BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

ENV-2016-AKL-000042, 45

UNDER	the Resource Management Act 1991 ("Act")
IN THE MATTER OF:	appeals under section 120 of the Act
BETWEEN:	**NGAI TE HAPU & OTHERS** Appellants
AND	**BAY OF PLENTY REGIONAL COUNCIL** Respondent
AND	**THE ASTROLABE COMMUNITY TRUST** Applicant
AND	**VARIOUS** Section 274 parties

REPLY EVIDENCE OF REUBEN FRANCIS FRASER – PLANNING

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1. **Qualifications and Experience**

1.1 My full name is Reuben Fraser. My statement of evidence of 30 November 2016 sets out my qualifications, experience and commitment to the Environment Court's Code of Conduct for Expert Witnesses including the Environment Court Practice Note 2014.

1.2 Since preparing my evidence in chief I have reviewed statements of evidence on behalf of the Iwi Appellants, the supporting parties, and all of the Joint Witness Statements. I understand that cultural caucusing has taken place, but note that a Joint Witness Statement was not yet available at the time of writing my rebuttal evidence. I have also taken part in the planning caucusing and signed the Statement dated 3 February 2017.

1.3 I do not comment on all matters raised in the evidence and this does not mean I necessarily accept the matters I do not respond to. I have not repeated conclusions that I have already covered in my evidence or in the caucusing statement.

1.4 I address the following matters in this reply:

(a) Effects on Māori

(b) Bow removal

(c) Economic effects

(d) Term of consent

(e) Conditions and the agreements

(f) The planning assessment

1.5 A number of the matters raised in the evidence of the planning experts for the Iwi Appellants in particular will be addressed in the legal submissions for the Council.

1.6 As a general comment, I note that my position in relation to this application has been that it is necessary and appropriate to apply planning concepts in a realistic and workable manner that takes account of the reality of the situation. I think it is safe to assume that no one would have prospectively supported the Rena grounding on Otaiti. However it is something that did occur. We now have to consider, taking into account all of the available information that has been gathered over the past five years, how to achieve sustainable management of the environment under the RMA. This will not necessarily be achieved by applying planning concepts rigidly and without regard to the uniqueness of the present situation. I therefore express general disagreement with the planning evidence of Hamish

Rennie and Vernon Warren, who in my opinion are attempting to apply the planning framework too rigidly to what Mr Warren refers to as a "one off event".[1]

2. **Effects on Maori**

2.1 Mr Warren and Dr Rennie have both reached conclusions that there are ongoing significant adverse effects on:

(a) The mauri of the natural resources of Otāiti and Maketū inshore fisheries;

(b) Value of these resources as taonga;

(c) The relationship of iwi to these resources.

2.2 They conclude that these effects are deep seated and trans-generational.[2]

2.3 Mr Warren also concludes that there are significant and trans-generational impacts on Maori, personal mauri, mauri of the Maketū kaimoana resource, mental health and sense of wellbeing as a result on the impact on Maori cultural and spiritual values.[3]

2.4 Mr Warren at paragraph 60 states that he has considered the iwi evidence and has concluded that there are significant cultural impacts. His conclusions are general. He does not appear to take into account any of the evidence of the supporting iwi parties in reaching his conclusions. He does not appear to take into account the written approval of iwi and hapu groups, or the fact that a number of groups have withdrawn their opposition to the Application.

2.5 Dr Rennie does acknowledge that other groups have either supported the application or are not involved in the proceedings. However he then gives reasons why he thinks those groups may not have opposed the application or have supported it, including resourcing, agreements with the Applicant, concern over what would happen if consents were declined, or "question marks over the degree to which those iwi…have been fully or correctly informed of factual matters".[4] He states that he has not seen any written approvals. Other evidence provided by the Iwi Appellants also canvasses reasons for the stance of other groups.

2.6 In my evidence at paragraph 6.56 and 6.57 I concluded that it was difficult to accept in light of the shift in position of key parties that the Proposal will have universally significant

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1 Evidence of Vernon Warren at Annexure A, page 14.
2 Evidence of Vernon Warren at paragraph 6 (Table) and evidence of Hamish Rennie at paragraph 21 (Table).
3 Evidence of Vernon Warren at paragraph 155(c).
4 Evidence of Hamish Rennie at paragraph 187.

effects on Maori. Rather, I said it was clear that there were mixed views, with some groups being opposed to removal.

2.7 I remain of this view and I do not accept the position of the planners for the Iwi Appellants that broad, all-encompassing conclusions about effects on Māori can or should be drawn from the evidence that has been filed. I also do not consider it appropriate to speculate about the reasons for certain groups not being involved or taking the approach to the application that they have. This is particularly so where groups are not involved in these proceedings and have no opportunity to respond to statements being made about them.

2.8 I accept that when considering effects on Maori cultural and spiritual values it is not a numbers game. However the wider evidentiary and factual context is important.

2.9 The Applicant challenges the nature of the relationship of various groups with Otaiti. It appears that Te Patuwai and Te Whanau a Tauwhau have the strongest relationship and it is not disputed that Te Arawa have a historical association with the reef. I also accept that other groups like the Tauranga Moana iwi and hapu have an association with the reef but it does not appear to be as direct as that of Te Patuwai, Te Whanau a Tauwhao and Te Arawa.

2.10 There are iwi and hapū groups (and individuals) with a relationship with Otaiti who:

(a) Actively support the application. These groups are the Te Kāhui o te Patuwai, Nga Tangata Ahikaaroa o Maketu, Ngati Tunohopu, Ngati Pikiao Environmental Society, Maketu Taiapure Committee, and Ngati Makino Heritage Trust.

(b) Actively oppose the application. These groups include Nga Potiki a Tamapahore Trust, Ngai Te Hapu Incorporated, Te Runanga o Ngati Whakaue ki Maketu and Te Arawa Takitai Moana Kaumatua Forum. These groups are collectively referred to as the Iwi Appellants.

(c) Are no longer or have never been involved in the application process. I note that since my evidence was prepared, Ngai Te Rangi has withdrawn from the process.

(d) Have given written approval to the application. These include Te Patuwai Tribal Committee, Te Runanga o Ngati Awa, Ruihi Shortland, Ngarangi Chapman, Adrienne Paul, Hemi Bennett, Te Whanau a Tauwhao ki nga Moutere Trust, and the Motiti Rohe Moana Trust. The written approvals for the first seven listed are provided in the Notices of Discontinuance filed with the Court, which I would have

expected to have been provided to the expert witnesses for the Iwi Appellants.[5] The written approval of the Motiti Rohe Moana Trust is **attached** to my evidence at **Attachment A**.

2.11 I acknowledge that there are issues of mana (ie mana moana) across the different groups and that there is a great deal of complexity regarding the different groups and dynamics between them.

2.12 Ultimately I consider that the focus of the assessment should be the evidence of (and on behalf of) the groups listed in (a) and (b) as that is all that is directly available for the decision-maker to rely on when it makes its decision on the application in terms of the impact leaving the wreck in situ will have on Maori values.

2.13 As I stated in my evidence at paragraph 6.56, it may be that following consideration of the evidence provided by the opposing groups at the hearing, there is a conclusion reached that the adverse effects on the relationship of those particular groups with the reef are significant. That evidence then needs to be considered and weighed alongside the other evidence before the Court, including alongside that of the supporting parties.

2.14 I have now had the opportunity to consider the evidence filed on behalf of the opposing groups. Several of these briefs are prepared by experts on behalf of the Iwi Appellants. In light of my above comments, when those experts reach conclusions about the effects on "tangata whenua", I read this as being about the effects on the Iwi Appellants, ie those giving evidence. I do not think it is open to those experts to reach conclusions that there will be adverse effects on tangata whenua generally. This is particularly given some tangata whenua have given written approval and others have provided their own evidence in support.

2.15 The key issues raised in the evidence for the Iwi Appellants appear to be:

(a) Whakama caused by the failure, in the event the wreck is not removed, to uphold their kaitiaki responsibilities. Associated with this is the perception that the continued presence of the wreck will continue to create offence.

(b) A reluctance to resume fishing around Otaiti and effects on kaimoana, including in Maketu estuary and other inshore fisheries.

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[5] The Notices for the first five groups / individuals listed state that they "*agree to the grant of the resource consents on the conditions set by the Council decision, as may be amended in accordance with the agreements reached at the Court-assisted mediation on 30 and 31 May 2016 (or to like effect)*". The Notice for Te Whanau a Tauwhao ki nga Moutere Trust states "*In giving this notice Te Whanau a Tauwhao ki nga Moutere Trust acknowledges the Application, with the imposed conditions, sufficiently avoids, remedies, mitigates and/or offsets the environmental, social, cultural, and other effects of concern to it*". Mr Bennett's Notice states "*In giving this notice the Appellant acknowledges the Application, with the imposed conditions, sufficiently avoids, remedies, mitigates and/or offsets the environmental, social, cultural, and other effects of concern to him*".

(c) Potential effects of water contamination on human health and other effects on mental health.

(d) Ongoing oil spills (particularly washing up at Maketū).

(e) The consent process, consultation and the issues and conflicts that have arisen between iwi and hapu groups during the process. This includes issues of mana and mandate.

(f) Impact on environmental and human mauri.

2.16 In my opinion the evidence shows there are likely to be ongoing effects on the Iwi Appellants caused by the Proposal. I cannot however conclude from the evidence I have considered that these will be significant. I explain my reasons below.

Focus on the grounding

2.17 The evidence remains very focussed on the impacts of the grounding and its aftermath. I accept that in the Maori world view it is not easy to separate the effects of the grounding with the ongoing effects caused by the Proposal and it can seem to some to be an artificial distinction. However there is no way to change the past and the focus of my assessment needs to be on the effects of the Proposal. There are ongoing effects on the Iwi Appellants and the evidence demonstrates a change in the way some of the witnesses see and connect with their important areas as a result of the MV Rena grounding. I do not consider that declining the consent could ever fully address the effects of the grounding.

Consultation and mandate

2.18 A focus of much of the evidence is on alleged flaws in the consultation process.

2.19 The evidence of Nga Potiki suggests that there should be a process for recognising and restoring the mana of various groups. Te Runanga o Ngati Whakaue ki Maketu's key concern seems to relate to perceived lack of consultation and issues with the groups that decided to support the application, purportedly on behalf of all Te Arawa ki Tai iwi and hapu. Ngai Te Hapu Incorporated witnesses seem to see the consultation process as flawed because the Applicant did not agree to remove the vessel.[6]

2.20 In my opinion there was an extremely extensive consultation and engagement process undertaken. There are certainly complexities caused by the cultural dynamic of the Bay of Plenty coastline and this does create issues. The evidence of the Applicant shows that

[6] For example Mr Mikaere suggests at paragraph 3.57 that the Applicant has failed to act consistently with the principle of partnership and that this is because it was not willing to have a partnership on the Hapu's "full wreck removal" terms.

there were in fact a number of meetings held with representatives of these groups. In any event those groups have the opportunity through this process to present their views to the Court and have them considered which should go some way to remedying perceived issues with the consultation undertaken to date.

2.21 There are certainly concerns raised about mandate, with different groups saying that their views should be afforded greater weight than they have been, as opposed in some cases to other groups. There is evidence of fractured relationships that have been caused by the lack of unanimity across iwi and hapu.

2.22 However this is not something that can be resolved by the Applicant or the Court, and I do not consider that effects on mana and distress caused by consultation and agreements with other groups to be an effect under the RMA.

2.23 I do think that the conditions should attempt to ensure, to the extent that they can, that the whakama and distress that is present is not exacerbated. The Council (with my support) has in the past sought the removal of conditions that it considered could have this effect.[7] Balanced alongside this is the need to ensure that conditions are workable and appropriate, and I will come back to this when I discuss the evidence regarding conditions.

2.24 I note that the Council suggested that it may be better for the consent holder to administer the Te Arawa fund rather than a Trust that some groups have raised concerns with. This may provide some assurance to those groups that they would have equivalent access to the funds, which I understand is the intention – that all Te Arawa coastal iwi and hapu would have the opportunity to apply for monies. This was something canvassed in the Decision, however being an *Augier* condition the Council could not amend it.

Ongoing effects

2.25 There is some evidence focussed on the ongoing effects the Proposal will have on the Iwi Appellants.

2.26 Tamati Waaka concludes that the most significant effect is the whakama (guilt and shame) and the failure on the part of Iwi Appellants to uphold their kaitiaki responsibilities.[8] This is a reoccurring theme throughout the evidence of the Iwi Appellants. I accept that this is an effect. I also consider that the ability to be involved in the consent process and the conditions of consent which provide for the active involvement of the Kaitiakitanga Reference Group and cultural monitoring will go some way to mitigating these effects,

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7 Refer to the Decision at [146] to [152] regarding the Council's request for deletion of conditions requiring mauri monitoring

8 Paragraph 174 Tamati Waaka

albeit not to the extent that some parties would like. It may be that some improvements could be made to these conditions through the hearing process.

2.27 There is also evidence raising concerns about contamination of fisheries / kaimoana both around Otaiti and further inshore, ongoing oil spills from the wreckage, and potential effects on health caused by contamination in the water. These concerns may also contribute to some extent to the views that the mauri of the reef and surrounds will continue to be affected while the wreck remains on the reef. Mr Mikaere provides evidence that "[i]n generic terms the mauri of Otaiti relates to its value as a fishery"[9], which implies that effects on the fishery are to some extent linked with the potential for effects on mauri (at least for Ngai Te Hapu Incorporated).

2.28 I consider the perception of contamination of fisheries and water and the consequent reluctance to undertake activities that the Iwi Appellants have customarily undertaken as a result of that perception to be a cultural effect of the Proposal. This also extends to related psychological and emotional health effects. However this perception needs to be considered in light of the expert evidence:

(a) The Proposal is not considered to have effects inshore, for example at Maketū. The effects are limited to an area surrounding the wreck. There is a disagreement over the extent of the area affected, with Dr Shaw Mead suggesting it is 300 ha, and the other ecological experts concluding it is approximately 40 ha.[10]

(b) All of the wreck experts agree that there may be some oil trapped in the MV Rena and that as it degrades any pockets of oil might be released, but that any amounts released will be small and rapidly dispersed.[11] I do not consider it to be likely that, if oil is being identified onshore, for example at Maketū, it could be attributed to the MV Rena.

(c) The health experts agree that when the concentrations of contaminants in ocean water are below amounts that can affect human health then they will not cause an impact through direct contact. Dr Francesca Kelly and Peter Cressey have considered the concentrations of contaminants that may affect human health through direct contact and agree that they are below levels that would be of a concern. That evidence is not contested.[12]

(d) The human health experts consider the results of analytes / contaminants measured to date indicate that the kaimoana is safe to eat (even with highest

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9 Evidence of Buddy Mikaere at paragraph 3.15.
10 Refer to the Ecology Joint Witnessing Statement at paragraph 17.
11 Refer to the Wreck Removal / Degradation JWS at paragraphs 23 and 25.
12 Refer to Joint Witnessing Statement – Public Health at paragraph 16(d).

consumption diet modelled). Peter Cressey has noted that the levels are comparable to anywhere in NZ.[13]

(e) All ecological experts agree that the contaminants of concern from an ecological perspective are limited to TBT and copper.[14] There is disagreement between the experts as to the severity of the present effects and the potential effects that could occur in the future. All experts accept there is some level of uncertainty. In general it appears the experts for the Applicant and the Council (Dr Ross, Dr De Luca, and Mr Brodie) consider the effects to be significant in a localised area around the reef, but minor on the reef ecology overall. The ecological expert for the Iwi Appellants (Dr Mead) considers there is insufficient monitoring data to conclude that the effects are minor overall. The experts for the Applicant and Council consider the prospect of significant effects occurring in future to be low (taking into account the wreck degradation evidence) whereas Dr Mead is concerned there could be significant effects. I prefer the evidence for the Applicant and Council in light of their experience both generally and specifically in relation to the reef site and the monitoring (particularly that of Dr Ross) and the fact that all three are relatively consistent in their conclusions.

2.29 There are also a suite of conditions requiring monitoring over the next 20 years and implementation of contingency actions should issues arise, including not only for contaminants but also in relation to cultural effects. For example the conditions require monitoring of mahinga kai and species important to customary needs and identification of circumstances in which measures may need to be implemented to avoid, remedy, or mitigate adverse effects on cultural values at the site and at customary fishing grounds around the site, of Maori who have a relationship to the site (Condition 6). There is little or no discussion of these or any other conditions in the evidence of the Iwi Appellants, including the planning evidence, and this makes it difficult to assess whether they have been fully considered by the various witnesses before reaching their views on effects.

2.30 I note that Dr Donna Clarke and Sir Mason Durie have said in the Human Health Joint Witness Statement that:[15]

(a) If the trauma evident in the submissions by parties that say they don't feel safe eating kaimoana and have emotional effects "can be addressed, through validation of the Maori world view and looking at impacts in terms of wellbeing, then that would go some way towards addressing impacts"; and

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13 Refer to Joint Witnessing Statement – Public Health at paragraph 22(a).
14 Refer to the Ecology Joint Witnessing Statement at paragraph 16(u).
15 Joint Witness Statement – Public Health at paragraphs 35(a), (b).

(b) "If people are unsettled and uncertain then if they are actively involved in the monitoring and active involvement in decision making then that will help with that uncertainty".

2.31 The conditions do provide for involvement, incorporation of Matauranga Maori, and monitoring of impacts on cultural wellbeing, and these need to be taken into account when considering the degree of effects and extent to which they can be mitigated. I accept that improvements could be made to these conditions through the hearing process.

2.32 The evidence also suggests that there is very little that can be done about the existing contamination, including the TBT.[16] Unlike copper, TBT and other contaminants in the sediments are not visible[17] and so could not be easily removed. Leaving aside potential effects on the structure of the reef, the copper is under and within the wreckage and there is potential for it (and other contaminants) to be released and dispersed during wreck removal.[18] These issues have not been discussed by the witnesses for the Iwi Appellants.

3. Bow removal

3.1 The majority of the evidence filed for the Iwi Appellants seeks full removal of the wreck and contaminants.[19] The ability to seek this relief will be dealt with in legal submissions.

3.2 I discussed removal of the bow sections in my primary evidence from paragraph 9.2. I noted at paragraph 9.8 that the only ground for requiring removal would be to further restore natural character, which I did not consider to be necessary, particularly given the damage the removal works would cause, or potentially to mitigate cultural effects. I noted that I had seen no evidence that partial removal would mitigate these effects in a meaningful way, and I concluded that it would be disproportionate to require the removal of those pieces.

3.3 The Iwi Appellants have now provided their evidence, and some of this discusses bow removal, albeit to a limited extent. Mr Waaka concludes that "*[i]n the circumstances here, the best outcome that can be achieved for the iwi and hapu would appear to be the removal of the bow section. It will not completely remove the whakama due to the stern section remaining, but this provides an outcome that in my view would have the greatest chance of averting the significant effects of whakama*".[20] However he remains of the view

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16 Refer for example to the Ecology JWS at paragraph 19(aa)
17 Evidence in chief Jon Brodie, paragraph 39
18 JWS Wreck Removal and Degradation paragraphs 20 and 33(f)
19 Tane Ngawhika raises concerns with the removal of the wreckage and would not support it if it involves destruction of parts of the reef or risks to life (paragraphs 28 and 29). However he does seek removal of the contaminants.
20 Evidence of Tamati Waaka at paragraph 182.

that "*leaving the stern section on the seabed will represent a failure by the iwi and hapu to uphold their kaitiaki responsibilities and be a permanent source of whakama*".[21]

3.4 I do not consider this to be sufficient evidence that the removal of these sections would mitigate the cultural effects in a meaningful way. It is simply a statement that, if it is the best that can be achieved, it should be done. It does not appear from the evidence that it would address in any real way the concerns the various witnesses have about the wreck remaining *in situ*. My view, that requiring the removal of these sections would be disproportionate, remains.

4. Economic effects

4.1 The Iwi Appellants have engaged Dr Fairgray to provide an 'economic perspective' on the application. I have reviewed the Joint Witness Statement of Dr Fairgray and Michael Copeland dated 8 February 2017.

4.2 In my view it is unusual to attempt to quantify cultural effects using an economic framework. I consider the appropriate approach is that outlined in the provisions of the RPS – which is that tangata whenua are capable of identifying and evidentially substantiating their relationship and that of their culture and tradition with sites and taonga of importance to them. That is what they have done through the cultural evidence lodged in these proceedings, and in my view the economic evidence of Dr Fairgray does little to assist the Court in understanding the cultural effects of the proposal.

4.3 I understand that Mr Copeland will be providing reply evidence on behalf of the Applicant and I expect this will discuss these issues in more detail.

5. Term of consent

5.1 Mr Warren in his evidence in chief expresses concern for the potential for further discharges to occur beyond the 10 year consent period, which he maintains would be in breach of s15B RMA[22]. At caucusing both Mr Warren and Mr Rennie disagreed that a 10 year consent term was appropriate and Mr Warren stated that the maximum term (35 years) is appropriate[23].

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21 Evidence of Tamati Waaka at paragraph 176.
22 Evidence of Vern Warren at paragraph 35
23 JWS Planning at paragraph 32

5.2 I note that legal issues regarding the duration of consent will be dealt with in legal submissions, but I wish to reiterate my position, as stated in my evidence in chief[24], that a 10 year consent term is appropriate.

5.3 As I stated in my evidence in chief, it has now been more than 5 years since the grounding and monitoring and response conditions will apply for a further 10 years, taking the total time since the grounding out to approximately 16 years. A bond of $6.35 million will apply throughout that time. The conditions also provide (condition 18.11) for a review report to be undertaken by the Applicant no later than 1 year before the consents expire. The purpose of the review report is to summarise and interpret the monitored effects and to determine whether there are, or likely to be, ongoing significant adverse effects on the environment after the expiry of the consent, and if so, any remediation work and/or measures to address those. That work would be expected to be undertaken before the expiry of the consent.

5.4 At the expiry of the consent, the amount of the bond will be reduced to $2.9 million (Council will also have the Letter of Undertaking for $5 million mentioned in my evidence in chief) and will undertake monitoring at Years 15 and 20 which is provided for in the bond conditions. As such, Council will monitor and address any effects out to say 2037. As such, I remain of the view stated in my evidence in chief that "I consider the term will be sufficient to ensure there are controls in place to provide for unforeseen long-term effects for a period of 20 years from the commencement of the consent".

6. Conditions and Agreements

6.1 As I have mentioned, there is little analysis or discussion in the evidence of the Iwi Appellants of the conditions of consent, including when reaching conclusions on the effects of the Proposal.

6.2 Dr Rennie includes a section on consent conditions, but notes that his review is primarily of a technical nature, moving to the substantive only in relation to cultural elements".[25] I respond to each of the issues he has raised below:

(a) Dr Rennie is less concerned about the size of the KRG and says he is "familiar with processes where there may be 12-15 members and in situations where there may be substantial differences and external conflicts between them".[26] He is concerned to avoid further cultural damage being caused via decisions on membership. I have also raised concerns about the size of the KRG. While I agree

[24] At paragraphs 9.11-9.16
[25] Evidence of Rennie at paragraph 220.
[26] Evidence of Rennie at paragraph 221.

that the conditions should avoid causing cultural damage, it is very important given the role of the KRG in the conditions in providing advice to the Council and Consent Holder, that it is a functional group. It may become very difficult to act with the advice of the KRG if there are "substantial differences and external conflicts between" it and I consider the larger the group the more these issues may arise. I also consider that regardless of how inclusive the group intends to be, there will still be people or groups that do not consider they are being adequately represented.

I note that provision was made in the conditions for engagement with other Maori representatives outside of the KRG process (Condition 3.8). This was to allow for groups that either might not be represented on the KRG or, for whatever reason, did not wish to participate as part of the KRG. The condition provides for a register of those parties, for information will be provided to them at the same time as the KRG, and for them to provide feedback on that information to the Consent Holder and/or the Regional Council.

(b) Dr Rennie comments on the frequency of KRG meetings.[27] There is sufficient scope in the conditions for the KRG to meet as regularly as is required (refer Condition 3.5 a) which states that as a minimum, meetings shall be held at a sufficient frequency to ensure that the obligations of the KRG are met, but in any event shall not be less than one time per year).

(c) I agree that it would be useful for a draft MOU to be completed in advance of the hearing, as do all of the planning witnesses (refer paragraph 35(b) of the Planning Joint Witness Statement).

(d) Dr Rennie says he has difficulties with the logic of the KRG existing for only 10 years when there is a bond in place for ongoing monitoring for a subsequent 10 years. All conditions except for those relating to the bond, and including those relating to the operation of the KRG and ITAG, cease at the 10 year expiry of the consent. My opinion, that a 10 year consent is sufficient based on the evidence, has not changed. Monitoring after that expiry is precautionary. I do not consider there to be a need to keep the KRG operating to inform the monitoring beyond the term of consent.

(e) I agree that the ITAG conditions could be written to be clearer that the KRG could have a member on the ITAG in addition to the required matauranga Maori expert (refer paragraph 35(d) of the Planning Joint Witness Statement). While the KRG

[27] Evidence of Rennie at paragraph 222.

could recommend a matauranga Maori expert I think issues could arise if it was the KRG's role to appoint them, particularly if there were issues with reaching agreement in the KRG on who that expert should be.

(f) The conditions require the costs of implementing response or contingency actions are proportionate to the benefit likely to be achieved (Condition 9.10). This is one of a number of matters that would be taken into account. I think that the matters set out in Condition 9.10 are entirely appropriate and reasonable considerations.

Agreements

6.3 Dr Rennie appears to think that the conditions of consent are "tied to the agreements that the owner has reached with several iwi and other Maori organisations".[28] He considers that those agreements need to be open to view and assess in order for them to be considered as remedying or mitigating effects.

6.4 The Council is not a party to these agreements and I have not seen them. I have been actively involved in the drafting of the consent conditions, both as one of the Reporting Officers processing the application and at the caucusing that took place during the Commissioner hearing. I did not rely on any agreements throughout this process and nor then did I consider them as remedying or mitigating the effects of the Proposal. The conditions achieve this, and they are transparent.

6.5 While it appears that groups have concerns with the agreements reached throughout this process with other groups, I do not consider their contents to be relevant to the application or conditions currently being considered.

6.6 The intention is for the conditions to be appropriately open and not confined to outcomes that accord with agreements. For example I have already referred to the specific mauri monitoring condition which Council requested be deleted in order to ensure that rifts between groups were not further exacerbated by including a requirement that appeared to relate solely to the Applicant's settlement with particular submitters (and was opposed by other groups). In deleting the condition the Commissioners stated that "[i]f the condition was part of the Applicant's settlement with Te Arawa ki Tai it could be incorporated within a side agreement, rather than being included in proposed conditions of consent which apply to all Māori".[29]

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[28] Evidence of Rennie at paragraph 159.
[29] Decision at [152].

6.7 Further improvements could be made to the conditions. Greater specificity in the KRG condition, may go some way to alleviating concerns that any membership, for example, has been somehow guaranteed through a side agreement.

7. The planning assessment

Otaiti wide assessment

7.1 Mr Warren considers that my approach of "reviewing consistency of the policy against the whole of Otaiti rather than in terms of that part of the reef most impacted…has the effect of diluting the relationship between environmental impacts of the Rena grounding and the environmental objectives and policies". His view is that the policy analysis should emphasise the impacted area because, even taken on its own, the scale of the event and proposal is very significant".[30]

7.2 I have some difficultly following Mr Warren's reasoning. In terms of environmental impacts and the appropriate approach to assessing, for example, ecological effects, I have relied on the evidence of the relevant experts. They have the expertise to advise on the appropriate scale of assessment for effects on things like ecosystems. I also do not understand his reasoning regarding the scale of the event and the proposal being significant, and why this would affect my assessment. I have tried in my evidence to comment on the immediately impacted area where appropriate (for example paragraph 7.12 of my evidence in chief).

7.3 I also do not agree that my role in this process is to assess the consistency of the grounding of the MV Rena with the policy framework. I think we could all agree that a ship crashing into a significant reef would be inconsistent with the policy framework, but I am not sure that takes us very far.

7.4 In terms of the ONFL, ONC and IBDA objectives and policies in the NZCPS, RPS, and Proposed Regional Coastal Environment Plan, I note that the classification and attributes of the reef are set at an Otaiti wide scale (or wider). I therefore consider it entirely appropriate to consider the effects and consistency with that policy framework on an equivalent scale.

"Avoid" policies

7.5 Mr Warren concludes that the Proposal is contrary to the "avoid" policies, for example NZCPS Policy 11,[31] Policy 13 and Policy 15. In relation to the latter, he disagrees with my

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30 Evidence of Warren at paragraphs 84 and 85.

31 Mr Warren focusses on Policy 11(b), which is the requirement to avoid significant effects.

comments that the level of inconsistency with the policy is expected to reduce over time as the reef continues to recover, and instead concludes that abandonment is permanently inconsistent with this policy.[32] My conclusion was based on the expert landscape evidence of John Hudson and it is not clear from his assessment what evidence Mr Warren is basing his alternative position on.

7.6 He considers Policy NH 4 of the Proposed Regional Coastal Environment Plan and notes that the language of the policy – "must be avoided" is "unequivocal".[33] He concludes that the Proposal is contrary to the policy.

7.7 It is difficult to conclude that the Proposal is entirely consistent with these policies, particularly in its present state (noting that the evidence is that the reef is expected to continue to recover over time). However I also do not consider that declining the Proposal would achieve consistency with these policies. In a situation where the Court is considering a prospective application to undertake an activity in the future that would not avoid adverse effects on outstanding attributes, the decline of the consent sought will ensure those effects are avoided, because the activity will not take place. In this case, declining the consent will not avoid effects. Removal of the wreck and contaminants (to the extent it can be done) would also not be consistent with the policy direction as it would not avoid adverse effects.

Precautionary Approach

7.8 Mr Warren concludes that the "ultimate precautionary approach would be to refuse consent to abandon the Rena".[34] I do not agree that refusing consent in the circumstances could possibly be consistent with a precautionary approach. I do not consider an unmanaged environment with no monitoring or contingency requirements to be a more precautionary outcome than a consent with comprehensive adaptive management conditions. Nor do I consider further removal works, even if they could be an outcome, to necessarily be precautionary in light of the evidence I have considered regarding potential for damage and spread of contaminants.

Reuben Fraser

17 February 2017

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32 Evidence of Warren Annexure A, page 6.
33 Evidence of Warren Annexure A, page 18.
34 Evidence of Warren Annexure A, page 4.