

TABLED AT HEARING

Application: Lyttelton Port Co.
CRC17455, CRC172456, CRC172522
Date: 2 May 2017

Before Hearing Commissioners
at Christchurch

under: the Resource Management Act 1991

in the matter of: applications CRC172455, CRC172522, CRC172456, and
CRC172523 to undertake channel deepening dredging
and maintenance dredging in Lyttelton Harbour

and

in the matter of: **Lyttelton Port Company Limited**
Applicant

Opening legal submissions on behalf of Lyttelton Port Company
Limited

Dated: 2 May 2017

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OPENING LEGAL SUBMISSIONS ON BEHALF OF LYTTTELTON PORT COMPANY LIMITED

INTRODUCTION

- 1 This hearing will determine four applications (*Applications*) by Lyttelton Port Company Limited (*LPC*) for:
 - 1.1 A coastal permit to undertake channel deepening dredging, including to:
 - (a) dredge (disturb) seabed material for purposes of deepening, extending and widening a shipping (navigation) channel that includes a ship-turning basin and berth pockets;
 - (b) dredge seabed material in preparation for reclaiming land for a new container facility in Te Awaparahi Bay;
 - (c) deposit seabed material on the seabed associated with (a) and (b) above;
 - 1.2 A discharge permit to discharge contaminants (seabed material and water) into water associated with channel deepening dredging as described above;
 - 1.3 A coastal permit to undertake maintenance dredging, including to:
 - (a) to dredge (disturb) seabed material for purposes of maintaining the depth of a shipping (navigation) channel that includes a ship-turning basin and berth pockets;
 - (b) to deposit seabed material on the seabed associated with (a) above; and
 - 1.4 A discharge permit to discharge contaminants (seabed material and water) into water associated with maintenance dredging as described above.
- 2 All of the activities to which the Applications relate are to be carried out in Lyttelton Harbour and Pegasus Bay, and relate to the proposed deepening of Lyttelton Port's main navigation channel to allow ships with a draught of up to 14.5 metres to enter the Port in all tides. The proposal is known as the Channel Deepening Project (*CDP*).
- 3 The Applications are for discretionary activities which means consent can be granted with conditions or declined.

OVERVIEW

- 4 These submissions are structured as follows:
 - 4.1 A brief introduction to the CDP;
 - 4.2 The Lyttelton Port Recovery Plan (*LPRP*) and background to applicable objectives, policies and rules;
 - 4.3 Submissions addressing the questions posed by the Commissioners in the Minute dated 21 April 2017 (*Minute*), which relate to:
 - (a) Adaptive management; and
 - (b) Mahinga kai (and net gain more generally); and
 - 4.4 More general submissions in terms of section 104, consent duration and lapse periods.

THE CHANNEL DEEPENING PROJECT

- 5 The CDP comprises two main components: channel deepening dredging and disposal, and maintenance dredging and disposal.¹
 - Channel deepening dredging**
- 6 The proposed channel deepening dredging will provide for a 14.5 m draught 'design vessel', capable of carrying 8,000-10,000 twenty foot containers or equivalent units (*TEU*) to access the Port in all tides. This compares with the Port's current ability to service vessels with a draught of up to 12.4 metres, but only at high tide.
- 7 To achieve this, the existing shipping channel needs to be deepened, extended, and widened. It will also be necessary to deepen and enlarge the ship-turning basin and some berth pockets.
- 8 LPC also proposes to deepen the seabed in Te Awaparahi Bay in preparation for the later construction of an approximately 350m bund that is to form the southern perimeter of the first stage of the future reclamation. An in situ volume of approximately 1 million cubic metres is to be dredged in this area.
- 9 Dredging to deepen the channel involves moving an in situ volume of approximately 18 million cubic metres. The sediment dredged as part of these activities is proposed to be disposed of at a 5 kilometre by 2.5 kilometre (1,250 hectare) offshore spoil disposal ground in

¹ See the evidence of John O'Dea and Andrew Purves for a full discussion of the proposed CDP

Pegasus Bay, approximately 4 kilometres from shore at its nearest point and 6 kilometres from Godley Head.

- 10 Channel deepening is proposed to occur in more than one stage. Assuming a 17,000 cubic metre hopper dredge, two stages each estimated to take six months is estimated.

Maintenance dredging

- 11 The depth of the deepened channel, ship turning basin, and berth pockets will be maintained by annual maintenance dredging. The sediment dredged as part of that process is to be disposed of primarily at the proposed offshore maintenance spoil disposal ground. The site is 1.6 by 1.6 kilometres (256 hectares) and is located approximately 2.5 kilometres offshore from Godley Head. The the existing Godley Head disposal ground being retained as a back-up.

- 12 For clarity, material dredged from the Inner Harbour will continue to be disposed of at Gollans Bay.

- 13 The upper annual average estimate of dredge spoil is in the order of 900,000m³ (noting that individual year volumes may be higher than the average).

Project rationale

- 14 As will be outlined in evidence, the CDP has been driven by two key considerations:²

14.1 An upwards trend in New Zealand's import and export volumes; and

14.2 An international trend towards the use of bigger ships.

- 15 In combination, these factors mean it is likely New Zealand will be serviced by the next generation of vessels within the relatively near future.³

- 16 The consequences of Lyttelton Port not being able to accommodate those vessels when they arrive are potentially significant; there is a substantial risk that Lyttelton Port will not be serviced by any or all of the shipping lines currently visiting New Zealand.⁴ Instead:⁵

16.1 Lyttelton Port may become a 'feeder' Port to other Ports that are able to accommodate larger vessels;

² See the evidence of John O'Dea and Simon Munt

³ See the evidence of Simon Munt

⁴ See the evidence of Simon Munt

⁵ See the evidence of John O'Dea, Simon Munt and Michael Copeland

16.2 Shipping companies may choose to 'hub' through the North Island or even Australia instead of visiting the South Island directly; and

16.3 The flow on economic effects of this would be significant for Christchurch, Canterbury, and the wider South Island.

17 In contrast, becoming big-ship capable stands to benefit these economies significantly.⁶

THE LYTTELTON PORT RECOVERY PLAN

18 The Canterbury earthquakes of 2010 and 2011 devastated the Port. The severity of the damage was recognised by the Minister for Canterbury Earthquake Recovery (*Minister*), who directed Environment Canterbury (*ECan*) to develop a LPRP. After an extensive public consultation and hearing process the LPRP was gazetted by the Minister in November 2015.

19 The LPRP recognises the Port's essential role in the recovery and economic productivity of greater Christchurch and the wider region. It also provides planning certainty that a series of interrelated projects can occur, through the application of an enabling set of objectives, policies and rules (at both District and Regional level) applying specifically to the Port.

20 The projects provided for are not limited to simply restoring the Port to its pre-earthquake state. Rather, the LPRP recognises:

20.1 The development time 'lost' in responding to earthquake damage; and

20.2 The opportunity presented for large-scale redevelopment.

21 The CDP is one of the key projects provided for under the LPRP. The others relate to the movement of Port operations to the east, and involve:

21.1 The reclaiming of land at Te Awaparahi Bay;

21.2 The construction of a container terminal on that reclaimed land; and

21.3 The development of Dampier Bay (now named Te Ana) into a public space and marina.

22 The projects are linked in that without the CDP there will likely be no need for the Port to construct the reclamation and container

⁶ See the evidence of Michael Copeland

terminal at Te Awaparahi Bay because freight volumes will not increase.⁷ Without the reclamation, the Port will not have sufficient space to justify the development of Te Ana; the land will be required for Port operations.

23 The planning context of these Applications is explained in full in evidence,⁸ however, LPC submits that particular attention should be paid to:⁹

23.1 Policy 10.1.1 of the Regional Coastal Environment Plan (*RCEP*), which refers to an expedited recovery of the Port including the increasing of shipping capacity through the deepening of the main navigation channel; and

23.2 Policy 10.1.8 which seeks to enable maintenance dredging and dredging to deepen and widen the main navigation channel, ship turning basins and berth pockets.

24 LPC further submits that the Commissioners must be mindful of section 60 of the Greater Christchurch Regeneration Act. The section provides, inter alia, that persons determining an application for a resource consent for a discretionary activity must not make a decision or recommendation that is inconsistent with a recovery plan, including the LPRP.

25 The section also enables LPC to request the Minister to decide whether any decision or recommendation made would be inconsistent with the LPRP.

26 Section 60 is reproduced in full in Appendix 1 to these submissions.

ADAPTIVE MANAGEMENT

27 The Commissioner's fourth Minute dated 21 April 2017 asks whether LPC accepts that the Applications are to be considered by reference to the adaptive management principles outlined in the Supreme Court decision in *Sustain our Sounds Incorporated v The New Zealand King Salmon Company Limited* (*Sustain our Sounds*).¹⁰

28 LPC confirms that *Sustain our Sounds* is applicable.

⁷ See the evidence of Michael Copeland and Simon Munt for a discussion of the consequences of no CDP

⁸ See the evidence of Andrew Purves

⁹ Noting that the proposed offshore disposal grounds were outside of the geographical extent of the LPRP, and so are not mentioned

¹⁰ *Sustain our Sounds Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 40

29 It sets out that any determination of whether adaptive management is appropriate in a given situation involves two considerations. Those relate to:¹¹

29.1 What must be present before an adaptive management approach can even be considered; and

29.2 What an adaptive management regime must contain in any particular case before it is legitimate to use such an approach rather than prohibiting development until further information becomes available.

30 These criteria are considered below, however, at the outset it is noted:

30.1 There are a number of similarities between the potential effects of the proposed CDP and the aquaculture proposed in *Sustain our Sounds*, and the way in which those effects are to be dealt with: both relate to water quality and both propose baseline monitoring as the basis for the adaptive management approach. A central difference, however, is that *Sustain our Sounds* proposed an 'addition' (i.e. fish food) to the environment, while the CDP deals only with naturally occurring sediment which is already present; and

30.2 The CDP is not what might be considered a typical adaptive management process; while channel deepening dredging is proposed to be completed in two stages, it is not necessarily the case that the second stage will be altered based on data gathered from the first stage (although there is some provision for this via the assurance monitoring being undertaken). Rather (and as explained further below), the key feature of the proposed adaptive management is that if the effects of dredging are greater than anticipated based on baseline monitoring, dredging within the immediate area of effect (at least) will cease.

What must be present

31 The Supreme Court was clear that in order for adaptive management to even be considered, there must be:¹²

an adequate evidential foundation to have reasonably assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk.

32 In *Sustain our Sounds*, the test was met by:

¹¹ *Sustain our Sounds* at [124].

¹² *Sustain our Sounds* at [125]

- 32.1 Conservative modelling showing that water quality would not be compromised at initial maximum feed levels;
 - 32.2 Evidence showing that the incidence of harmful algal blooms was unlikely to be affected by the salmon farms, apart from localised changes in some bays; and
 - 32.3 Evidence showing that a trophic shift was unlikely.
- 33 LPC accepts that there will always be some level of uncertainty associated with a project of this nature as we are dealing with a complex and dynamic environment. LPC submits, however, that:
- 33.1 The work it has already completed goes a long way to reducing that uncertainty; and
 - 33.2 There is now enough knowledge to provide certainty as to how any remaining uncertainty will be dealt with, i.e. via statistical analysis and response.
- 34 In respect of the work already undertaken by LPC, and as will be outlined in evidence:
- 34.1 There has been extensive modelling of the Harbour and Pegasus Bay;¹³
 - 34.2 Those models are conservative,¹⁴ and build on and reflect empirical work undertaken in the relevant areas over a number of decades;¹⁵
 - 34.3 The assessments of environmental effects (which relied on the models) were generally that adverse environmental effects are minor or less than minor;¹⁶
 - 34.4 LPC has put in place a comprehensive and extensive monitoring system, which it understands to be far in excess of anything previously used in similar projects in New Zealand.¹⁷ As well as collecting baseline data, the monitoring system will play a key role in risk management once dredging commences;

¹³ See the evidence of Brett Beamsley and Derek Goring

¹⁴ See the evidence of Brett Beamsley

¹⁵ See the evidence of Gary Teear

¹⁶ See the evidence of James Bentley, Robert Greenaway, Shaun Ogilvie, Thomas Shand, Ross Sneddon, Leigh Bull and Andrew Purves

¹⁷ See the evidence of Leonie Andersen

- 34.5 LPC has proposed clear methods of dealing with any unforeseen environment effect detected by that comprehensive monitoring system (and also the risks associated with the modelling being incorrect). Those methods are:¹⁸
- (a) Based on the collection of at least one year of pre-dredging baseline monitoring data, against which the effects of the CDP will be measured;
 - (b) Provide for the setting of 'trigger levels' based on the baseline data collected, along with the expected effects of dredging (against which the assessments of environment effects have been completed); and
 - (c) Require dredging to respond to trigger level exceedances (which are to be determined via statistical analysis), before ceasing altogether in the relevant area if the final compliance level is exceeded.
- 35 LPC therefore submits that the first limb of the *Sustain our Sounds* test is met, and that it is appropriate for the Commissioners to consider an adaptive management regime.

Adaptive management vs prohibiting development

- 36 The outcome of the second limb of the Supreme Court's test in *Sustain our Sounds* depends on an assessment of four key criteria. Those are:¹⁹
- 36.1 The extent of environmental risk (including the gravity of the consequences if the risk is realised);
 - 36.2 The importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);
 - 36.3 The degree of uncertainty; and
 - 36.4 The extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.
- 37 Each of these considerations is addressed below.

Extent of environmental risk

- 38 The Supreme Court in *Sustain our Sounds* found the extent of environment risk was acceptable on the basis that while the gravity

¹⁸ See the evidence of Jared Pettersson (EMMP), David Fox and Leonie Andersen

¹⁹ *Sustain our Sounds* at [129]

of risk was grave if realised, a change in the trophic level of the Sounds was unlikely.²⁰

39 Adverse effects associated with the CDP have generally been assessed as being minor or less than minor.²¹ LPC accepts, however, that those assessments rely on sediment and plume modelling completed as part of the Applications being accurate: if the modelling is not accurate, there is potential that the assessments of effects are not accurate either.

40 While LPC submits the modelling undertaken for these Application is robust accurate and can be relied upon (noting that evidence will be presented which addresses all of the concerns raised by Te Hapū o Ngāti Wheke, Te Rūnanga o Kōkourārata, Ngāi Tahu Seafood, and Te Rūnanga o Ngāi Tahu (*Ngāi Tahu*)),²² it must be emphasised that:²³

40.1 The original modelling undertaken accounted for all of the primary physical processes;

40.2 Subsequently, adding further parameters a the request of submitters made only very miniscule differences to the modelled outcomes, i.e. not enough to alter any of the conclusions reached; and

40.3 Importantly, even if the modelling remains incorrect for any of the reasons expressed by Ngāi Tahu, the actual effects of the CDP would not be significantly different.

41 In practical terms (and linking with the fourth consideration below), however, the risk of the modelling being incorrect does not lie with the environment; it lies instead with the CDP.

42 This is because that in the event the modelled outcomes are wrong, and the effects of sediment and dredge plumes are more widespread than anticipated:²⁴

42.1 Trigger values at the monitoring points which are set at baseline plus addition of the dredging will be exceeded;

²⁰ At [130]

²¹ See the evidence of James Bentley, Robert Greenaway, Shaun Ogilvie, Thomas Shand, Ross Sneddon, Leigh Bull and Andrew Purves, and leaving aside the direct impacts on benthic communities in the disposal grounds as these will be affected regardless of any issues with the modelling.

²² See the summary and response evidence of Brett Beamsley

²³ See the evidence and summary and response evidence of Brett Beamsley

²⁴ See the evidence of Jared Pettersson (EMMP)

42.2 The Environmental Monitoring and Management Plan framework would respond; and

42.3 Tier one, two, or three responses would be required. At minimum, this would require internal notification and investigation, while at maximum would require dredging to cease in the vicinity of the relevant monitoring station.

43 LPC submits that in effect, this means dredging would cease altogether if the sediment plumes are greater than what has been modelled (i.e. significant enough to trigger all of the monitoring stations).²⁵

44 As submitted above, the risk of the models being wrong is therefore not to the environment, but to the ongoing operation of the CDP, LPC submits it is therefore acceptable in terms of the *Sustain our Sounds* adaptive management approach.

The importance of the activity

45 The importance of the CDP has been briefly discussed above, both in the context of it being one of the key interrelated activities provided for specifically by the LPRP, and in terms of the practical and economic costs of not providing for bigger ships to be able to enter the Port.²⁶

46 This is similar to the importance attributed to aquaculture activities in *Sustain our Sounds*, where the Court noted that policy 8 of the NZCPS recognised that aquaculture was important to the social, economic and cultural wellbeing of people and communities.²⁷

47 LPC accordingly submits that the CDP is of great importance.

Degree of uncertainty

48 As above, it is accepted that there will always be some uncertainty associated with a project of this nature. LPC submits, however, that it has reduced uncertainty to an acceptable level via the modelling work completed, the baseline monitoring work underway, and the provision of a statistical method for determining trigger values (albeit that the trigger values themselves have not yet been determined).

49 The Supreme Court in *Sustain our Sounds* also recognised that some amount of uncertainty was inevitable, but considered the level

²⁵ See the evidence of Jared Pettersson (EMMP)

²⁶ See the evidence of John O'Dea, Simon Munt and Michael Copeland

²⁷ At [131]

of uncertainty around the baseline was high. It nevertheless considered this ground satisfied.²⁸

Extent to which an adaptive management approach will sufficiently diminish risk and uncertainty

- 50 The extent to which LPC's proposed approach will sufficiently diminish risk and uncertainty is largely outlined in the submissions above. One further matter, however, is worth expanding on: the establishment of trigger values, including the background plus dredge approach.
- 51 The background plus dredge approach will be explained in full in evidence, but briefly:²⁹
- 51.1 A background plus dredge approach has been adopted (over a background only approach) in order to recognise that the CDP will have some effect on turbidity (i.e. the modelled effect). The point of the modelling is to determine what that effect is when dredging is added to the background;
- 51.2 Tier one, two and three trigger values are set at the 90th, 95th and 99th percentile of background plus dredge modelled turbidity respectively (noting, for contrast, that if trigger values were set at the 90th, 95th and 99th percentile of background, natural turbidity and turbidity associated with the CDP would have to be at less than background levels);
- 51.3 This means that the exceedance of any of the trigger levels do not give rise to any significant adverse effects on aquatic life. Rather they are used to elicit a management response to reduce the risk of such effects developing; and
- 51.4 In effect, they place limits on dredging so that sediment plumes cannot exceed what has been modelled (i.e. the trigger values are all less than the total background plus dredge turbidity) and what the assessments of effects have been based on.
- 52 The combined effect of all of the above is very similar to the factors which the Supreme Court referred to under this heading in *Sustain our Sounds*. There, it was relevant that:³⁰
- 52.1 Good baseline information about the receiving environment would be collected prior to the activity starting (i.e. the baseline information was not required to be complete at the time consents were considered and granted);

²⁸ At [132]

²⁹ See the evidence of David Fox

³⁰ At paras [133]-[138]

52.2 The conditions provided for effective monitoring of adverse effects using appropriate indicators;

52.3 The thresholds were set to trigger remedial action before effects become overly damaging; and

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

Summary

53 In summary, LPC submits that the proposed adaptive management regime for the CDP is appropriate, and that not only does it meet the requirements outlined by the Supreme Court in *Sustain our Sounds*, it exceeds the adaptive management regime proposed in that case.

54 LPC accepts, however, that some uncertainty remains, and in that respect submits the Commissioners must take into account statements made by the Environment Court in *Crest Energy Kaipara Limited v Northland Regional Council*. The Court said:³¹

We are mindful of the findings of the Court in *Director General of Conservation v Marlborough District Council and Ors* (Clifford Bay), that we should not place the applicant in the position of having to have carried out all necessary research before making an application or before a hearing by the court, simply because it is seeking a privilege from the Crown. It would be unfair and unreasonable to hold that an applicant must try to anticipate and research all hypotheses that may occur to someone during the course of the application process.

MAHINGA KAI (AND NET GAIN GENERALLY)

55 The Commissioners' Minute of 21 April 2017 asks whether there is:

[A] resource management relevant provision, or legal precedent, that empowers the Panel to decline the Lyttelton Port Company applications on the ground that it is not "conclusively demonstrated that a net gain in mahinga kai values can be assured".

56 In this regard, reference is made to the recent High Court decision in *Davidson Family Trust v Marlborough District Council*³² which held that the reasoning in *Environmental Defence Society Inc v New*

³¹ *Crest Energy Kaipara Limited v Northland Regional Council* NZEnvC Auckland, A132/2009, 22 December 2009 at [228]-[229], noting the following paragraph refers to the converse situation being that the applicant must establish a sufficient case to persuade the Court the consent should be granted. That is not reproduced, given the matter is discussed at length above.

³² *Davidson Family Trust v Marlborough District Council* [2017] NZHC 52

*Zealand King Salmon Company Ltd*³³ (*King Salmon*) applies to s104(1) of the RMA. This is because the relevant provisions of the planning documents, including the NZCPS, have already given substance to the principles in Part 2 of the RMA. As a result, the High Court outlined that recourse should only be had to Part 2 only if there is invalidity, incomplete coverage or uncertainty in the planning documents.

57 A series of recent Environment Court cases have applied the reasoning in *Davidson*.³⁴

58 On this basis, the Commissioners must in the first instance refer to the various planning instruments that implement Part 2 of the RMA. These will be outlined fully in evidence, but briefly, the New Zealand Coastal Policy Statement (NZCPS), Canterbury Regional Policy Statement (RPS), Regional Coastal Environment Plan (RCEP) (as amended by the LPRP); and the Mahaanui Iwi Management Plan (IMP) are all relevant to these Applications.³⁵

59 While there are references to mahinga kai in all of those documents, they are not necessarily expressed in such a way that assists in answering the question posed by the Commissioners. The exception to this is the RCEP. The relevant provisions of the RCEP are as follows:

59.1 Objective 7.1

Enable present and future generations to gain cultural, social, recreational, economic, health and other benefits from the quality of the water in the Coastal Marine Area, while:

c) Safeguarding, and where appropriate, enhancing its value for providing mahinga kai for Tangata Whenua

59.2 Policy 10.1.5 – Lyttelton Harbour Relationships

Recognise that the recovery of Lyttelton Port, including reconfiguration, will result in some adverse effects on the environment that cannot in all circumstances be avoided or mitigated, but that the owner or operator of Lyttelton Port will undertake recovery activities while ensuring that:

4) Effort is made to achieve a net gain in mahinga kai.

³³ *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38

³⁴ See for example *Envirofume Limited v Bay of Plenty Regional Council* [2017] NZEnvC 12; *Infiniti Investment Group Holdings Limited v Canterbury Regional Council* [2017] NZEnvC 36; *Pukekohe East Community Society Incorporated v Auckland Council* [2017] NZEnvC 27

³⁵ See the evidence of Andrew Purves

59.3 Policy 10.1.9 – Deposition of dredge spoil

Subject to Policy 10.1.10, manage effects of the deposition of dredge spoil at the Spoil Dumping Grounds shown on Planning Map 10.5 by:

- 1) Enabling the deposition of dredge spoil removed during construction activities and the creation of berth pockets; and
- 2) Ensuring that any adverse effects of the deposition of dredge spoil removed during maintenance or capital dredging are avoided, remedied or mitigated; and
- 3) Requiring monitoring of the deposition area so that any adverse effects on the environment, including mahinga kai, can be identified and managed appropriately.

59.4 Rule 10.12 and Rule 10.18 which relate to disturbance associated with dredging and deposition generated from maintenance dredging respectively, both include as a matter of discretion:

The effects on cultural values, particularly mahinga kai.

60 The relevant requirements in the RCEP associated with the applications are therefore that:

- 60.1 Mahinga kai is safeguarded and enhanced where appropriate while enabling benefits to be gained from the coastal marine area (objective 7.1);
- 60.2 An effort is made to achieve a net gain in mahinga kai (policy 10.1.4);
- 60.3 Monitoring in the deposition area will identify and allow management of adverse effects on mahinga kai (policy 10.1.9); and
- 60.4 The effects on cultural values, particularly mahinga kai are considered as a matter of discretion (Rules 10.12 and 10.18).

61 There is no direction in any of the statutory instruments discussed above that a net gain in mahinga kai **must** be demonstrated. Neither is there any invalidity, incomplete coverage or uncertainty in the planning documents which would enable the Commissioners to have recourse to Part 2 of the RMA.

62 LPC therefore submits the Commissioners' question can be answered in the negative: there is no resource management relevant provision, or legal precedent, that empowers the Panel to decline the Lyttelton Port Company applications on the ground that

it is not "conclusively demonstrated that a net gain in mahinga kai values can be assured".

Net gain more generally

- 63 The issue of net environmental gains more generally also arose at the Pre-hearing Meeting, and it was acknowledged that this issue would be discussed in legal submissions. The particular questions raised were:

63.1 Is international best practice required as a matter of law, and

63.2 Would international best practice require achieving net environmental gain?

- 64 While the RMA does not specifically require the adoption of international best practice, it does enable regional councils to make rules requiring the "adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment" in relation to discharges.³⁶ Likewise, consent authorities are able to impose conditions on a resource consent for a discharge or coastal permit requiring the adoption of the best practicable option.³⁷
- 65 The relevant rules do not contain any "best practicable option" requirements, and there is nothing else that would specifically require the adoption of international best practice (generally, or in relation to achieving a net environmental net gain), the RCEP does require that dredging is undertaken in accordance with best practice methods that minimise adverse effects on the environment.³⁸
- 66 LPC has accordingly proposed the implementation of a Dredge Management Plan, Marine Management Plan and Biosecurity Management Plan, in accordance with best practice methods.³⁹ LPC therefore submits that the Applications meet RCEP requirements in this regard.
- 67 There is nothing further would could require LPC to achieve net environmental gain, and in any event, LPC submits there is nothing to suggest that international best practice is the achievement of net environmental gain.

³⁶ Section 70

³⁷ Section 108(2)€

³⁸ Policy 10.1.8

³⁹ See the evidence of Jared Pettersson (EMMP), Andrew Purves and Johan Pronk

LPC position on mahinga kai/net gain

- 68 Regardless of the above, LPC's position is that it is committed to reaching agreement with Ngāi Tahu on the formation of a partnership to achieve a net gain in mahinga kai.⁴⁰
- 69 This fulfils Policy 10.1.4. The policy recognises that recovery of the Port will result in some adverse effects on the environment, and on that basis requires effort to be made to achieve net gain in mahinga kai, noting:
- 69.1 The policy refers to the recovery of Lyttelton Port generally and not specifically to channel deepening;
- 69.2 The policy states that "effort" is to be made to achieve a net gain in mahinga kai; it is not a mandatory requirement;
- 69.3 The evidence is that the proposed dredging and disposal activities are likely to have very low overall effect on mahinga kai;⁴¹ and
- 69.4 Given the above, the removal of the primary disposal ground from Lyttelton Harbour as a direct result of these Applications appears a good option for achieving a net gain in mahinga kai.
- 70 Progress made in this respect will be outlined in full in evidence, but LPC is committed to reaching agreement on a co-governance approach to achieve a net gain in mahinga kai.

GENERAL SUBMISSIONS

- 71 The remainder of these submissions address more general legal issues.

Section 104 consideration of application

- 72 LPC submits that the CDP is consistent with all of the relevant provisions of the documents listed in section 104(1). The reasons for that submission will be outlined fully in evidence.⁴²
- 73 Evidence will also address the small number of instances where the section 42A Report and evidence from Ngāi Tahu express different conclusions.⁴³

⁴⁰ See evidence of John O'Dea

⁴¹ See the evidence of Shaun Ogilvie

⁴² See the evidence of Andrew Purves

⁴³ See the summary and response evidence of Andrew Purves, as well as the discussion of Policy 10.1.4 above.

Consent duration

- 74 LPC has sought consents of 35 years' duration. The reasons for this are outlined in evidence, but in summary the 35 year period for the channel deepening consents allows time for:
- 74.1 The baseline monitoring to be completed;
 - 74.2 There to be some flexibility as to the staging of the channel deepening dredging; and
 - 74.3 The appropriate dredgers to be identified and procured.
- 75 The duration sought in relation to the maintenance dredging consents reflects the cost of the process to LPC.
- 76 LPC submits that consents of 35 year duration are appropriate based on the scale, cost and design of the CDP, as well as the economic benefits associated with it. LPC also wishes to emphasise that a shorter duration would not provide any reduction in adverse effects.

Lapse period

- 77 LPC has sought a lapse period of 10 years for the consents associated with channel deepening dredging, and 12 years for consents associated with maintenance dredging. The longer lapse date for the latter recognises that maintenance dredging will not begin until at least the year after channel deepening dredging has been undertaken.
- 78 LPC submits that factors going against an extended lapse date in *Katz v Auckland City Council*⁴⁴ are not present in respect of the CDP. In that regard:
- 78.1 The CDP is specifically anticipated by the relevant planning documents following very recent amendments to those documents (via the LPRP);
 - 78.2 It is not the case that the relevant parts of Lyttelton Harbour and Pegasus Bay could or would be used for another purpose. The shipping channel would remain in that area regardless of whether these Applications are granted; and
 - 78.3 Clearly identified trends in international shipping and import and export growth means that the need for a deepened navigation channel is foreseeable and highly unlikely to change.

⁴⁴ *Katz v Auckland City Council* (1987) 12 NZTPA 211, 213, cited with approval in *Body Corporate 97010 v Auckland City Council* [2000] NZRMA 529 (CA)

79 With that in mind, LPC submits the considerations in *Crest Energy Kaipara Ltd v Northland Regional Council*⁴⁵ are applicable to the CDP. There, the Environment Court agreed with Crest's submission that a lapse date of 10 years was appropriate for a project of that scale and importance (a proposed tidal energy project), and given the adaptive management and monitoring requirements.

Witnesses and evidence

80 LPC has provided evidence from the following witnesses in support of the Applications:

- 80.1 Peter Davie (LPC);
- 80.2 John O'Dea (LPC);
- 80.3 Johannes Pronk (Dredge operation);
- 80.4 Simon Munt (LPC Marketing);
- 80.5 Mike Copeland (Economic assessment);
- 80.6 Jared Pettersson (Consultation);
- 80.7 Dyanna Jolly (Cultural Impact Assessment);
- 80.8 Brett Beamsley (Sediment and plume modelling);
- 80.9 Leonie Anderson (Water quality monitoring);
- 80.10 David Fox (Statistics for turbidity triggers);
- 80.11 Jared Pettersson (Environmental Monitoring and Mitigation Plan);
- 80.12 James Bentley (Landscape and visual amenity);
- 80.13 Robert Greenaway (Effects on recreation and tourism);
- 80.14 Shaun Ogilvie (Effects on aquaculture and mahinga kai);
- 80.15 Thomas Shand (Effects on coastal processes);
- 80.16 Michael Page (Geotechnical evidence);
- 80.17 Gary Teear (Marine physical environment);
- 80.18 Derek Goring (Effects on Harbour waves and currents);

⁴⁵ *Crest Energy Kaipara Ltd v Northland Regional Council* [2011] NZEnvC 26

80.19 Ross Sneddon (Marine ecology);

80.20 Deanna Clement (Marine mammals assessment);

80.21 Leigh Bull (Effects on marine birds);

80.22 Nevil Hegley (Noise); and

80.23 Andrew Purves (Planning).

- 81 Each of the witnesses that are being heard by the Panel will present a short summary of their written evidence, and make any responses to expert evidence filed by other submitted that are required.



Jo Appleyard
(Counsel for Lyttelton Port Company Limited)

APPENDIX 1 – SECTION 60 GREATER CHRISTCHURCH REGENERATION ACT

60 Councils, etc, not to act inconsistently with Plan

- (1) Subsection (2) applies,—
- (a) in relation to a Plan or an amendment to a Plan notified in the *Gazette* after the commencement of this Part, on and from the date specified in the *Gazette* notice; and
 - (b) in relation to a Recovery Plan notified in the *Gazette* before the commencement of this Part, on and from the commencement of this Part.
- (2) Any person exercising powers or performing functions under the Resource Management Act 1991 must not make a decision or recommendation relating to all or part of greater Christchurch that is inconsistent with the Plan on any of the following matters under the Resource Management Act 1991:
- (a) an application for a resource consent for a restricted discretionary, discretionary, or non-complying activity (whether or not the application was first lodged after the Plan was gazetted);
 - (b) a notice of requirement (whether or not notice was given after the Plan was gazetted);
 - (c) an application to transfer a resource consent under section 135, 136, or 137;
 - (d) an application to change or cancel the conditions of a resource consent under section 127;
 - (e) a review of a resource consent under section 128;
 - (f) the preparation, change, variation, or review of an RMA document under Schedule 1.
- (3) A council, requiring authority, or heritage protection authority may—
- (a) request the Minister to consider and decide whether a decision or recommendation referred to in subsection (2) would be inconsistent with a Plan;
 - (b) appeal in accordance with section 119 against a decision under paragraph (a).
- (4) Lyttelton Port Company Limited may—
- (a) request the Minister to consider and decide whether a decision or recommendation referred to in subsection (2) that relates to the Lyttelton Port Recovery Plan would be inconsistent with that Plan;
 - (b) appeal in accordance with section 119 against a decision under paragraph (a).
- (5) For the purposes of an application for a resource consent for a restricted discretionary activity, the Plan is a matter over which discretion is restricted and section 87A(3) of the Resource Management Act 1991 applies accordingly.