**MEMORANDUM OF LEGAL COMMENTS OF COUNSEL FOR THE ROYAL FOREST AND BIRD PROTECTION SOCIETY INC**

1. These legal submissions are filed on behalf of the Royal Forest & Bird Protection Society Inc (Forest & Bird) and address the legal framework and conditions. Any failure to comment on a matter should not be read as agreement with the applicant or as indicating no view; it reflects the procedural limitations of this process.

**The FTAA scheme**

*Purpose of the FTAA*

*2.* The purpose of the Fast Track Approvals Act 2024 (FTAA) is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits. Whether projects have "significant regional or national benefits" must involve a question of net benefits. A project whose regional or national costs outweigh, or even substantially reduce, its benefits is not a project with significant regional or national benefits. That requires a net analysis: first, benefits must be assessed on a net basis (i.e. the benefits must be set off against the costs of achieving those benefits); and second, those net benefits must be balanced against the project's adverse impacts under section 85 of the FTAA.

*3.* This conforms with the approach taken by the Expert Panel that considered the Taranaki VTM application, which took the following three-step approach:[1]

   a. First assessed the extent to which any regional or national benefits are established, and the extent to which there may be comparable disbenefits by assessing the veracity of the information provided about each;
   b. Second, discounted any comparable established disbenefits from any established benefits; and
   c. Third, for the purpose of s 85(3) FTAA, considered whether any adverse impacts (that have not already been accounted for as disbenefits) are sufficiently significant to be out of proportion to the extent of the project's regional or national benefits.

*Assessment of resource consent application*

4. For resource consents, the criteria largely adopt the Resource Management Act 1991 ("RMA") provisions relevant to assessing resource consents, albeit with some important distinctions, including that the Expert Panel must give the greatest weight to purpose of the FTAA and the RMA provisions that direct decision-making are matters to "take into account".

[1] Draft decision on the Taranaki VTM application 4 February 2026 at [93]

5. For a resource consent, the relevant "applicable clauses" are clauses 17 and 18 of Schedule 5. Clause 17 requires the panel to "take into account", giving greatest weight to paragraph a:

    a. the purpose of the FTAA;

    b. the provisions of Parts 2, 3, 6, and 8 to 10 of the Resource Management Act 1991 that direct decision making on an application for a resource consent (but excluding section 104D of that Act); and

    c. the relevant provisions of any other legislation that directs decision making under the Resource Management Act 1991.

6. Each factor above must be assessed independently before those factors are weighed in accordance with the prescribed hierarchy. The purpose of the FTAA (being to facilitate projects with significant regional or national benefits) can have no logical relevance to either the assessment or weighting or adverse impacts. That approach is supported by the Court of Appeal's decision in *Enterprise Miramar Peninsula Inc v Wellington City Council.*[2] The approach in *Enterprise Miramar* has been applied in other FTAA panel decisions to date, including Taranaki VTM, Bledisloe Wharf, Maitahi Village, Waihi North and Milldale.

7. Part 6 of the RMA relates to resource consents, and the usual decision-making considerations under section 104(1)(a) to (c) of the RMA apply. This includes under 104(1)(b), to have regard to any relevant provision of the NZCPS.

8. When assessing the provisions contained in the NZCPS (and any other relevant planning instruments), the Supreme Court's decision in *Royal Forest and Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26 (*East West Link*) is relevant.

9. *East West Link* contains interpretative principles which guide how to address planning provisions, including policy documents such as the NZCPS (which contains environmental bottom lines and restrictive policies in areas affected by the proposal).

10. There are directive policies in the NZCPS which are "very specific as to subject matter and concrete as to intended effect." For example, NZCPS Policy 22(2) to "*require* that … development will not result in a significant increase in sedimentation in the

[2] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541at [52]-[53], [59].

coastal marine area."[3] The Supreme Court found that NZCPS Policy 22(2) provides no "wriggle room."[4]

11. Powell J, in the (overturned) High Court decision, considered the statutory obligation to "give effect" to the NZCPS and its "environmental bottom line" policies, such as NZCPS Policy 11. Powell J found that the Board of Inquiry considering the East West Link project only needed to satisfy "the softer regard/particular regard standards under ss 104 and 171" where "the requirement was merely to "give genuine attention and thought" to the NZCPS, rather than a duty to accept its requirements.[5]

12. Likewise, the applicant and respondent Council argued before the Supreme Court that the "directive potency" of NZCPS Policy 11 was "diluted by the fact that ss 104 and 171 require only that consent authorities have regard or particular regard to it" which, it was said, "is materially different to the "give effect" standard applicable to plan preparation in Part 5; the standard at issue in *King Salmon*.[6]

13. The Supreme Court held that Powell J erred in this approach. Directive policies had to be applied:[7]

> [169]…[Powell J] erred in his application of the duties to have regard/particular regard relevant objectives and policies. Again, those duties do not invest consent authorities with a broad discretion to "give genuine attention and thought" to directive policies, only to then refuse to apply them. That would contradict what we have already described as the consistently strong "avoid" language employed from top to bottom in the RMA hierarchy of objectives and policies. It would also be to waste the significant resources invested by public and private stakeholders in the processes by which those objectives and policies are settled.

14. The same approach must be taken with direction to "take into account" the various factors in clause 17.

15. The panel in the Bledisloe North Wharf and Fergusson North Berth Extension application, following *Royal Forest and Protection Society and Auckland Transport Agency,* treated "take into account" as requiring it to "directly consider the matters so identified and give them genuine consideration; rather than mere lip service, such as by listing them and setting them aside."[8]

16. This accords with the Supreme Court's finding that it is not open to decision makers at the consent level to "undermine the choices made in planning documents of

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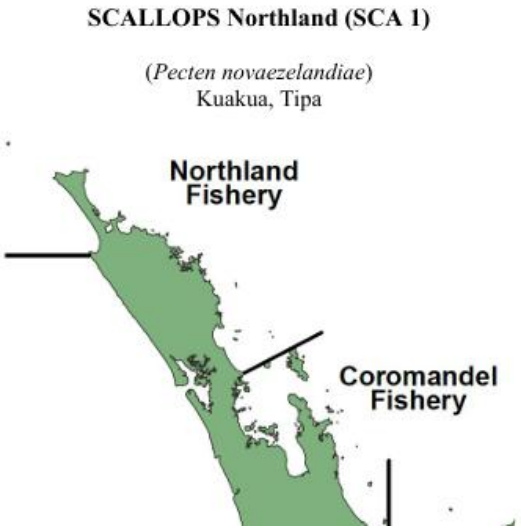
[3] *Royal Forest & Bird Protection Society Inc v New Zealand Transport Agency* [2024] NZSC 26 at [104]
[4] *Royal Forest & Bird Protection Society Inc v New Zealand Transport Agency* [2024] NZSC 26 at [104]
[5] *Royal Forest & Bird Protection Society Inc v New Zealand Transport Agency* [2024] NZSC 26 at [140]
[6] *Royal Forest & Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26 at [97]
[7] *Royal Forest & Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26 at [169]
[8] Record of Decisions of the Expert Panel considering the Bledisloe North Wharf and Fergusson North Berth Extension dated 21 August 2025 at [119]; see also [39]-[40] of Forest & Bird's Legal Comments dated 6 October 2025

favouring environmental protection through avoidance policies if directly applicable to the relevant project."[9]

17. The proposal engages several important environmental bottom lines (including "avoid" standards) under the NZCPS. An example is Policy 11(a)(vi) – to avoid adverse effects of activities on areas set aside for full or partial protection of indigenous biological diversity under other legislation. The application area forms part of "SCA1" – the quota management area of the Northland scallop fishery – which is currently the subject of a prohibition on taking scallops:[10]




18. Policy 11(a)(i) is also engaged where threatened or at risk species, including marine species and coastal avifauna such as the tara iti/NZ Fairy Tern. Forest & Bird notes the information from the New Zealand Fairy Tern Charitable Trust that tara iti are plunge divers and need clear water to see their prey. Sandmining is likely to disturb their foraging at sea, because of the disruption to water clarity.[11]

19. Policy 3 is also significant as it requires a precautionary approach be adopted:

    a. Where effects are uncertain, unknown or little understood put potentially significantly adverse; and

    b. To the use and management of coastal resources potentially vulnerable to effects from climate change, so that, among others, the values of the coastal environment meet the needs of future generations.

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[9] *Royal Forest & Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26 at [224]
[10] Fisheries (SCA1 Closure) Notice 2022 (No. 2)(MPI 1543)
[11] As set out in notes from Heather Rogan of the NZFT in the comments provided from Bream Bay Guardians.

20. Little has been provided on the effects ocean acidification will have in the application area. We note the corals (and any carbonate sand) affected by the proposal will also be impacted by climate change and ocean acidification. The Environment Court in *McCallum Bros Ltd v Auckland Council* accepted evidence that "increased water temperatures and ocean acidification will reduce the quantity of carbonate sand produced by marine organisms, as well as increasing the rate of dissolution of the existing standing stock of carbonate sand at Pākiri."[12]

21. We submit that even under the FTAA, the bottom lines in the NZCPS cannot be easily departed from and that the strength of these protections must guide the Panel in its assessment of adverse effects for the purpose of the weighing exercise in s 85 of the FTAA.

22. This accords with the approach in *East West Link*, where the Supreme Court also found that relevant objectives and policies cannot "simply be put in a blender with the possible effect that stronger policies are weakened and weaker policies strengthened."[13]

23. For completeness, we note the Supreme Court recognised the rigidity caused by "avoid" policies could be overcome in very limited circumstances and developed a bespoke "exceptions pathway" in relation to the proposed East-West Link proposal:

> [118] Though expressed in different ways, the relevant NZCPS and AUP policies in essence require a proponent seeking to locate significant infrastructure requiring reclamation in a SEA to show that three elements are met:
>
> (a) it is a necessary—and not just a desirable—solution by reference to functional or operational need, the regional or national benefit obtained, and the absence of any practicable alternative locations or solutions;
>
> (b) adverse effects that cannot be avoided have been remedied or mitigated to a standard that corresponds with the significance of the environment, ecosystem and/or species that ought to have been protected to an avoid standard; and
>
> (c) the benefits of the solution plainly justify the environmental cost of granting consent

24. The "exceptions pathway" was unique to the East-West Link proposal – involving a regionally significant road in Auckland and reclamation of the coastal marine area. It was under the Auckland Unitary Plan and engaged different provisions under NZCPS – the reclamation policy. In concluding there was a pathway through the "avoid" framework, the Supreme Court observed that "it would be wrong to treat the

[12] *McCallum Brothers Ltd v Auckland Council* [2024] NZEnvC 075 At [514]
[13] *Royal Forest & Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26 at [80];

distinctive context of Auckland and the EWL as irrelevant; this would risk subverting the purpose of the RMA."[14]

25. In any event, given the circumscribed grounds for decline in s 85(3) FTAA, the "exceptions pathway" is largely irrelevant. The reasons for establishing an exceptions pathway do not arise under the FTAA in the same way. Ultimately, *East-West Link* requires that, when undertaking its s 81(2) analysis, the Expert Panel apply the directive policies in the NZCPS (and other planning documents) according to their terms.

*Wildlife Act 1953*

26. For a wildlife approval, the clauses 5 and 6 of Schedule 7 of the FTAA are applicable. Pursuant to cl 5, when considering an application for a wildlife approval, including conditions under clause 6, the panel must take into account, giving the greatest weight to paragraph a:
    a. the purpose of the FTAA;
    b. the purpose of the Wildlife Act 1953 and the effects of the project on the protected wildlife that is to be covered by the approval; and
    c. information and requirements relating to the protected wildlife that is to be covered by the approval (including, as the case may be, in the New Zealand Threat Classification System or any relevant international conservation agreement).
27. The Wildlife Act does not apply to marine mammals, but covers certain aquatic marine species – corals, some sharks, and rays.[15] It otherwise declares all wildlife to be absolutely protected, including all seabirds.[16] Described as the "mainstay of statutory protection of animals in the environment",[17] the Wildlife Act's long title is:[18]

> An Act to consolidate and amend the law relating to the protection and control of wild animals and birds, the regulation of game shooting seasons, and the constitution and powers of acclimatisation societies.

28. Kororā are known to forage in the proposed sand mining area. Potential effects of the proposed extraction activity include interaction with the sand extraction vessel, fuel/oil spill, airborne noise and underwater noise.[19] Given this real risk of adverse effects on these threatened seabirds, it cannot be said that the proposal is consistent with the Wildlife Act.

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[14] *Royal Forest and Bird Protection Society and New Zealand Transport Agency* [2024] NZSC 26 at [120]
[15] Wildlife Act Schedule 7A
[16] Wildlife Act section 3
[17] *Shark Experience Ltd v PauaMAC5 Inc* [2019] NZSC 111 at [46]
[18] Wildlife Act 1953 long title.
[19] Attachment 13 Assessment of Seabird and Shorebird Effects on behalf of McCallum Bros (April 2025) page 6

*Dealing with inconsistency with provisions under planning documents under the s 85(3) assessment*

29. When deciding whether or not to grant consent under s 85(3), a breach of bottom lines or restrictive policies will weigh heavily against granting consent but may not be determinative. However, inconsistency or contrariness to such provision must weigh heavily in the 85(3) assessments. At the very least, inconsistency with planning provisions will influence how the Expert Panel assesses the adverse impacts.

30. There would be no point in undertaking the s 81(2) analysis unless it was relevant to the question of whether or not to decline consent. The s 81(2) analysis informs the assessment of adverse impacts that might justify the decline of consent.

31. The Panel's analysis of the relevant criteria in section 81(2) of the FTAA can inform the "significance" of an adverse impact under section 85(3). For example, where the adverse impact breaches a bottom line under the NZCPS, that will confirm the significance of the adverse impact.

32. Section 85(4) is also relevant. This stipulates the Panel "may not form the view that an adverse impact meets the threshold in subsection 3(b) **solely on the basis** that the adverse impact is inconsistent with or contrary to a provision of a specified Act or any other document" (emphasis added).

33. The provision does not prevent consideration of inconsistency or contrariness with the NZCPS or other relevant planning document. It only prevents reliance on inconsistency alone as sufficient grounds for decline. In other words, the threshold for decline is not met where inconsistency is the only factor supporting a decline decision.

34. Where inconsistency with an Act or other document occurs alongside actual adverse impacts, both factors may legitimately contribute to a decision to decline. The inconsistency with the NZCPS gives the actual adverse impacts greater weight in the s 85(3) evaluation.

*Power to decline*

35. Section 85(3) provides that an approval may be declined if adverse impacts are sufficiently significant to be "out of proportion" to the project's regional or national benefits, even after taking into account any conditions. When applying this test, the Panel will have already assessed the nature and significance of the adverse impacts under section 81(2) of the FTAA and the project's benefits under section 81(4).

36. When considering what "out of proportion" means, the Expert Panel in the Draft Taranaki VTM Decision, found that s 85(3) is inherently evaluative. It is not a like-for-like assessment that compares a particular impact with a particular benefit of the same time, but that it "requires incommensurable impacts to be considered and compared".[20] The Expert Panel was assisted by submission of South Taranaki District Council – who framed "out of proportion" as meaning that the identified adverse impacts (after mitigation by any consent conditions or modification) are "larger, worse, or more important than the benefit".[21]

*Consent conditions*

37. When it comes to consent conditions, the relevant provisions of Parts 6, 9, and 10 of the RMA apply to the panel, subject to all necessary modifications.[22]

38. When setting conditions a decision-maker can delegate the administrative task of ensuring standards are met to a third party. However, conditions must be sufficiently certain and must not unlawfully delegate the making of substantive decisions. This principle applies to management plan certification. Conditions must identify the performance standards and limits that are to be met and the management plan then identifies how those standards are to be achieved.[23] The objectives and standards set for management plans in conditions must ensure that it is possible to certify that the management plans (including subsequent revisions of the management plans) achieve the specified standards.

39. In order to avoid an unlawful delegation the question of how effects are to be managed must be addressed as part of the consent decision, not by officials certifying a plan. This is supported by recent authority in *Remediation (NZ) Limited v Taranaki Regional Council*, which emphasised the importance of being vigilant against inappropriate deferral of decisions which safeguard the environment.[24] In that case the Court held that the objectives and parameters to be met must be set in conditions of consent and not left to management plans. A further recent example is *CJ Industries v Tasman District Council*[25] in which the Court emphasised that it is important that conditions explicitly state clear performance standards (as opposed to leaving these to be determined at a later date); and that where expert certification is required, the condition must state clear parameters and specified standards in relation to this.

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[20] Draft decision on the Taranaki VTM application 4 February 2026 at [247].
[21] Draft decision on the Taranaki VTM application 4 February 2026 at [247].
[22] Clause 18 of Schedule 5 FTAA
[23] *Re Canterbury Cricket Association Inc* [2013] NZEnvC 184 at [125]. See also *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37 at [175].
[24] *Remediation (NZ) Limited v Taranaki Regional Council* [2024] NZEnvC 213 at 27, and 466-467.
[25] *CJ Industries Limited v Tasman District Council* [2025] NZEnvC 213 at [343]

40. The legal limits on delegation is an administrative law concept[26], not a Resource Management Act-specific concept, so it also applies to approvals granted under the Fast-Track Approvals Act 2024 ("FTAA"). It has been applied in other FTAA decisions, for example the Maitahi Village Decision, which said that a condition may authorise a person to certify that a condition of consent has been complied with or otherwise settle a detail of that condition, subject to the requirement that the basis for any exercise of a power of certification must be clearly set out with the parameters for certification expressly stated in the relevant conditions.[27]

**MBL's application**

41. Forest & Bird's position is that the application should be declined. The adverse impacts of the project – especially when addressed through the lens of caution required under the NZCPS – outweigh the modest economic benefit of the project. Most of the benefits will accrue outside of Northland, where the costs will be entirely left to the Northland community and the natural environment.

42. There remain significant uncertainties on the extent and significance of adverse effects. Adverse effects appear to be of most significance for the benthic environment. The applicant considers that the benthic environment will recover, however this does not mean recovery of the same variety and abundance of species as currently present. On the applicant's information it is not possible to conclude that significant adverse effects would not occur during extraction or that significant adverse effects would not be long lasting. Effects on benthic ecosystems, organisms, and habitats in the coastal environment are relevant to the environmental bottom lines in Policy 11 of the NZCPS.

43. The applicant has failed to identify the extent of high value reef habitat, scallop bed recovery, and the distribution and abundance of cup corals within the proposed extraction area. Without this information it is not clear what level of adverse effects the panel is expected to consider in relation to the project. In this context the certification of environmental management plans becomes problematic at the time of granting consent and could lead to substantive decisions being made after the grant of consent via management plan development, review and certification which effectively becomes an approval on the extent to which adverse effects will be addressed.

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[26] *Turner v Allison* [1971] NZLR 833 (CA).
[27] At 684.

44. The applicant has materially overstated the benefits, while its costs and adverse effects have been understated or overlooked. The applicant has: [28]

    a. assumed that Auckland's future concrete demand will mirror past business-as-usual consumption;

    b. dismissed feasible alternative sand sources;

    c. used of a discount rate that inflates the present value of benefits by more than 100%.

45. When these issues are properly considered, the benefits are trivial at the regional level.

46. Consent can and should be declined on the basis that adverse effects outweigh the regional benefits. The regional benefits are trivial, amounting to just "cents per Auckland household per week."[29] They cannot credibly be described as regionally significant. Against this, there will be significant impacts on environmental, amenity, and cultural impacts on Te Ākau Bream Bay and its community. On any balanced assessment, those impacts outweigh the trivial benefits asserted. [30]

47. The applicant's proposed conditions fail to provide the certainty that is essential both in terms of the level of adverse effects authorised and exactly what the conditions require of the consent holder.

48. If the Panel were minded to grant the application, which Forest & Bird reemphases it strongly opposes, then it is critical that robust conditions are imposed to ensure that promised environmental outcomes are in fact delivered.

Dated 26 May 2026

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[28] Evidence of Dr Richard Meade, Section 1.4
[29] Evidence of Dr Richard Meade, 1.1.1
[30] Evidence of Dr Richard Meade, Section 1.4