in the matter of application FTAA-2511-1150 (Bream Bay Sand Extraction Project)

between

BREAM BAY GUARDIANS SOCIETY INCORPORATED
Invited party

and

MCCALLUM BROTHERS LIMITED
Applicant

SUBMISSIONS ON LEGAL ISSUES RAISED BY MBL APPLICATION

25 May 2026

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MAY IT PLEASE THE PANEL

Introduction

1. McCallum Brothers Limited's (**MBL**) application for consent to extract sand from Bream Bay gives rise to legal issues that will need to be addressed by the Panel. This memorandum is complementary to the submissions made by other invited parties and is confined to the following matters.

2. First, Bream Bay Guardians Society Incorporated (**BBG**) set out in greater detail the legal framework for the assessment of regional or national benefits, as referred to in their comments document. BBG submits that when their comments and expert reports it has filed together with this memorandum are considered, and the required legal analysis is properly undertaken, the application should not be granted.

3. Secondly, MBL's proposed dredging operation would contravene bans under the Fisheries Act 1996 (**Fisheries Act**), even if the consents sought were granted. As such, it would be an error of law to allow the application to proceed.

4. Thirdly, MBL's application fails to account for the potential movement and removal of sand by another consent holder in Bream Bay. Channel Infrastructure NZ Limited (**Channel Infrastructure**) holds resource consents to undertake dredging within the same closed marine system as that in which MBL seeks consent to undertake its own dredging operations. BBG says that this ought to have prevented the substantive application being lodged at all. However, even were it to be incorrect about that, MBL has still failed to address the impact of Channel Infrastructure's consented activites in its assessment of cumulative effects on coastal processes, leaving it materially deficient.

Assessing the extent of significant regional or national benefits

5. As the Panel will be aware, at the heart of the fast-track approvals regime is the requirement for a proposed project to deliver "significant regional or national benefit".

6. In deciding whether to grant approval to a project, the panel must consider the *extent* of the significant regional or national benefits that will be delivered. The benefits considered must be public in nature, and the panel must assess them on a net basis.

7. BBG submits that when the alleged benefits of MBL's application are properly considered against its adverse effects, the proper conclusion is that the application should be declined.

Extent of the benefits

8. Section 81(4) of the Fast Track Approvals Act 2024 (**FTAA**) requires to the Panel to "consider the extent of the project's regional or national benefits" when taking the purpose of the FTAA into account. Further, where the

project has one or more adverse impacts, and they are out of proportion to the project's regional or national benefits, this can be a basis for declining the consent under FTAA s 85(3).

9. MBL's project is listed in Schedule 2 of the FTAA. The title of that Schedule was amended in 2025 to read "Listed projects with significant regional or national benefits".

10. The effect of this amendment was to remove the initial threshold assessment of "significance" that was undertaken in pre-amendment fast-track decisions for listed projects. The amendment has limited practical impact, as the Panel is still required by statute to consider the "extent" of the benefits.[1]

Public benefits are to be assessed, not private benefits

11. Importantly, in analysing whether a project delivers significant regional or national benefits and considering their extent, the Panel will have to consider *public* benefit, as opposed to benefits accruing to private interests.

12. Parliament's intention in this respect was clarified when the FTAA, including specific listed projects, was being passed into law. In particular, a proposal to classify the legislation as a private bill was debated in the House, and rejected. The Speaker of the House favoured the Government's argument that it was a government bill for the benefit of the wider public.[2] Hon Chris Bishop stated that:[3]

> The projects have been listed for their ability to deliver significant regional and national benefits, and the overall value of them in terms of economic and social benefit. The Government is listing these projects, or attempting to list these projects, in order to generate significant regional and national benefits to the country. That is clearly a matter of public policy.

13. To the extent MBL's application relies on private benefits, no weight ought to be placed upon them in considering the extent of benefits that may be delivered.

Assessing the extent of the benefits – net basis

14. Regarding how a panel is to go about considering the extent of the regional or national benefits, previous fast-track panel decisions are instructive. A consensus has emerged that benefits are to be assessed on a net basis.[4] This stands to reason as it avoids perverse outcomes that would otherwise arise, such as approval of projects imposing costs that outstrip the benefits that they would deliver.

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[1] FTAA, s 81(4).
[2] (10 December 2024) 780 NZPD 7799 – 7801.
[3] (10 December 2024) 780 NZPD 7795.
[4] See, for example, Taranaki VTM Project, Draft Decision of Expert Consenting Panel, dated 4 February 2026 at [93]; Waihi North Project Final Decision of Expert Consenting Panel, dated 18 December 2025 at [784].

15. The panel that considered the Taranaki VTM application established a three-step benefit assessment process.[5] BBG submits that this is the correct approach to assessing the public benefits under the FTAA. It provides that a panel is to:

    (a) First, assess the extent of regional or national benefits, and the extent to which there may be comparable disbenefits by assessing the veracity of the information provided about each;

    (b) Second, discount any comparable established disbenefits from any established benefits; and

    (c) Third, for the purpose of FTAA s 85(3), consider whether any adverse impacts (that have not already been accounted for as disbenefits) are sufficiently significant to be out of all proportion to the extent of the project's regional or national benefits.

16. The term "benefit" is not defined in the FTAA. Its ordinary meaning of "advantage" has been referred to.[6] The assessment of the extent of a project's benefits is a factual question based on evidence and informed by judgement.[7]

Declining a consent where adverse impacts are out of proportion to regional or national benefits

17. As mentioned above, the prescribed decision-making process under the FTAA requires a panel to consider whether it must decline the application, or whether to exercise its discretion to decline it, under s 85.

18. Sections 85(1)-(2) prescribe circumstances where it is mandatory for the panel to decline consent.

19. Section 85(3) provides that a panel may decline to grant approval where it forms the view that:

    (a) There are one or more adverse impacts in relation to the approval sought; and

    (b) Those adverse impacts are sufficiently significant to be "out of proportion" to the project's regional or national benefits, even taking into account:

        (i) Any conditions that may be set regarding the adverse impacts; and

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

[5] Taranaki VTM Project, Draft Decision of Expert Consenting Panel, dated 4 February 2026 at [93].
[6] Taranaki VTM Project, Draft Decision of the Expert Consenting Panel, dated 4 February 2026 at [82].
[7] Taranaki VTM Project, Draft Decision of the Expert Consenting Panel, dated 4 February 2026 at [83].

20. The FTAA defines "adverse impact" broadly, to include any matter considered by the panel that arises in information that it receives in accordance with the FTAA.[8]

MBL's proposal will contravene bans under the Fisheries Act 1996

The bans

21. The scallop fishery SCA1 is presently closed under s 11 of the Fisheries Act, effective 3 November 2022.[9] The current notice replaced an earlier closure notice in the same terms, effective 1 April 2022.[10]

22. Section 11 of the Fisheries Act empowers the Minister of Fisheries to implement sustainability measures for fish stocks governed by that statute. There are various prescribed considerations under the statute before exercise of the power, none of which reflect any exception available for mining or other activities similar to the proposal.[11]

23. The early 2022 decision paper that preceded the first closure notice explains the context for the closure. In its summary recommendations the paper recorded:[12]

    (a) Recent surveys of the abundance and biomass of the SCA 1 fishery highlighted concerns for the ongoing sustainability of scallop populations within SCA 1;

    (b) It is likely that there are numerous contributing factors for the low abundance and low density of scallops and that it is "clear that ongoing fishing at current levels and under the current management settings poses a risk of further decline in this important shared fishery";

    (c) The SCA 1 Fishery was not responding to the mananagement approach then in place;

    (d) There are concerns regarding the impact of dredging on scallops, their habitat, and on the benthic environment more generally. Fisheries New Zealand considered that to ensure the recovery of the SCA 1 population, protection of the scallop population and habitat is necessary; and

    (e) A cautious approach to managing the recovery of SCA 1 scallop populations is appropriate.

24. More recently, a ban has been put in place for the taking or possessing of spiny rock lobsters (crayfish), effective 1 April 2026.[13]

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[8] FTAA, ss 85(5) and 81(2)(a).
[9] See closure notice at https://www.mpi.govt.nz/dmsdocument/55522/direct.
[10] See original gazetted notice at https://gazette.govt.nz/notice/id/2022-go1122.
[11] See ss 11(1), 11(2), 11(2A), 11(3).
[12] https://www.mpi.govt.nz/dmsdocument/50530-Review-of-Sustainability-Measures-for-the-2022-April-round-Fisheries-New-Zealand-Decision-Paper. See at [752]-[756].
[13] https://gazette.govt.nz/notice/id/2026-sl110.

Taking and Fishing under the Fisheries Act

25. Under the Fisheries Act, "taking" is defined as follows:

> ***taking*** means fishing; and ***to take*** and ***taken*** have a corresponding meaning

26. In turn "fishing" is defined by reference back to "taking", widely (emphasis added):

> **fishing—**
>
> (a) means the catching, taking, or harvesting of fish, aquatic life, or seaweed; and
>
> (b) includes—
>
> (i) **any activity that may reasonably be expected to result in the catching, taking, or harvesting of fish, aquatic life**, or seaweed; and
>
> (ii) any operation in support of or in preparation for any activities described in this definition

27. Activities that result in catching, taking, or harvesting fish are covered by that definition. It has been consistently interpreted widely by the Courts such that fishing covers a broad range of activities that result in fish being taken, rather than solely activities with the specific purpose of catching fish to dispose of them by consumption or sale.

28. The decision of the District Court in *Ministry of Fisheries v B & G Fishing Ltd*, set out the approach to the definition as follows:[14]

> … The definition is a wide one quite capable of including actions which, on any fair minded assessment, would be far too remote from the act of fishing to attract fishing penalties. Nevertheless the public interest in practical enforceability requires that expansive definition.

That passage has subsequently been cited with approval in *MPI v Amaltal*.[15]

29. There is a longstanding body of law that reflects a broad interpretation of the term fishing. Fish are "caught" or "taken" whether returned to the water immediately or not, regardless of intention to appropriate the fish.[16]

30. Fish includes "all species of finfish and shellfish, at any stage of their life history, whether living or dead".[17] Scallops are shellfish and explicitly subject to Fisheries Act management in many respects.

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[14] *Ministry of Fisheries v B & G Fishing Ltd* DC Napier, CRN 3016510112-16, 21 September 2004 at [22].
[15] [2022] NZDC 3705.
[16] *Ministry of Agriculture and Fisheries v Prangley* [1994] 1 NZLR 416 at 420, citing *Southland Acclimatization Soc v Otago Acclimatization Soc* [1918] NZLR 524 (CA), at 535.
[17] Section 2 Fisheries Act.

Suction dredging in the SEA will breach the bans

31. The prohibitions under the sustainability measures in place alone mean that neither scallops nor crayfish may be disturbed or removed at all from SCA1. SCA1 includes all of the proposed SEA and control areas in the application.

32. The Environment Court has, pertinently, observed that activities that threaten life on the sea bottom in another area subject to the same scallop ban will be prohibited:[18]

> The major concern is with bottom contact fishing methods touching the benthic environment, the seagrass meadows and shellfish beds in Area B. Fisheries Act controls now provide for full closure of the scallop fisheries in Northland from 1 April 2022 and this will prohibit activities which threaten the ecological values.

33. Even if the bans were not in place, the proposal involves will necessarily involve taking scallops, and that would require a permit under the Fisheries Act anyway. The applicant has not set out whether it has any permit for that at all let alone whether it has sought to secure an exception from the bans (assuming it was possible to lawfully issue one in view of the nature of the bans). Attachment 12 to the application mentions the ban in passing (to say the seabed is not pristine due to earlier dredging before the ban)[19] but offers no explanation about how the proposal will not contravene it. While attachment 16 to the application relating to fisheries also acknowledges the ban,[20] it does not refer to any right that MBL has to take scallops despite it either. Rather, it simply minimises the significance of the scallop fishery in Bream Bay itself,[21] which is no answer to the contravention of the sustainability measure.

34. Three principal points emerge:

    (a) The protection enacted for the recovering scallop population must be given due weight in view of the inevitable disturbance of the seabottom in the SEA from the proposal;

    (b) Even if the consents sought in the proposal before the Panel were granted, the proposed sand extraction will not be lawful and there is no indication whatever that the necessary exception or permission would be available despite the bans, which calls into question the project going ahead (with what benefit it may have, which BBG considers negligible) even if this Panel grants the consents sought;

    (c) While it is acknowledged that the Panel does not have the necessary powers under the Fisheries Act to overturn a ban, grant an exception to it, or to grant a fishing permit generally, it remains that the application has been made without a critical element. It is contrary to the concept of the FTAA providing a “one stop shop”

[18] *Bay of Islands Maritime Park Inc v Northland Regional Council*, [2021] NZEnvC 228, at [182].
[19] At [6]
[20] At [3.5].
[21] At [3.5].

for an omission such as this to have been made. Applicants should not be permitted to invoke the FTAA unless their application fits within the purpose of statute to actually facilitate the whole of a relevant project.

Existing Bream Bay dredging resource consents

35. MBL's application fails to account for the potential movement and removal of sand by another consent holder. Channel Infrastructure holds resource consents to operate within the same closed system as that in which MBL seeks consent to undertake its dredging operations (together the **Channel Infrastructure Consents**).[22]

36. In particular, BBG submits that:

(a) First, MBL's application ought to have been returned on the basis that the Channel Infrastructure Consents are existing consents for the same activity. (BBG is aware that the EPA decided on 26 February 2026 that there were no existing resource consents for the purposes of the FTAA. BBG disagrees with that conclusion).

(b) Second, even if the EPA were to have been correct in determining that there are no existing consents which disqualify MBL's application, the Channel Infrastructure Consents permit activites including dredging in the same closed sand system as the proposed SEA, and the effects of Channel Infrastructure's dredging operations need to be addressed by MBL in order that its application can be properly considered by the Panel.

Legislative framework – existing consents

37. Pursuant to FTAA s 47, the EPA must, in consultation with the relevant administering agencies and relevant consent authorities, make a recommendation to the Minister on whether there are any existing resource consents of the kind referred to in s 30(3)(a) that are not identified in the substantive application. Relevantly:

(a) FTA s 30(3)(a) refers to consents to which section 124C(1)(c) of the Resource Management Act 1991 (**RMA**) would apply if the consent were applied for under the RMA.

(b) RMA s 124C(1)(c) refers to a consent granted as a result of the application that could not be fully exercised until the expiry of the consent described in s 124B(1)(a). This includes where a person holds an existing resource consent to undertake an activity under s 12, which includes among other things, removal of any sand, shingle shell other natural material from the common marine and coastal area.

[22] The Channel Infrastructure Consents are listed in the Schedule to BBG's letter to the EPA dated 18 March 2026. Refer: https://www.fasttrack.govt.nz/__data/assets/pdf_file/0021/22629/Bream-Bay-Guardians-Society-Incorporated-letter-18-March-2026.pdf

38. Upon receiving the recommendation from the EPA under FTAA s 47, the Minister (or the EPA, if the decision-making power is delegated), pursuant to s 47A, must decide whether there are any existing consents of the kind referred to in FTA s 30(3)(a). Where they determine that there are such existing consents, the EPA must return the application under s 46(4).

39. In this case, the Channel Infrastructure Consents permit activities including the dredging, removal, and deposition of sand and discharge of sediment and water in Bream Bay.[23] BBG submits that these existing consents ought to have required MBL's application to be returned

Cumulative effects on coastal processes - extant resource consents

40. Even were the EPA to have been correct that the Channel Infrastructure Consents were not "existing consents" for the pruposes of FTAA s 47 (which is denied), they are, as a matter of fact, extant consents for substantially the same activity, within the same closed marine sand system.

41. MBL's application does not address the impact of Channel Infrastructure's consented activites in its assessment of cumulative effects on coastal processes. This is discussed in the expert report of Sian John concerning coastal processes, provided by BBG.[24] This is a crucial deficiency that absent remediation, ought to prevent the application being granted,

Dated 25 May 2026

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23 https://www.fasttrack.govt.nz/__data/assets/pdf_file/0021/22629/Bream-Bay-Guardians-Society-Incorporated-letter-18-March-2026.pdf
24 Haskoning Report at [37].