdiction to address matters relating to aircraft safety or transport under the RCEP. Further, it does not have jurisdiction to:

"(a) address historical grievances or require the return of land; [237]

237 Mr Carlyon Table 6, items 2, 3 and 4.

(b) require the Regional council or the Port to implement managed retreat of industry away from Whareroa Marae;
(c) address issues under the Marine and Coastal Area (Takutai Moana) Act 2011, Wildlife Act 1953, Fisheries Act 1996 or any Act other than the RMA; or
(d) address effects on the environment which are not caused or will not be caused by Port activities, such as the wider issues of erosion in Te Awanui."

[594] While these are not matters that can be the subject of an order or direction by the Court, that does not preclude POTL from consulting and working with tangata whenua to see if a way forward can be found in relation to them.

7.8 Iwi Management Plans

[595] Neither the s87F report nor the AEE referred to the Matakana and Rangiwaea Islands Hapū Management Plan. The s87F report provided no evaluation of the proposal against either that plan or the Tauranga Moana Iwi Management Plan **(TMIMP).** The AEE did address the TMIMP at section 11.4 and noted that the "coastal provisions are particularly relevant including protecting and restoring the mauri of coastal areas and providing opportunities for Iwi and Hapū to be involved in coastal management".

[596] The AEE concluded:

> "The Port has been working closely with iwi to manage the effects of ports activities and the expansion consistent with Policies 12, 14, 15 and 16 of the TMIMP. The ecological assessment undertaken by the University of Waikato has considered any effects of the dredging on the pipi bed known as Te Paritaha o Te Awanui and found effects to be negligible. Through consultation and engagement, the Port are contributing to a cultural monitoring framework for the Tauranga Harbour developed by iwi, consistent with Policy 7.
>
> Overall the application is considered to be consistent with the TMIMP which is the relevant iwi management plan for the proposed work."

[597] In our view, this is more of an assertion than an analysis of how the proposal addresses the management plan. The evidence before us, much of which we have set out in this decision, does not support this conclusion.

7.9 Evaluation of the cultural evidence

[598] As noted in Part 1.8, counsel for the Regional Council submitted that the appropriate approach to the assessment of cultural evidence has been described by the courts as "the rule of reason". We have adopted that approach and our findings are that:

> "(a) the cultural values identified by tangata whenua indisputably correlate with the physical features of Tauranga Moana and Tauranga whenua, particularly Mauao, Te Awanui and Te Paritaha;
> (b) the explanations by tangata whenua of their values and their traditions were clearly, coherently and consistently expressed by witnesses, leaving no doubt as to the sincerity with which they are held and observed, and that they are widely held by the iwi and hapū of Tauranga Moana; and
> (c) there was corroborating explanations by way of waiata, whakataukī and Crown acknowledgements."

[599] We are also satisfied that the evidence provides a sound foundation for other findings made in this decision.

7.9 Overall evaluation

[600] In accordance with s 104(1) RMA, as the consent authority, we must have regard to:

> "(a) any actual and potential effects on the environment of allowing the activity; and
> (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and
> (b) any relevant provisions of:

(i) a national environmental standard:
(ii) other regulations:
(iii) a national policy statement:
(iv) a New Zealand coastal policy statement:
(v) a regional policy statement or proposed regional policy statement:
(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application."

[601] There are no relevant National Environmental Standards or other regulations we must have regard to. [238]

238 Ms Loomb, EIC at 37.

[602] We are satisfied that the RCEP is in accordance with the NZCPS and gives effect to the RPS, noting the agreement of the planning experts referred to in Part 5.2. We have considered all the relevant objectives and policies in our evaluation and taken into account the relevant Iwi Management Plans. [239]

239 In accordance with RCEP Policy IW 4(a).

[603] Objectives 13 and 15 to 18 of the RCEP are particularly relevant to this case. They address Te Tiriti, s 6(e) matters, mitigation or remediation, restoration or rehabilitation and the use of cultural health indicators.

[604] Policy IW 2 is:

> "Avoid and where avoidance is not practicable remedy or mitigate adverse effects on resources or areas of spiritual, historical or cultural significance to tangata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS. Where adverse effects cannot be avoided, remedied or mitigated, it may be possible to provide positive effects that offset the effects of the activity."

[605] Appendix F of the RPS sets out criteria for assessing matters of national importance in the Bay of Plenty region. Set 4 of the appendix includes the following criteria in relation to Maori culture and traditions:

> **"Mauri**
>
> 4.1 Ko te mauri me te mana o te waahi, te taonga rānei, e ngākaunuitia ana e te Māori.
>
> The mauri (for example life force and life supporting capacity) and mana (for example integrity) of the place or resource holds special significance to Māori.
>
> **Waahi Tapu**
>
> 4.2 Ko tērā waahi, taonga rānei he waahi tapu, arā, he tino whakahirahira ki ngā tikanga Māori, ki ngā puri mahara, me ngā wairua ā te Māori.
>
> The place or resource is a waahi tapu of special, cultural, historic and or spiritual importance to Māori.

Kōrero Tūturu/Historical

4.3 Ko tērā waahi e ngākaunuitia ana e te Māori ki roto i ōna kōrero tūturu.

The place has special historical and cultural significance to Māori.

Rawa Tūturu/Customary resources

4.4 He waahi tērā e kawea ai ngā rawa tūturu ā te Māori.

The place provides important customary resources for Maori.

Hiahiatanga Tuturu/Customary needs

4.5 He waahi tērā e eke ai ngā hiahia hinengaro tuturu a te Māori.

The place or resource is a venue or repository for Māori cultural and spiritual values.

Whakaaronui o te Wa/Contemporary Esteem

4.6 He waahi rongonui tērā ki ngā Māori, arā, he whakāhuru, he whakawaihanga, me te tuku mātauranga.

The place has special amenity, architectural or educational significance to Māori."

[606] Advisory Note 1 to the policy is:

"This policy may apply to specific resources or areas of significance or special value to Maori in the coastal environment which are identified under method 19A(b) as those which require protection through the avoidance of significant adverse effects."

[607] In our view, all the criteria apply to Te Awanui, Mauao and Whareoa Marae.

[608] We found in Part 6.10 that the existing effects of the Port, associated industries and other infrastructure nearby projects on Whareroa mean that the people and communities of Whareroa Marae are unable to provide for their social, economic, and cultural well-being and for their health and safety. Under these circumstances, authorising any adverse cumulative effects would be contrary to the purpose of the RMA.

[609] As we stated earlier, POTL's evidence did not state what its understanding of Maori cultural values is or what measures were proposed to address specific relationship issues. That did not provide an evidential basis from which we could make any definitive determination as to the extent to which adverse effects were avoided, remedied of mitigated. Further, the evidence provided no clear understanding of how kaitiakitanga was intended to be provided in any meaningful way, or how mātauranga Māori was intended to be incorporated.

[610] In terms of understanding the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, it was very clearly explained to POTL at the time of the 2011 dredging consent hearing. It had been explained to it a number of times before that and it was clearly explained yet again through the consultation and/or evidence process forming part of the current applications. There should have been no possible way that POTL could say it did not understand the relationship. Yet, its evidence indicated that it either does not

understand or chose not to engage with tangata whenua in a way that could have enabled a way forward to have been found, albeit despite tangata whenua's strongly held views that their relationship has already suffered enough.

[611] The case cannot be determined without consideration of the current state of the environment and how it has been affected by POTL and related activities. This must be the starting point for assessing the cumulative effects of the current proposal and whether they are appropriately mitigated. The evidence did not allow the current state of the environment to be understood with any certainty, partly as a result of non-compliance with consent conditions by POTL.

[612] Policy IW 8 of the RCEP is requires that "Tangata whenua shall be involved in establishing appropriate mitigation, remediation and offsetting options for activities that have an adverse effect on areas of significant cultural value … " The proposal before the Court does not provide any certainty as to whether tangata whenua will have meaningful involvement in these matters, which does not enable the Court to evaluate the proposal against Policy IW8.

[613] POTL has had more than 11 years to engage meaningfully with tangata whenua, only starting to engage when it had little option but to. The original evidence was silent on measures it proposed to avoid, remedy or mitigate specific s 6(e) effects and in our view, it was only in closing submissions that some elements of clarity were provided. These fell well short of what will be required for us to make our determination in relation to all aspects of the application.

[614] While POTL's approach to consultation has improved since the 2011 dredging consent application, it is apparent to us that little has been learned by POTL about building effective relationships with tangata whenua. in the intervening period.

[615] We find that:

> "(a) The amended proposal does not adequately provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga;
> (b) The amended proposal does not adequately provide for kaitiakitanga or appropriately address Policy IW 8 of the RCEP;
> (c) The proposed Southern Te Awanui Harbour Health Plan could provide a basis to address tangata whenua concerns relating to Te Awanui but will require to be significantly clearer in terms of detail before that will be known;
> (d) Three kaimoana surveys of Te Paritaha must be undertaken before we can make a final decision relating to Sulphur Point Stage 1;
> (e) An appropriate ecological baseline survey must be undertaken and all-encompassing baseline report describing the condition of the existing environment across the area of Te Awanui affected by Port activities must be provided before we make our final decision on other aspects of this case;
> (f) Any cumulative effects on Whareroa Marae, however minor, would be contrary to the purpose of the RMA unless existing effects are remedied, mitigated or otherwise addressed appropriately by way of compensation or offsetting;
> (g) Subject to appropriately addressing the above, we consider it likely that consent to proceed with Stage 1 of the Sulphur Point Wharf extension can be granted.
> (h) All other parts of the application are unable to be granted until the matters raised in this interim decision are addressed."

Part 8 Decision and Directions

[616] Consent for the Stage 1 Sulphur Point wharf extension within the already consented area of dredging will be **granted,** subject to the matters set out in the directions in C being addressed to our satisfaction; and

[617] We reserve our decision on whether to grant consents for the Stage 2 Sulphur Point wharf extension and for the proposed works on the Mount Maunganui wharf pending the provision of further information as directed in this decision.

[618] We make the following directions:

> "(1) Port of Tauranga Limited **(POTL)** is directed to file and serve within six months of the date of this decision a detailed scope of the proposed Southern Te Awanui Harbour Health Plan as referred to and described in this decision at [135], [391], [464] and [615] prepared cooperatively with tangata whenua (subject to their willingness to participate) and the Regional Council.
>
> (2) Either as part of the Southern Te Awanui Harbour Health Plan or separately, POTL is directed to propose a meaningful kaitiaki role for tangata whenua as referred to and described in this decision at [392] to promote the objectives and policies of the Bay of Plenty Regional Coastal Environment Plan including in relation to planning, implementing and reviewing monitoring programmes and contributing to management decisions arising from implementation of these programmes. These details should include a management structure which recognises the relationships between POTL and tangata whenua and how the implementation of the plan is to be funded.
>
> (3) POTL is directed to provide further evidence that the extent and degree of recognition of and provision for the relationship of Ngāti Kuku and Whareroa Marae with their ancestral taonga is appropriate, as referred to and described in this decision at [414].
>
> (4) POTL is directed to undertake a minimum of three surveys of kaimoana at Te Paritaha within 6 months of the date of this decision as referred to and described in this decision at [566], unless some or all have been undertaken since the hearing, before we make our final decision in relation to Sulphur Point Stage 1.
>
> (5) POTL is directed to undertake follow-up surveys of Te Paritaha at intervals, as well as surveys of kaimoana in other parts of Te Awanui affected by POTL operations, in accordance with previous consent conditions and as referred to and described in this decision at [436] and [565] — [568].
>
> (6) POTL is directed to undertake a comprehensive state of the environment report of the areas affected by Port operations within six months of the date of this decision as referred to and described in this decision at [437] and [569].
>
> (7) POTL is directed to produce 'before and after' visual simulations to demonstrate the full extent of increased visual enclosure on Whareroa Marae that would result from structures, vessels and stacked containers on the Sulphur Point side, and from the proposed development on the Mount Maunganui side as referred to and described in this decision at [410] and [573]
>
> (8) POTL is directed to prepare an updated Blue Penguin and Avian Management Plan in consultation with the Department of Conservation and tangata whenua, including some restoration of the area of the sand pile towards the area available at the time of the 2011 consent as referred to and described in this decision at [494] and [572].
>
> (9) POTL is directed to convene a wananga with tangata whenua and the Regional Council to discuss the further information produced as a result of these directions and any related outcomes from the above work as referred to and described in this decision at [427] and [438]."

[619] We direct that a conference be convened to discuss the process for the provision of further information on a date to be fixed by the Registrar in consultation with parties.

[620] Costs are reserved.

Appendix 1 - List of witnesses

Port of Tauranga Limited

(a) Mr D A Kneebone, POTL Property Manager;
(b) Mr R K Johnstone, POTL Engineering Manager;
(c) Dr W P de Lange, Senior Lecturer at the University of Waikato, an expert in coastal processes, hydrodynamics and sediment transport;
(d) Professor C N Battershill, Chair of Coastal Sciences for the University of Waikato, an expert in marine biology, marine ecology and environmental toxicology;
(e) Ms H M McConnell, consultant marine ecologist;
(f) Dr D G Bennet, consultant avifauna ecologist, 2023;
(g) Mr S K Brown, consultant landscape architect;
(h) Ms J M Simpson, consultant air quality expert;
(i) Dr L S Dennison, consultant human health risk assessment expert;
(j) Mr P J Julian, POTL Senior Pilot;
(k) Mr N I Hegley, consultant noise expert; and
(l) Ms C A M Loomb, consultant planner.

Bay of Plenty Regional Council

(a) Mr D J Greaves, consultant planner;
(b) Mr B T Coombes, consultant landscape architect; and
(c) Dr S Childerhouse.

Ngā Hapū o Ngā Moutere Trust

(a) Mr R E T W Rollestion, a kaumatua born on Matakana Island, whose principal hapu are Ngai Tamawhariua and Te Whānau a Tauwhao and also Ngāti Tauaiti;
(b) Mr M T Sydney, an uri of Te Whānau a Tauwhao and Te Ngare of Rangiwaea Island, and Ngāi Tūwhiwhia at Matakana Island. He also has whakapapa ties to Tainui waka, Ngāti Korokī Kahukura and Taranaki Te Atiawa abd was raised on Rangiwaea Island;
(c) Ms N H kuka, an uri of the Ngāi Tūwhiwhia hapū and Te Kuka whanau who lives at their papakāinga on Matakana Island;
(d) Mr J Murray, on behalf of Te Ngare, who has lived on Matakana Island and has been involved in restoring, enhancing, and preserving their taonga within their rohe;
(e) Mr H T T Murray, am an uri of Ngāi Tūwhiwhia and Ngāti Tauaiti hapū, who was born and bred on Matakana Island and whose main role is to protect and maintain the island's coastal foreshore;
(f) Ms N L Taingahue who lives on Rangiwaea Island with her whanau and is “a servant of her people”. She gave evidence on behalf of Ngā Hapū o Ngā Moutere o Rangiwaea me Matakana Trust, Rangiwaea Marae, and Te Rūnanga o Ngāi Te Rangi Iwi Trust;
(g) Mr T U Roretana (Rolleston), who is an uri of Te Whānau Roretana me Te Whānau Wikeepa and was born on Matakana Island. He is the Chief Operations Officer for Te Awanui Hauora Trust gave on evidence on behalf of the hapū of Ngāi Tamawhariua;
(h) Mr H T Murray, who was born and bred on Matakana Island. He is the Ngāti Tauaiti Hapū representative on the Ngā Hapū O Ngā Moutere Trust and his tūrangawaewae is Te Kutaroa Marae;
(i) Mr B Taingahue, who lives on Rangiwaea Island and whose whakapapa is Te Whānau a Tauwhao and Te Ngare hapū and he affiliates to Rangiwaea marae;

(j) Mr R R Uuanau, whose iwi is Ngāi Te Rangi and he is Te Whānau a Tauwhao from Otāwhiwhi marae. He was the Chairperson of the Western Bay of Plenty District Council Tauranga Moana Partnership Forum for the past three years.

Ngati Kaahu A Tamapahore Trust

Mr W R Mcleod, the chairperson of Ngāti Kaahu a Tamapahore Trust.

Ngāti Kuku Hapū and Trustees of the Waheroa Marae Trust

(a) Mr M Ngatai, whose mother was Tuhoe and his father was Ngāi Te Rangi, of Ngāi Tukairangi and Ngāti Kuku, is Chairperson of the Trust and caretaker of the Whaeroa Marae grounds;

(b) Mr J N Gear is a trustee on the Whareroa Marae Reservation Trust and gave evidence on behalf of the Trust. He is a descendant of Taiaho Hori Ngatai and whakapapa that connects him to Ngāti Tapu, Ngāi Tukairangi, Te Whanau a Tauwhao and Ngāi Tamawhariua for Ngāi Te Rangi iwi, and Ngāi Tamarawaho and Ngāti Ruahine for Ngati Ranginui iwi;

(c) Ms V Edwards is an uri of Tauranga Moana through her Whānau a Tauwhao whakapapa and her Ngati Hangarau whakapapa. She works at Te Kōhanga Reo o Whareroa;

(d) Ms N Ngatai was born and raised in Tauranga Moana she lives and works at Whareroa Marae

(e) Mr T W T K (Jack) Thatcher. He raised in Tauranga Moana under the care of the tribes of my kuia, Rakapa Makarauri. Ngāi Te Rangi, Ngāti Ranginui, Ngāti Pukenga and Waitaha are her tribes. Ngā Potiki, Ngāti He and Ngāi Te Ahi are her subtribes. He is pononga (servant) for his people of Tauranga Moana and a Master Navigator or Pwo; [240]

240 Which Pwo, Grand Master Papa Mau Piailug of Micronesia, said means “you are the light, you are now responsible for preserving life”, Mr Thatcher, EIC at 11.

(f) Mr J H Ngātuere, who gave evidence on behalf of Whareroa Marae, married in to Whareroa Marae and Ngāti Kuku. He whakapapas to Te Wairarapa; Ngāti Kahungunu and Rangitāne. He is Site Manager for Oranga Tamariki Office — Ngā Parirau/Tauranga East. My office provides care and protection statutory services across Mount Maunganui, Pāpāmoa, Te Puke, Maketu, Welcome Bay, and Ohauiti areas;

(g) Ms A K P Ngātuere, who gave evidence on behalf of Ngāti Kuku Hapū, is a direct descendant of Taiaho Hori Ngatai and lived at Whareroa Marae for a period with her husband Joel. She is the Chief Executive of Toi Kai Rawa Trust, a regional Māori economic development organisation working across the wider Bay of Plenty region;

(h) Ms A M August is a trustee of the Whareroa Marae Māori Reservation Trust and gave evidence on behalf of the Trust. Her whakapapa links are Ngāti Kuku, Ngāi Tukairangi, on herfather's side and her mother was local born and bred and affiliated to Ngāti Tapu (Matapihi), Ngāti Hangarau (Bethlehem) and Ngāti Rangiwewehi (Rotorua). Ms August belongs to the only Marae at Mt Maunganui which is Whareroa; and

(i) Mr N T R James is a direct descendant of Taiaho Hori Ngatai and gave evidence on behalf of his hapū, Ngati Kuku. He is a trustee on the Te Karangi A32B Trust and Whareroa Marae Reservation Trust.

Ngāti Ranginui Fisheries Trust

(a) Mr C J Rahiri, who is a direct descendant of Ngāmārama an ancient Iwi known to have occupied Tauranga Moana. He is also of Ngāti Ranginui, Ngāi Te Rangi and Ngāti Paoa descent. He is Chair of Ngāti Ranginui Fisheries Trust;

(b) Mr C Bidois, who whakapapas to the Iwi of Ngāti Ranginui and Ngāi Te Rangi and also whakapapa to the hapū of Pirirakau, Ngāti Hangarau and Te Whānau a Tauwhao me Te Ngare;

(c) Mr R McGowan (Pa Ropata) gave evidence for the Trust and works for Nga Whenua Rahui, a unit within the Department of Conservation that works to help Maori landowners care for the natural values of their whenua;

(d) Mr C Taiapa, who whakapapas to Ngāti Ranginui, Ngāi Te Rangi, Ngāti Pikiao, Ngati Whakaue, Te Rarawa. His hapū within Tauranga Moana is Ngati Taka. He has qualifications in marine ecology and his research includes reclamation and reinstatement of Matauranga Maori;

(e) Ms T M Ngatoko is a direct descendant from Puwhenua mountain to the expanse of Te Awanui. She was born in Tauranga, and raised within the surrounding land and catchment areas of the Ngāi Tamarāwaho sub-tribe. She is a cultural protector of histories of the Takitimu ancestral vessel, Ngāti Ranginui tribe and the internal and external genealogies that exist.

Ngati Ranginui Iwi Incorporated Society

Ms D Gardiner, who gave evidence as an Uri of Ngati Ranginui Iwi and the chairperson of Ngāti Ranginui Iwi Incorporated Society with endorsement from the board of Ngati Ranginui Marae Representatives.

Ngāti Tapu and Ngāti Hē

(a) Mr P Ihaka, who is Ngāti Tapu and currently the chairperson of the Otamataha Trust, the beneficiaries of which are the hapū of Ngāti Tapu and Ngaitamarawaho. He is also a trustee of the Ngāi Te Rangi Settlement Trust and Te Rūnanga o Ngāi Te Rangi Iwi Trust and the current chairperson of the Ngāi Te Rangi Fisheries company;

(b) Mr M M Ririnui, who is the chairperson of the Ngāti Hē Hapū Settlement Trust and gave evidence on behalf of Ngāti Hē; and

(c) Mr C F Reeder, an Advisory Trustee for Nga Potiki a Tamapahore Trust.

Te Runanga O Ngai Te Rangi Iwi Trust

(a) Mr H Palmer, whose hapū are Ngāi Tūwhiwhia and Ngāti Tapu and whose iwi is Ngāi Te Rangi of the Mātaatua waka. He provided a historical account to demonstrate Ngāi Te Rangi's long-standing association with Tauranga Moana;

(b) Mr C W Tawhiao, who has been chairman of the Trust since 2008;

(c) Mr P Stanley, who is the the CEO of Ngāi Te Rangi Iwi Tribal Authority;

(d) Ms P Bennett who is employed as the Kaiarataki, Te Ohu Kaupapa Taiao, which broadly involves ensuring that Ngai Te Rangi are appropriately recognised within the processes and by the administrations that are charged with managing natural resources;

(e) Mr J G Heaphy, who is a Department of Conservation biodiversity ranger, who gave evidence for the Trust at their request. His experience is in avian and marine mammal values;

(f) Dr R E S O Stewart, who is of of Ngāti Awa, Rongo mai wahine and Ngāti Mahuta. She is a tohunga tohorā, a whale expert;

(g) Ms D J Lucas, consultant landscape architect;

(h) Mr GJ Carlyon, consultant planner who gave evidence for for Te Rūnanga O Ngāi Te Rangi Iwi Trust, Ngā Hapū O Ngā Moutere Trust, Ngāti He, Ngāti Kaahu A Tamapahore Trust, Ngāti Kuku Hapū, Ngāti Tapu, And Whareroa Marae Trust

Te Runanga o Ngāti Kahu

Mr C W Tawhiao, who has been Chairperson of Te Runanga O Ngai Te Rangi Iwi Trust

Tupuna Trust

Mr P L Nicholas who is an uri of Tukorako of the land of Te Awa o Tukorako. Among other things, he is a Kaitiaki for Te-Maunga-o-Mauao-Mataitai-Reserve.

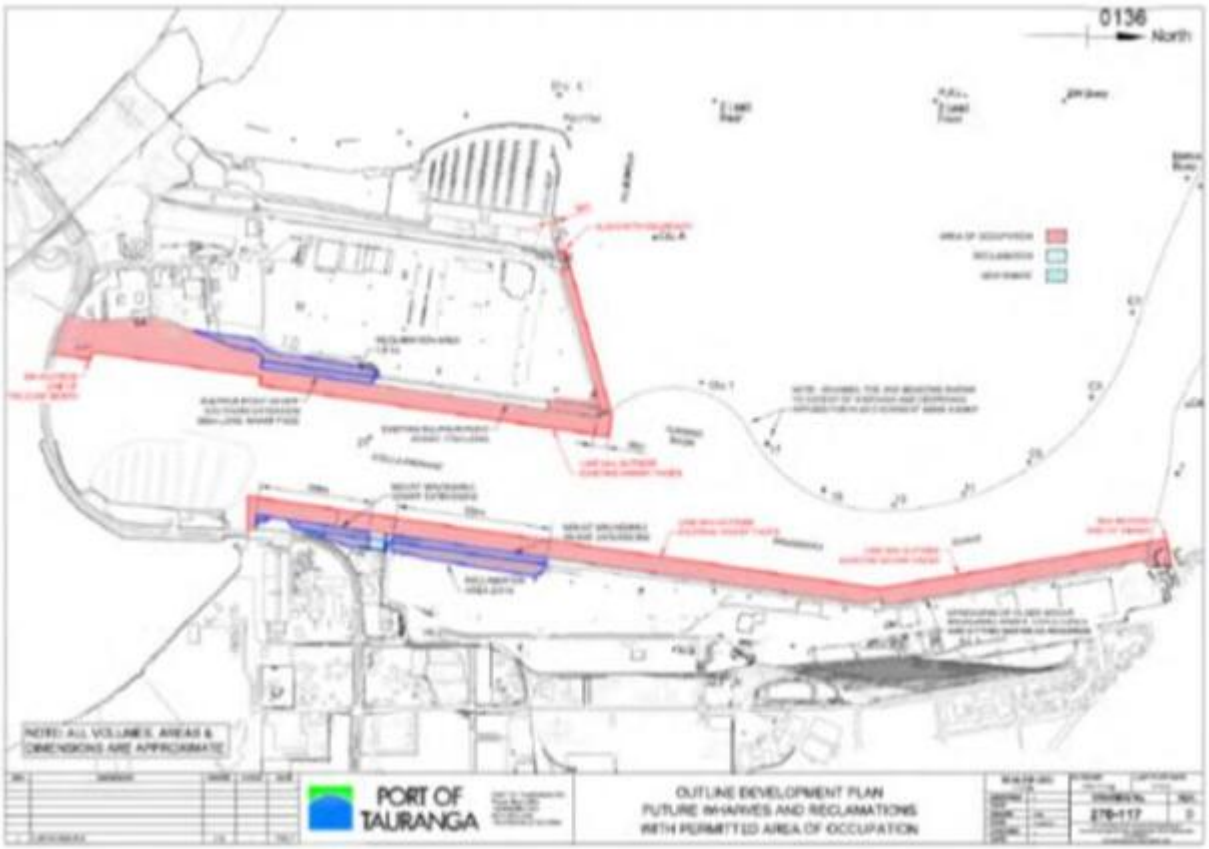
Appendix 2 - Existing resource consents for port activities

[1] There are four existing consents of relevance to the applications as set out below:

Coastal Permit 04 0128 for Occupation of the Coastal Marine Area

[2] The permit was issued to POTL on 27 July 1994 to occupy the area of the CMA shown on the following plan until 30 September 2026 to enable the company to manage and operate the Port related commercial undertakings that it acquired under the Companies Act 1988. On 10 December 1996 the Minister of Transport modified the permit to include the occupation of areas beneath structures. [241]

241 AEE at Appendix B



Permit 62920 to disturb the bed of the Tauranga Harbour by dredging and to disturb and damage habitat on the bed of Tauranga Harbour

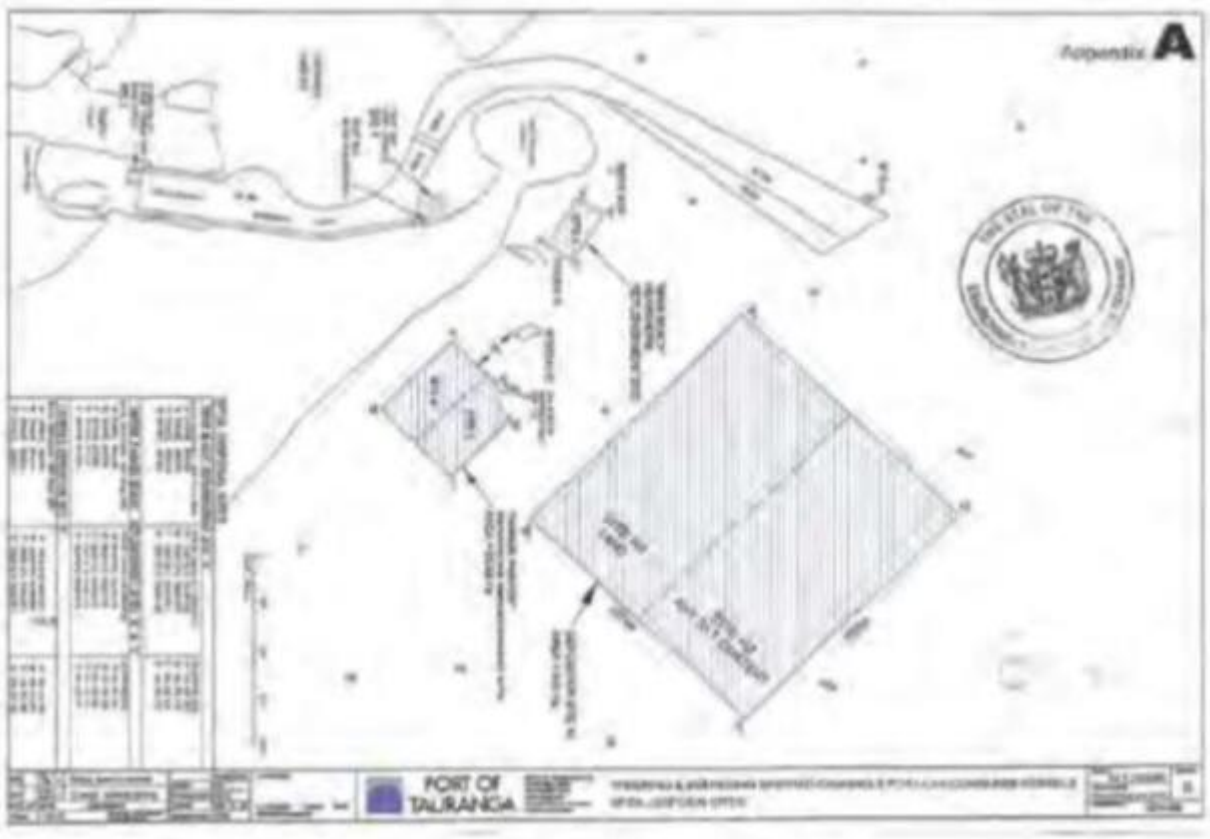
[3] The purpose of the consent was to extend the existing channel by dredging a volume not exceeding 800,000 m^3 to a maximum water depth of 12.9 m in the area shown on the attached part plan. It also authorises the disposal of dredged materials.

[4] The permit lapses on 31 January 2026 and expires on the same date.

Permit 65806 to disturb the bed of the Tauranga Harbour by dredging and to disturb and damage habitat on the bed of Tauranga Harbour Channel Deepening and Widening

[5] The permit was issued on 3 March 2013 and authorises and sets conditions for, among other things, the dredging of material from the coastal marine area to deepen and widen and maintain the navigation channels of the Port of Tauranga as shown on the following drawing. It authorises dredging of approximately 1.3 m m^3 of material to deepen Stella passage to a depth of 16 m, which is able to accommodate vessels with a 14.5 m draught at low tide. It also authorises the disposal of dredged materials.

[6] The permit expires on 6 June 2027.



Relevant consent conditions

[7] Condition 7.2 required the establishment of the Ngā Matarae Trust with the following resource management purposes:

- To provide an appropriate mechanism through which the Consent Holder can recognise the relevant Iwi and Hapu as kaitiaki of Te Awanui Tauranga Harbour and the importance of Te Awanui, including Mauao and Te Paritaha to Tangata Whenua; and
- To provide an appropriate mechanism through which Tauranga Moana Iwi and Hapu and the Consent Holder can form an enduring relationship and engage with each other directly and equally; and
- To set priorities and allocate funding for projects within Te Awanui Tauranga Harbour catchment and Te Moana a Toi including but not limited to projects to be implemented by the TMICFT [242]

242 Tauranga Moana Iwi Customary Fisheries Trust and Mauao Trust.

[8] Other relevant conditions are:

7.1 The relationship of Ngai Te Rangi, Ngati Ranginui and Ngati,Pukenga and their Hapu with Te Awanui (including Mauao) is to be recognised and provided for by the Consent Holder through:

- the recognition of TMICFT as the entity to represent Iwi and Hapu of Tauranga Moana in relation to the sharing of information, the appointment of a cultural monitor and the preparation of a Kaimoana Restoration Programme as required by this consent,

…

- provision for renourishrnent of the beach at Whareroa Marae,

…

7.3 The Consent Holder shall contribute to the trust the following funds:

(a) An initial fund of $500,000; and

(b) Ongoing annual payments of $50,000 per annum adjusted annually for inflation in accordance with the Consumer Price Index ("CPI Index"), from the commencement of this consent until the expiry of this consent.

7.5 The Consent Holder acknowledges that that TMICFT is the entity to represent lwi and Hapu of Tauranga Moana in respect of the dredging activities authorised by this consent. Its purpose is to:

(a) Recognise the relevant lwi and Hapu as kaitiaki of Te Awanui Tauranga Harbour and the importance of Te Awanui, including Mauao and Te Paritaha to Tangata Whenua; and

(b) Enable the free flow of information between the Consent Holder and the Tangata Whenua of the Tauranga Moana in respect of activities carried out under this consent; and

(c) Acknowledge, enable and provide for the value of hapu traditional environmental knowledge of Te Awanui with respect to all relevant research, planning and decision making processes in relation to this consent; and

(d) Provide a forum for discussion between Tangata Whenua and the Consent Holder of any other matters considered relevant by the parties, including the appropriate ongoing monitoring that should be undertaken by the Consent Holder as required by conditions of this consent.

7.14 Prior to carrying out any works under this consent, the Consent Holder shall develop a **Kaimoana Restoration Programme (KRP)** in close conjunction with the TMICFT. The purpose of the KRP is to determine and mitigate the actual and potential loss of kaimoana by identifying methods and techniques to ensure the ability of Ngai Te Rangi, Nqati Ranginui and Ngati Pukenga and their Hapu to collect the kaimoana species that are affected by the works authorised by the consents is maintained. The KRP will:

- Take into account the results of the monitoring undertaken in accordance with this consent.
- Develop research and monitoring criteria to remedy or mitigate the effects on kaimoana.
- Include baseline surveys to identify the abundance, distribution and diversity of kaimoana of the areas close by and affected by the proposed dredging, comprising Te Paritaha o Te Awanui, the southern Matakana Panepane Point Area, Mauao rocky reefs (Tanea Shelf), Motuotau and Moturiki Islands and surrounding rocky reefs.
- Include annual monitoring of the main kaimoana species, their locations, abundance, size health and harvesting pressure within the vicinity of dredging and disposal sites comprising Te Paritaha o Te Awanui, the southern Matakana Panepane Point Area Mauao, Tanea Shelf, Motuotau and Moturiki Islands and surrounding rocky reefs.

7.15 The programme described in 7.14 and 7.15 shall:

(a) Be developed in conjunction with the TMICFT (unless TMICFT advises that it does not wish to have any input into the programme in which

case the Consent Holder must prepare a KRP and submit it to the Chief Executive of the Bay of Plenty Regional Council for approval); and

(b) Continue until the expiry of this consent

and the Consent Holder shall undertake work to the value of $50,000 per annum adjusted annually for inflation in accordance with the CPI Index, from the commencement of this consent until the expiry of this consent.

12.2 The Consent Holder shall annually for the first five years following capital dredging carry out bathymetric surveys of the harbour floor between the seaward extent of the dredged area and Tauranga Harbour Bridge, of Centre Banks and of Matakana Banks in sufficient detail to determine whether there have been changes in the harbour floor as a result of the dredging.

12.3 The Consent Holder shall, for the duration of this consent, carry out bathymetric and topographic survey (between high and low water) of the subtidal and intertidal regions in an area encompassing the full extent of the ebb tide delta and the adjacent coastline prior to the capital dredging and annually thereafter. … The Consent Holder shall provide an annual report prepared by a suitably qualified person to the Chief Executive of the Regional Council or delegate and the TMICFT, …

12.4 Should the Matakana shoreline retreat beyond the 1922 shoreline, the Chief Executive of the Regional Council shall direct the Consent Holder to deposit material at the site(s) identified under Condition 14.5 and in accordance with 14.8.

Permit 65807 to carry out beach nourishment in the coastal marine area and other defined activities

[9] This permit authorises the use of suitable material dredged under Permit 65806 beach nourishment only with the written approval of the Chief executive of the Council or delegate. That is the only part of this permit of relevance to the applications. Sites can be any site approved in writing by the Chief executive of the Council or delegate. The permit contains conditions the same or similar to those in Permit 65806.

[10] The permit expires on 6 June 2027.

Appendix 3 - The consent application process

[1] POTL initially applied to the Council for the necessary resource consents. As urgency to proceed increased, POTL applied for the consents to be referred under the Shovel Ready and Covid-19 Recovery (Fast Track Consenting) Act 2020. When these applications were declined, POTL sought and was granted direct referral to the Environment Court.

Consents applied for

[2] The following restricted discretionary resource consents are required under the RMA and the RCEP: [243]

243 JWS Planning agreed by all planners.

(d) under sections 12(1) and 15(1) RMA and restricted discretionary activity rule PZ 10 of the RCEP for the capital dredging;

(e) under sections 12(1) and 15(1) RMA and controlled activity rule PZ 5 of the RCEP for the maintenance dredging; and

(f) under sections 12(1) and 15(1) RMA and pursuant to rules P8 and P11 of the RCEP for the structures and reclamation respectively.

[3] All of the proposed works fall within the Port Zone in the RCEP. Most of the area for the planned works falls within airport height restrictions. [244]

244 Ms Loomb, EIC at 26 and 27.

[4] Disposal of dredged material is already authorised under consents 65806 and 65807.

[5] Maintenance dredging will be required as part of the current application and this will, cumulatively, not exceed the maximum volume authorised under consent 65806. Maintenance dredging is a controlled activity subject to Rule PZ 5 of the RCEP. [245]

245 Ms Loomb, EIC at 33 to 35.

Lead up to the initial Council consent process

[6] In an endeavour to address comments made by the Court in its 2011 Decision, [246]

246 Te Runanga 0 Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council [2011] NZEnvC 402 at [315].

POTL appointed a cultural liaison officer to try to improve consultation with tangata whenua. We were told that he resigned after a short time and local iwi and hapū provided direct feedback that they wanted to deal directly with representatives from POTL, not through a liaison officer. In response, Mr Kneebone and Mr Johnstone represented POTL in the subsequent consultation process, and since his appointment, Mr Sampson, the Chief Executive of POTL, has also represented the company.

[7] In opening submissions, counsel for POTL submitted that POTL did not seek to limit the pool of iwi, hapū, or other representative entities, that it engaged with.

[8] Initial information about the proposed Port expansion was provided to the Ngā Mātarae Trust. Mr Johnstone stated that: [247]

247 Mr Johnstone, EIC at 67

> "Through my involvement with the Ngā Mātarae Charitable Trust, updates of POTL's intention to develop the Stella Passage region and the consultation and the resource consent process underway was discussed with representatives from Ngāi Te Rangi, Ngāti Ranginui, Ngāti Pūkenga, the Tauranga Moana Iwi Customary Fisheries Trust and the Mauao Trust starting in late 2016 … "

[9] In February 2019, he sent drawings of the intended development to representatives from Ngāi Te Rangi, Ngāti Ranginui, Ngāti Pūkenga, Ngāi Tukairangi, Ngāti Kuku, Ngāi Tamarāwaho and the Tauranga Moana Iwi Customary Fisheries Trust with an invitation to a hui with the experts from the University of Waikato. He stated that the hui provided an early opportunity to inform the groups of the research underway and for them to provide feedback of any areas of research iwi and hapū would like to see added. While not all parties attended the hui, those that did identified the effects on birds as another area of research they would like to see. He engaged Wildland Consultants to undertake this work and they looked at the bird life in and around the proposed works. [248]

248 Mr Johnstone, EIC at 68.

[10] Following further investigations, a draft assessment of effects was circulated to representatives of what Mr Johnstone described as the relevant iwi in March and April 2020. The summary of consultation undertaken by POTL showed that hui took place in March 2020 with representatives of Ngāi Te Rangi,

Whareroa, Ngai Tamarawaho, Ngati Pukenga, the Tauranga Moana Iwi Customary Fisheries Trust, Ngati Ranginui and Matakana Island Hapu. [249]

249 Mr Johnstone, EIC at 69 and Mr Kneebone, reply evidence at Appendix 1.

[11] Further contact was made with all parties in July and early September of 2020 to offer assistance and or resourcing to assist with any response and informing of POTL's intention to lodge by the end of September 2020. Formal responses were received from Ngāti Ranginui, Ngāti Pūkenga, Ngāi Tamarāwaho and the Tauranga Moana Iwi Customary Fisheries Trust, including the provision of a cultural impact assessment by the Trust and a cultural values assessment by Ngāi Tamarawaho.

[12] At the request of Ngāi Te Rangi, POTL engaged and funded Mr G Carlyon, independent planner, to assist the Rūnanga to review the resource consent application as they did not have sufficient resources to do so. Mr Johnstone stated that from October 2020 Ngāi Te Rangi, Ngāti Kuku, Ngāi Tukairangi, Ngāti Tapu and Whareroa Residents worked as a collective with the assistance of Mr Carlyon to co-ordinate a response. [250]

250 Mr Johnstone, EIC at 72.

[13] On 28 July 2020, POTL advised Ms Bennett by email that "We would like to lodge our resource consent application with the Bay of Plenty Regional Council by the end of September." On 3 September 2020, POTL sent a further email to Ms Bennett advising her that POTL still intended to lodge its resource consent application by the end of September and "We intend to make use of the new Covid-19 Recovery Fast Track Consenting option to streamline our application." [251]

251 Mr Johnstone, reply evidence at Appendices 5 and 6.

Mr Kneebone's reply evidence records that emails were sent to 10 other tangata whenua recipients on 3 September 2020.

[14] It was clear from the evidence that Mr Carlyon played a very significant role in assisting tangata whenua. [252]

252 Mr Carlyon, EIC at 1.10 and section 5.

He presented evidence at the hearing on instruction from Te Rūnanga o Ngāi Te Rangi Iwi Trust, Ngā Hapū o Ngā Moutere Trust, Ngāti Hē, Ngāti Kaahu a Tamapahore Trust, Ngāti Kuku Hapū, Ngati Tapu, and Whareroa Marae Trust. He clearly set out the comprehensive engagement process with POTL, including:

a. An open offer by PoTL for Te Runanga (on behalf of hapū and marae) to design an engagement process and engage on the Application.

…

c. Obtaining independent planning support to Te Rūnanga

…

e. Significant ongoing engagement with PoTL staff (in particular Mr Kneebone and Mr Johnston) to address issues associated with the engagement process.

…

h. Direct engagement with senior leadership for Te Rūnanga, hapū, and PoTL for the purposes of improved understanding of effects and resolution where possible.

[15] We were impressed with Mr Carlyon's openness, honesty and fairness, noting his opinion that there was significant good faith demonstrated by the parties towards one another. However, he also stated:

> "In respect of the cultural values and context, the Application and AEE has been acknowledged by both the Applicant and reporting officers for BOPRC as being deficient. The rationale for this is the accepted practice that it is mana whenua who speak to those values and the effects associated with them. The PoTL has had material available to it since the early part of 2020 to assist with the identification of values and associated effects of the proposal on those values. I am not aware of any response or material changes to the Application in light of those disclosures.
>
> For many hapū and kaitiaki representatives they put their views and expectations to one side for the purposes of the engagement in order that constructive outcomes could be achieved, where that had not been the previous experience. I would characterise the view held by many mana whenua as low trust and low confidence demonstrated by the substantial loss of values over a relatively short period of time. I understand that it is difficult for those same participants to now be at the place they expected before the engagement process was initiated — within a court environment defending their customary values from further degradation and permanent loss.
>
> In my opinion, regardless of the process undertaken, the outcomes and expectations of the parties to address the effects identified have not been satisfactorily met. While the parties are before the Environment Court the opportunity remains for resolution of significant matters."

[16] It is clear from Ms Bennett's evidence that her participation in the consultation process took up a very significant amount of her time, including 11 workshops with hapu clusters in April 2022 alone. Accordingly, we consider her commentary on the process requires particularly careful consideration. She stated: [253]

253 Ms Bennett, updated evidence at 155 to 157.

> "Responding or the lack of, is more common than people might think. It's a deficiency based off of a lack of awareness. You can have as many meetings as you like, but when you're not responding to any of the issues that are raised and discussed, or to concerns that are shared, the engagement is not going to succeed. When you do not respond to any of those points, that's a failed process.
>
> The whole point is about listening, understanding, and responding. When the process only does one part of that, for instance only does the listening part and not the responding part, then it's deficient. The process hasn't achieved what its meant to achieve. It is meant to achieve understanding from information exchange and be responsive. That's where the PTL fall short.
>
> In the evidence of Mr Dan Kneebone, there is an extensive looking engagement table and, although it appears to be an extensive looking list, what is missing is the responses. There is no information that sets out what (if any) the PTL's responses were to the matters raised in all of those meetings."

The Council process

[17] POTL lodged an application for resource consents with the Council on 28 May 2021. The accompanying letter stated that POTL had notified relevant groups required to be notified under the Marine and Coastal (Takutai Moana) Act 2011**(MACA)**.

[18] On 15 June 2021, POTL wrote to the Council pursuant to s 87D RMA to request that the Council allow the application to be determined by the Environment Court, instead of by it as consent authority.

[19] On 15 December 2021 POTL lodged a S87G Notice of Motion with the Court for Direct Referral.

[20] The Court's understanding of the Council process is limited to what is stated in the s 87F Officer's report. This stated that the application was limited notified on 4 October 2021, in accordance with approval given by an independent hearings commissioner. At the close of the submission period four submissions had been received from Tauranga Airport Authority, Te Runganga o Ngāi Te Rangi Iwi Trust, Ngāti Hē and Ngāti Ranginui Incorporated Society and Ngāti Ranginui Fisheries Trust.

[21] The Reporting officer, Mr Greaves concluded that:

> "As has been identified in the submissions from the tangata whenua parties, there is some uncertainty as to the scale of cultural effect resulting. In my opinion, this matter remains outstanding. It is anticipated that further clarification will be provided by the submitters at or before the hearing.
>
> Subject to the further clarification providing some certainty regarding the scale of cultural effect, I am of the opinion that the Proposal is consistent with the relevant provisions of the planning documents and the Act."

[22] He recommended that:

> "Having considered all relevant matters under Sections 104-104D, I am of the opinion that the policy analysis completed supports the grant of resource consent RM21-0341 for a duration of 35 years, with regards to the structures, and 15 years with regards to the dredging activities, subject to the attached conditions."

Application for referral under the Shovel Ready and Covid-19 Recovery (Fast Track Consenting) Act 2020

[23] Mr Kneebone stated that as it became increasingly clear that the development is urgently needed, POTL applied for consideration under the Government's "shovel ready" and "fast track" consenting programmes in 2020. Both applications were declined, with Government Ministers suggesting that POTL seek a direct referral to the Environment Court. [254]

254 Mr Kneebone, EIC at 40 and 41.

[24] When advised of this application, Ms Bennett stated "This approach changes everything because it limits our options significantly and forces us into an adversarial position which will not be 30 good for relationships, among other things." [255]

255 NOE at page 89.

[25] Exhibit 5 [256]

256 FTC 44 Application for referred project under the Covid-19 Recovery (Fast Track Consenting) Act - Joint Stage 2 decision on: Application 2020-29- Port of Tauranga Limited for Ports of Tauranga Stella Passage Wharves and Dreging Project, Memorandum dated 4 March 2021.

relates to the Fast Track application. The officers' recommendation was to decline the application:

> " … as we anticipate there will be a high level of public and tangata whenua interest in the project. We consider there would be an expectation of a full consultation and consenting process for the Project given the Port's consenting history, Treaty settlements acknowledging grievances relating to the Port and commitments to improving processes around the Crown's management of the Port and activities in Tauranga Moana. In this context, it is our view that it is more appropriate for the Project to go through the standard consenting process under the Resource management Act (RMA). This could include investigating Direct Referral to the Environment Court under section 87D of the RMA.
>
> … We consider that referring the Project may undermine the redress (which includes the acknowledgements and apologies) and commitments in these settlements regarding the full participation of iwi authorities in RMA consenting. In addition, Te Rununga o Ngai Te Rangi commented that they are working actively with the applicant and aim to conform their view on the Project by April or early May 2021. There is a risk that fast tracking the Project could derail this engagement process and cut across the relationship between iwi and the Port Authority."

[26] Ms Bennett pointed out that irrespective of the advice from Ministers that it was more appropriate for the Project to go through a public process, the application was limited notified, [257]

257 Ms Bennett, updated EIC at 109 to 112.

going on to say:

> "Ngāi Te Rangi do not agree with the section 95 decision on notification. We had originally seriously considered a Judicial Review of the notification determination because it got it so wrong. This kind of approach makes it very difficult for Ngai Te Rangi to look past.
>
> This proposal is one of high public interest and importance. Much like the dredging campaign, the process should have allowed the public to participate. The PTL should have allowed that, and the Regional Council should have insisted on it."

[27] Other relevant matters addressed in the report include:

> "BOPRC state the community is concerned about a wide range of issues relating to the Port which include air quality and the impact industrial activities have on Whareroa Marae and residential areas.
>
> In the Ngāi Te Rangi an Ngā Potiki settlement the Crown acknowledged that:
>
> a. public works have had an enduring negative effects on the lands, resources, and cultural identity of Ngāi Te Rangi an Ngā Potiki, including the development of the Port and airport
> b. the development of the Port has resulted in environmental degradation of Tauranga Moana and reduction of biodiversity and food resources.
>
> In the Ngāti Ranginui settlement the Crown acknowledged that development of the Port hase resulted in environmental degradation of Tauranga Moana which remains a source of great distress to the hapū of Ngāti Ranginui.

> The Ngāti Pūkenga Treaty settlement also acknowledges the grievances felt by Ngāti Pūkenga as a result of their marginalisation in Tauranga Moana by the Crown.
>
> In each settlemet the Crown seeks to address these acknowledgements by committing to relationship with each iwi (relevant to the settlement) based on mutual respect, co-operation and respect for the Treaty of Waitangi."

[28] The report referred to the Port being an access route for orcas and dolphins and the potential for pile driving activities to trap them. It referred to the significant high tide roost for birds, stating it was unclear if the roost is affected and suggesting it might be possible to enhance its values.

Direct referral to the Environment Court

[29] On 15 December 2021 POTL lodged a S87G Notice of Motion with the Court for Direct Referral. The Court advised the parties who had made submissions to the Council by letter of the same date. The submitters were Ngāi Te Rangi Iwi Trust, Ngāti Ranginui Incorporated Society, Ngāti Ranginui Fisheries Trust and Tauranga Airport Authority.

[30] The period for lodging s 274 Notices closed on 31 January 2022. Nine s 274 notices were filed. [258]

258 Te Rūnanga o Ngāi Te Rangi Iwi Trust; Te Rūnanga o Ngāti Kahu (ki Tauranga Moana); Ngāti Kuku Hapū; Ngāti Tapu; Ngāti He; Ngāti Ranginui Fisheries Trust; Ngāti Kaahu a Tamapahore Trust; the Trustees of Whareroa Marae; and Ngā Hapū O Ngā Moutere.

Only one of the parties had made a submission of the applications to the Council but POTL noted that all of the parties submitting s 274 Notices are hapū and/or are affiliated with the iwi and hapū that were notified by the Council as Consent Authority. For that reason, POTL consented to them joining the proceedings as s 274 parties. [259]

259 Joint memorandum of counsel for POTL and the Council dated 8 February 2022.

[31] On 17 March 2022, the Court was notified of a wish for Ngāti Ranginui Incorporated Society to be a party to the proceedings under s 274 RMA. The Court did not receive any objections to the application and the waiver has been granted. [260]

260 Court email dated 24 March 2022.

[32] By email dated 8 July 2022, Patrick Nicholas advised the Court that he had made a submission dated 30 October 2021 to the Council opposing the applications but was not consulted. He heard by way of Facebook that there was to be a Court hearing and sought to become a party. He made an application for an out of time waiver on 14 July 2022.

[33] POTL opposed the application on the grounds that it would be unduly prejudiced. The Regional Council did not oppose the application and agreed to abide the decision of the Court. Other parties who responded either supported the application or were neutral and also agreed to abide the Court's decision.

[34] Following receipt of a memorandum of counsel for POTL on 14 February setting out proposed procedural matters, the presiding Judge directed that a Judicial Telephone Conference (JTC) occur on 21 February 2022. The Court directed mediation between the parties

[35] A further JTC took place on 18 March 2022 at which a two-week hearing with a likely commencement date of 11 July 2022 was set down.

[36] In the evening of 10 July 2022, the day before the hearing, the Ngāi Te Rangi parties advised the Court that pre-hearing hui on 5 and 6 July appeared to have been a Covid super spreader event and a very significant number of witnesses had since tested positive for Covid or were close contacts. An urgent meeting of counsel and legal representatives was arranged for 10 a.m. on 11 July 2022, at which it was agreed that under the circumstances the hearing should be adjourned.

[37] By email dated 15 July 2022, the presiding Judge advised parties that " … the Court is most concerned not to delay the hearing more than absolutely necessary." Parties were directed to confirm their availability for the reconvening of the hearing in the weeks of 3, 10, and 17 October 2022. [261]

261 Court email dated 15 July 2022.

[38] Finding dates for a reconvened hearing when parties, counsel, witnesses and members of the Court were available proved challenging. The October dates proved unachievable and, ultimately, the earliest start date for the rescheduled hearing was 27 February 2023. This was confirmed by Notice of Hearing dated 1 September 2022.

[39] The hearing commenced on 27 February 2023 and continued until Friday 17 March, with seven days of the hearing held at Whareroa Marae. Members of the Court wish to express their sincere appreciation for the warmth of the welcome and the generous hospitality shown by the Whareroa community to all participants throughout that part of the hearing.

[40] In an endeavour to use the unanticipated extra time available, the Court issued a minute dated 21 July 2022 which identified a number of matters in relation to which the Court would be assisted by further evidence at the time the hearing reconvenes. POTL provided the information requested on 30 September 2022.

All Citations

[2023] NZEnvC 270, 2023 WL 8797971

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