

IN THE MATTER of the Local Government Act 2002

AND IN THE MATTER of

**THE BAY OF PLENTY REGIONAL COUNCIL  
PROPOSED FLOOD PROTECTION AND DRAINAGE BYLAWS 2020**

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**REPORT AND RECOMMENDATIONS OF THE HEARING COMMITTEE**

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**HEARING COMMISSIONERS:**

- Andrew von Dadelszen, Councillor and Hearing Committee Member (Chair)
- Kevin Winters, Councillor and Hearing Committee Member
- Norm Bruning, Councillor and Hearing Committee Member
- Bill Clark, Councillor and Hearing Committee Member
- David Love, Councillor and Hearing Committee Member
- Toi Kai Rākau Iti, Councillor and Hearing Committee Member

Date: 11<sup>th</sup> November 2020

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## 1.0 INTRODUCTION AND BACKGROUND

### 1.1 INTRODUCTION

- (1) The Hearing is run under the provisions of the Local Government Official Information and Meetings Act 1987.
- (2) This report and recommendations relate to Proposed Flood & Drainage Bylaws 2020.
- (3) The Bylaws are necessary for the protection and efficient operation of flood protection and drainage schemes managed by Council. Flood protection and drainage scheme assets are constructed to prevent damage, danger and distress to the community from river flooding and problems associated with a lack of drainage. It is crucial that these assets are functioning properly when needed.
- (4) The Bylaws do not apply to any privately owned/managed drainage or flood protection systems or those that are managed by other local authorities.
- (5) Under these Bylaws, Council issues “Bylaw Authorities” to allow landowners to carry out works within Bylaw Applicable Areas.
- (6) An internal review of the ongoing effectiveness of the existing Bylaws has now been completed. In most cases it has been decided that the existing Bylaws rules are effective for protection and effective operation of the flood protection and drainage scheme assets managed by Council.
- (7) However, in the ten years since the last Bylaw was developed, there have been new developments in geotechnical thinking; a number of significant flood events; and progress in scientific fields such as climate change, water management and flood management. All of which Council have taken into account when reviewing these Bylaws.
- (8) The review has highlighted some additional activities that when carried out in close proximity to assets, could have a detrimental effect on the integrity of these assets.
- (9) These activities include repeated ploughing, some methods of fence and pole installation, and the installation of intensified infrastructure for horticulture close to stopbanks.
- (10) **Area covered:** Proposed new Bylaws outline the need for prior written authority from the council to undertake these activities and could have a significant impact on some landowners near assets in the lower reaches of the Rangitāiki, Tarawera and Kaituna Rivers in particular.
- (11) **What the proposed change does: Under section 155 of the LGA 2002 the Bylaw review has to consider:**
  - (a) That Bylaws are the most appropriate way of addressing a perceived problem.
  - (b) That the proposed Bylaws are the most appropriate form of Bylaw, and
  - (c) That these Bylaws are not inconsistent with the New Zealand Bill of Rights Act 1990
- (12) **Appropriateness of Bylaws to address a perceived problem** - Under s155(1) of the LGA, Council must determine whether a Bylaw is the most appropriate way of addressing a perceived problem.
- (13) To that end, alternative methods to using Bylaws to ensure protection and efficient operation of the flood protection and drainage systems, have been investigated. These include:
  - (a) Adding rules to the Regional Natural Resources Plan
  - (b) Adding rules to a District Plan
  - (c) Developing Strategy/Collective Agreements
  - (d) Develop Bylaws under the Local Government Act

Bay of Plenty Regional Council considers the continued use of a Flood Protection and Drainage Bylaws document to be the most effective method for ensuring the protection and ongoing efficient operation of the schemes.

The Local Government Act 2002 s149 outlines the power of regional councils to make Bylaws "...for the purpose of managing, regulating against, or protecting from, damage, misuse or loss..." of flood protection and flood control works.

The Bylaw Authority method is administratively quick, reasonably priced and effective. All of the other alternative methods have inherent monetary disadvantages and council considers the ongoing use of these Bylaws is the most effective for our ratepayers.

- (14) **Most Appropriate Form of Bylaw** – Under the LGA 2002, council must determine whether the Bylaw are in the most appropriate form (e.g. standalone, amendment to existing document, consolidation with other Bylaws).

There are a number of reasons why Council believes a standalone, written document is the most appropriate form of Bylaw (though this is an amendment of the previous 2008 Bylaw).

- Hold all of the regulations in one place and is easily accessible
- The document focusses only on the Flood Protection and Drainage Bylaw and cannot be confused with others
- The document is relatively short and concise and can be easily printed or referenced in its entirety
- Becomes a repository for all the legal matters associated with Flood Protection and Drainage.

- (15) **NZ Bill of Rights Act 1990** – Under section 155(3) of the Local Government Act 2002 Council must determine that the Bylaw are not inconsistent with the New Zealand Bill of Rights Act 1990. Council considers the Bylaw as proposed here, are not inconsistent with the Bill of Rights Act 1990.

- (16) **Amended Bylaw** – The Proposed Flood Protection and Drainage Bylaws 2020 has a number of amendments from the 2008 document. This is due to new developments in geotechnical, hydrological and engineering thinking; Council learnings from a number of significant flood events; and the progress made in scientific fields such as climate change, water management and flood management.

- (17) **Bylaw Authority Fees** - The existing Bylaws contain a schedule of fees including a Standard Application Fee. A Bylaw authority is the written approval from Bay of Plenty Regional Council to carry out a work or activity that would otherwise contravene the Bylaws. Council intend to waive the application fee in the proposed Bylaws 2020, to encourage affected landowners to contact the Council when they wish to undertake activities outlined in these Bylaws, and to ensure these activities do not compromise the integrity of the flood protection and drainage systems. Fees would only be charged for technical review and expert advice. The fees will be set as part of the Annual Plan 20/21 process – as an update to the Revenue and Finance Policy.

- (18) **The new schedule of Bylaw authority fees is recommended as follows:**

Proposed Schedule of Fees	All fees are GST inclusive
Standard application fee	Written authority applications: \$0.00
Other functions or services	Written authorities are not routine and require technical investigation (e.g. engineering design, advice, surveying and/or site visits) will be charged at rates set under the Council's LTP.

- (19) **Public notification of the proposal** to amend the Bay of Plenty Regional Council Floodway and Drainage Bylaw 2008 occurred on 27<sup>th</sup> March 2020 for a period of submissions closing on 28<sup>th</sup> April 2020. Informal engagement with various sectors, territorial authorities and landowners was held before this, in the final four months of 2019.
- (20) **Covid-19 emergency** - The Local Government Act 2002 requires Council to undertake a comprehensive review of its Bylaw ten years after they were last reviewed (section 159); and complete the review within a two-year time frame from that review date. If the Bylaws were not reviewed, as required under the Act, then they would be revoked under LGA section 160A. This was the premise under which staff continued consultation of the Bylaw under the 2020 COVID-19 emergency.  
  
Ministers approved progressing temporary legislative changes to address issues arising from the COVID-19 emergency. *The COVID-19 Response (Further Management Measures) Legislation Act 2020* temporarily suspends the provision that automatically revokes Bylaws after 2 further years if they were not renewed within the required period.
- (21) **Process to amend Bylaws under the Local Government Act 2002** - Before public notification (and COVID-19 lockdown), letters were also sent to potentially affected parties including landowners, territorial authorities, affected government departments, multiply owned Maori landowners and iwi.
- (22) An investigation was initiated in April 2020 to engage with targeted iwi, to develop how traditional cultural practices and waahi tapu areas may be affected by these new Bylaws, and whether specific clauses in this Bylaw would be appropriate.

## 1.2 BACKGROUND TO THE FLOOD PROTECTION AND DRAINAGE BYLAW

- (23) The Soil Conservation and Rivers Control Act 1941 (SCRCA) gave former catchment boards, and subsequently the Bay of Plenty Regional Council, the statutory function to manage land use within the region to prevent and mitigate damage caused by floods and erosion. Targeted rating districts were established for communities prepared to pay to receive the benefits of this function. In response, the Council and its predecessors developed a system of flood protection and flood control works including stopbanks, groynes, vegetation plantings, floodways and drainage schemes.
- (24) These assets controlled and/or managed by the Council, are valued at approximately \$350m and have an annual maintenance expenditure of approximately \$12m. In 2002, the Council adopted the Bay of Plenty Regional Council Floodway and Drainage Bylaws to ensure these flood protection and control schemes (including drainage networks) were appropriately protected from damage caused by third parties.
- (25) This Bylaw does not apply to any privately owned/managed drainage or flood protection systems, nor those that are managed by other local authorities.
- (26) While the purpose of this Bylaw is asset protection, the Bay of Plenty Regional Council will follow good environmental practice in its application. This Bylaw is intended to be used in conjunction with current national direction, other Bay of Plenty Regional Council statutory documents, and current industry standards.
- (27) The Minister for the Environment has released the *Essential Freshwater* management package. Essential Freshwater outlines proposed freshwater management mechanisms for driving improvements in water quality and water allocation.

- (28) Of particular note is the risk that pump stations operated by the regional council may be unable to operate in the future if the agricultural drainage water these pumps discharge to the receiving environment cannot meet the water quality standards set by the Minister.
- (29) As a minimum Bay of Plenty Regional Council would expect landowners to be complying with their current industry standards.
- (30) Further development of Bylaws for the protection and control of council strategic assets has occurred over 20 years – with two reviews within that period, 2008 being the last review date. The Local Government Act 2002 requires that these Bylaws are reviewed every ten years.
- (31) The intent of this Proposal is to ensure these Bylaws are in a *form* that is [still] the most appropriate way of addressing the perceived problem (LGA, s155). And that the intent of the rules is still fit for purpose; informed by the latest data and science; informed by experience from previous flood events and address present issues and risks.
- (32) The problem, as stated above, is the protection of flood protection and flood control assets. To achieve this the following high-level amendments were proposed:
- No stock access to any drain, or the bank of any drain, without prior written authority
  - Increased distances for Area 3 of defences against water in which certain activities need the written authority – especially ground disturbing activities like digging, fencing, foundations, ploughing.
  - More robust rules around erosion protection works.
  - Additional clauses introduced for certain activities in areas of pumiceous soils i.e. Kaituna, Rangitāiki and Tarawera.
  - Additional clauses for floodways, spillways and ponding areas.
  - The introduction of new floodways

### 1.3 PROPOSED AMENDED BYLAW

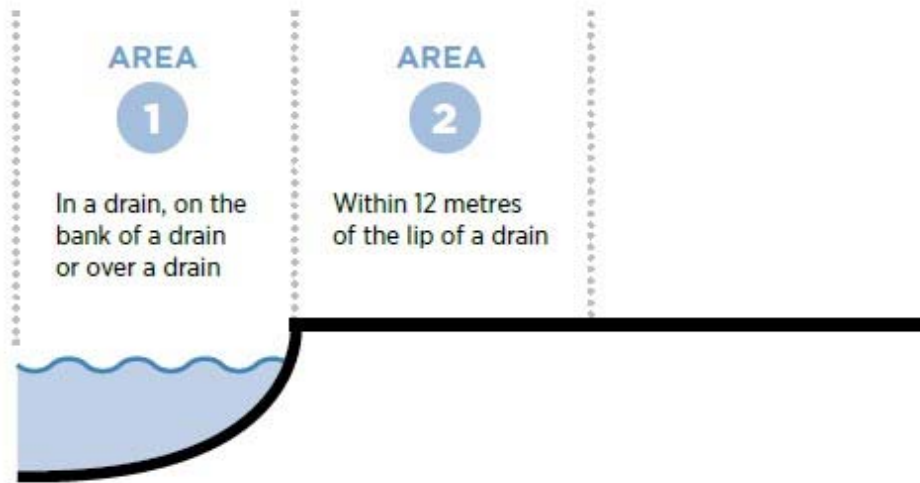
- (33) The Flood Protection and Drainage Bylaws 2020 have a number of amendments from the 2008 document. This is due to new developments in geotechnical, hydrological and engineering thinking; Council learnings from a number of significant flood events; and the progress made in scientific fields such as climate change, water management and flood management.

#### **APPLICATION OF PART I**

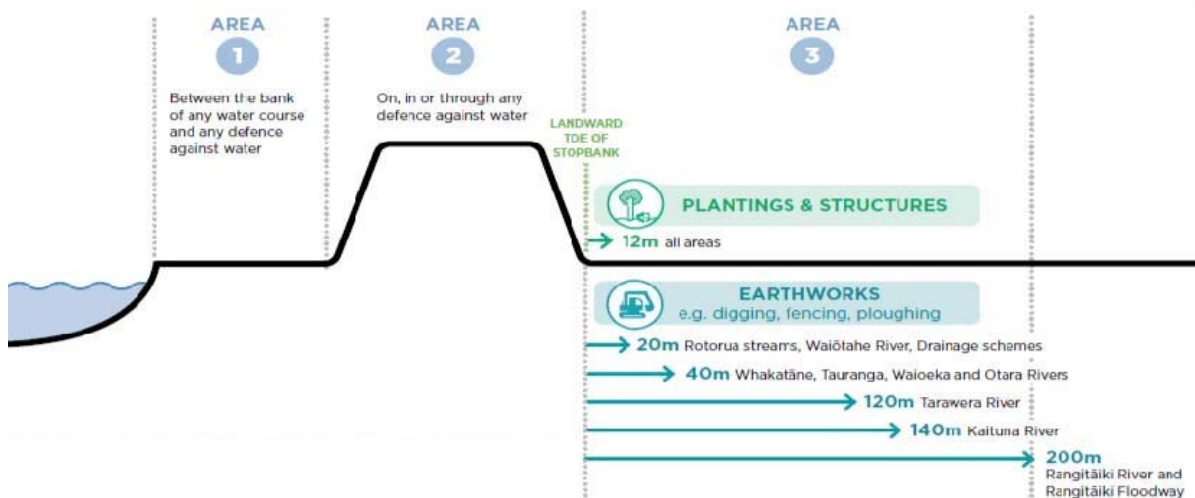
- (34) Part I of these Proposed Bylaws applies to all scheme assets including: stopbanks, erosion protection works, bunds, crossings, drains, pumps, structures and other scheme assets which are managed by, or under the control of, the Council.
- (35) Part I does not apply to stopbanks, erosion protection works, crossings, drains, pumps, structures and other scheme's assets which are not managed by, or under the control of, the Council.
- (36) Part I does not apply to any river edge where there are no defences against water, erosion protection, or any other Council asset.

**TABLE 1: DEFENCES AGAINST WATER - DRAINS**

**FLOOD PROTECTION AND DRAINAGE BYLAW  
APPLICABLE AREAS – DRAINAGE SCHEME DRAINS**



**TABLE 2: DEFENCES AGAINST WATER - STOPBANKS**



**TABLE 3: THE SPECIFIED MARGINS FOR THE BYLAW APPLICABLE AREAS**

Waterway	Margin distance
Rangitāiki River (including Rangitāiki Floodway)	200m
Tarawera River	120m
Kaituna River	140m
Rotorua streams (Waingaehe, Puarenga, Utuhina, Mangikakahi, Otamatea, Waiowhiro, Ngongataha, Waitetī, Ōhau Channel)	20m
Whakatāne, Tauranga, Otara and Waioeka	40m
Drainage scheme canals, drains and canals	20m



## PART II — ADDITIONAL BYLAW APPLYING TO THE LOWER RANGITAIKI RIVER, THE LOWER TARAWERA RIVER AND THE LOWER KAITUNA RIVER

- (37) The lower reaches of the Kaituna, Rangitāiki and Tarawera Rivers have layers of pumiceous soils that are more susceptible to seepage and piping failures beneath the stopbanks during flood events. The purpose of these specific clauses is to minimise the risk of such failures occurring.

**TABLE 4: SOIL PROFILES FROM NEAR THE CONFURENCE OF WAIARI STREAM & KAITUNA RIVER**



- (38) Part II of this Bylaw does not apply to stopbanks, bunds, bank protection works, crossings, drains, pumps, structures and other scheme assets that are not managed by or under the control of the Council.
- (39) No person will, without the prior written authority of the Council undertake any of the following activities:
- Digging, maintenance or any other earthworks including building foundations:
    - within **200 metres** of the landward toe of the prescribed **Rangitāiki River stopbanks and the Rangitāiki Floodway stopbanks**
    - within **120 metres** of the prescribed **Tarawera stopbanks**
    - within **140 metres** of the prescribed **Kaituna stopbanks**

**Note:** For the purpose of *small-scale, backyard cultivation*, disturbing soil to a depth of 300mm is permitted. Any digging deeper than 300mm into the soil profile cannot be carried out except with prior written authority of Council.

- Undertake earthworks for the fencing, replacement fencing, or for the purposes of intensifying infrastructure including (but not limited to), artificial or natural shelter belting, subsoil irrigation or drainage:
  - within **200 metres** of the landward toe of the of the prescribed **Rangitāiki River stopbanks and the Rangitāiki Floodway stopbanks**
  - within **120 metres** of the prescribed **Tarawera stopbanks**
  - within **140 metres** of the prescribed **Kaituna stopbanks**

**Note:** Anyone undertaking new fencing or replacing old fencing within the Bylaw Applicable Area will need to work with Council on the best practice methods for fencing, which may include, but not limited to, filter collars for posts.

### **PART III — ADDITIONAL BYLAW APPLYING TO FLOODWAYS, SPILLWAYS AND PONDING AREAS**

(40) Part III of this Bylaw applies to Floodways, Spillways and Ponding areas, specifically:

- **Ngongataha Floodways** (refer to Schedule 2 for map)
- **Waingaehe Floodway** (refer to Schedule 3 for map)
- **Paraiti Floodway** (refer to Schedule 4 for map)
- **Rangitāiki Floodway** (refer to Schedule 5 for map)
- **Te Rahu ponding Area** (refer to schedule 6 for map)
- **Waioeka Floodway** (refer to Schedule 7 for map)

#### **FLOODWAYS AND SPILLWAYS**

(41) No person shall, **without the prior written authority** of the Council in respect of the **Floodways or spillways**:

- I. Plant any tree or construct any dwelling or structure or deposit any material in the Floodway or spillway that is likely, in the opinion of the Council, to obstruct the free flow of water.
- II. Remove any plant cover from the ground within 20 metres of any spillway structure.

**Explanation:** For the avoidance of doubt, plant cover for Part III means any type of grass or low-lying ground cover. This type of planting ensures ground protection of the floodway/spillway area without inhibiting the free flow of water in a flooding situation.

- III. Carry out any earthworks or ploughing within 20 metres of any spillway structure.

#### **TE RAHU PONDING AREA**

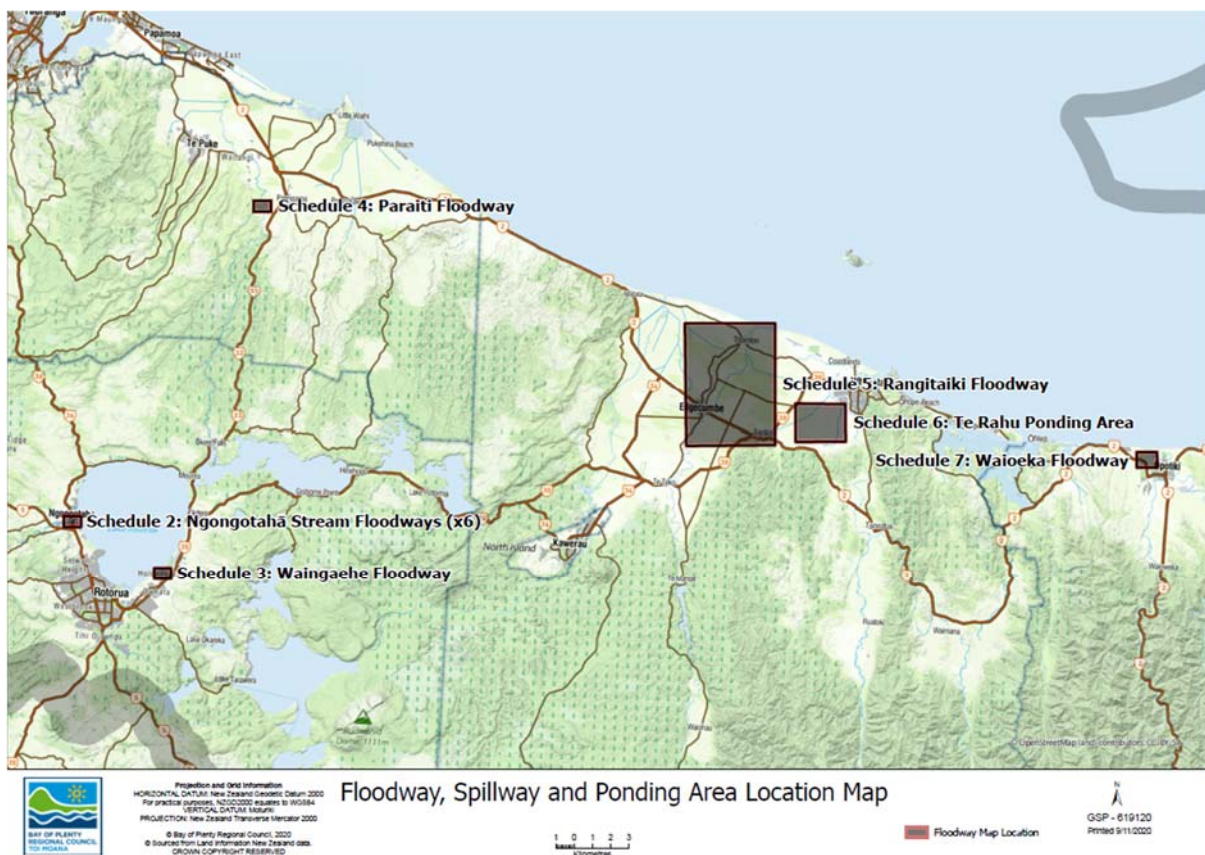
(42) No person shall, **without the prior written authority** of the Council in respect of the **Te Rahu Ponding Area** (refer to Schedule 6 for map):

- a. Remove any plant cover from the ground within 20 metres of the spillway structure.
- b. Carry out any earthworks or ploughing within 20 metres of the spillway structure.
- c. Construct **any dwelling** within the Te Rahu Ponding Area.

**Note:** any farm buildings that are not dwellings will have no controls over floor levels and may be partially inundated by ponded water during flood events.



## Schedule 1 –FLOODWAY, SPILLWAY & PONDING AREA LOCATION MAP



## Schedule 2 – NGONGATAHĀ STREAM FLOODWAYS



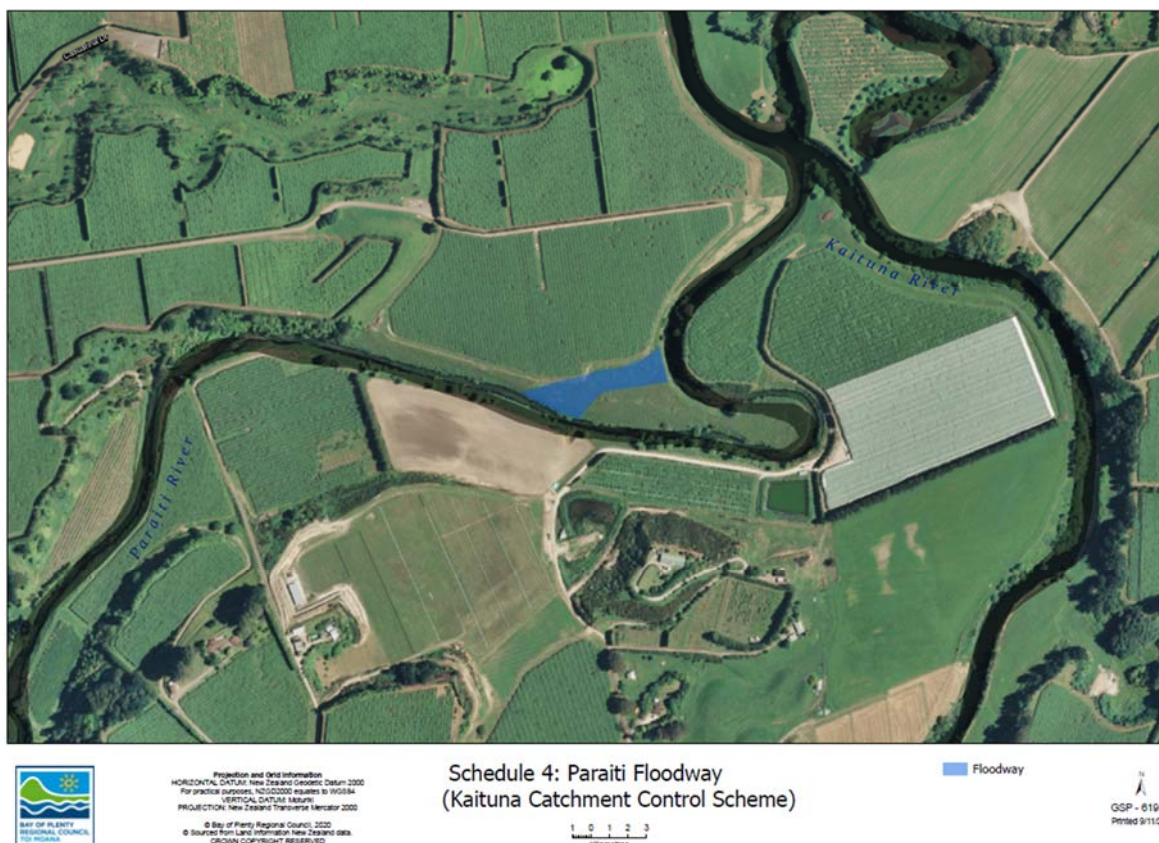


## Schedule 3 – WAINGAEKE FLOODWAY



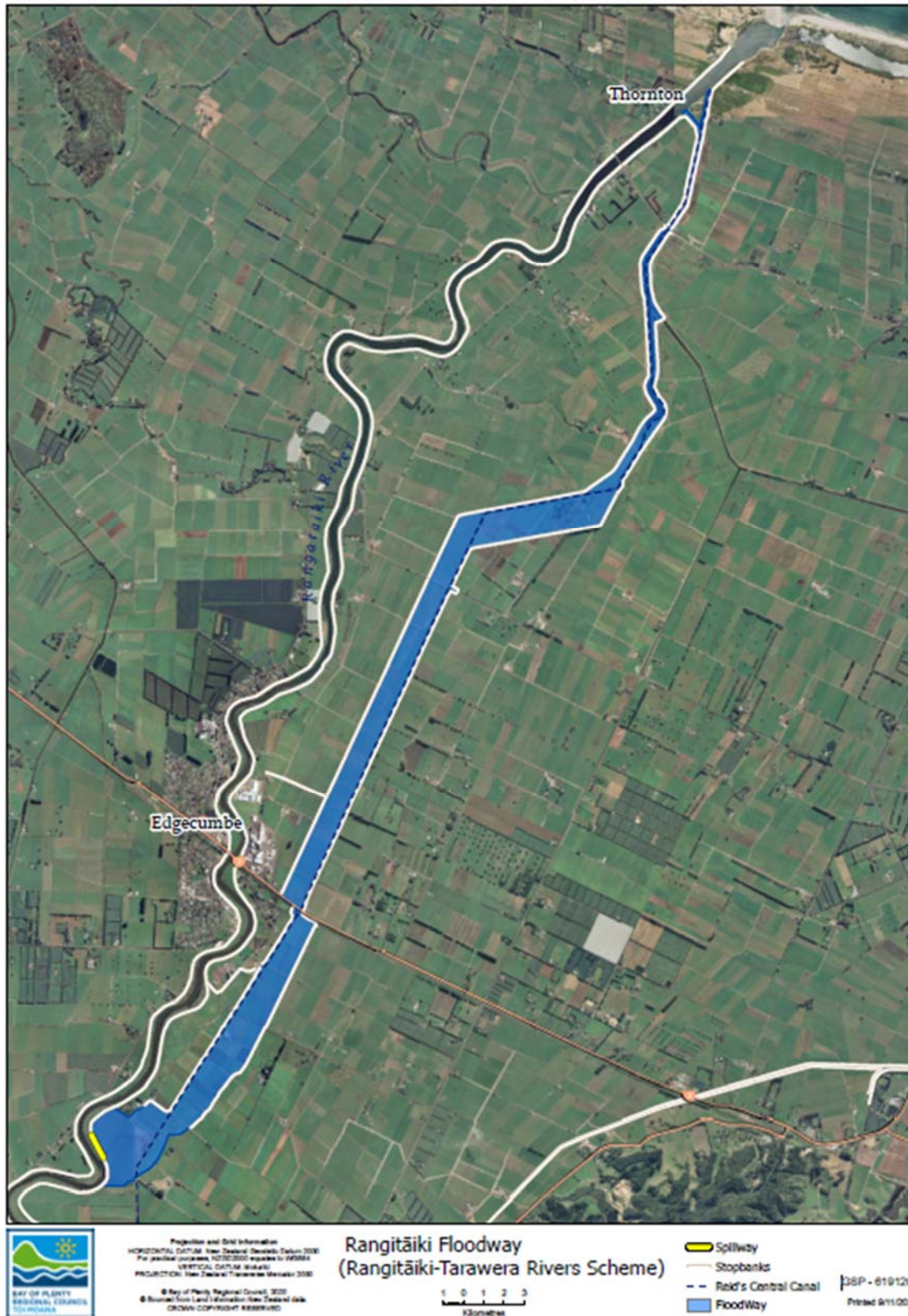
## Schedule 4 – PARAITI FLOODWAY (formally called MANGOREWA FLOODWAY)

**NOTE:** The Mangorewa Floodway has been renamed the “Paraiti Floodway” to ensure accuracy.



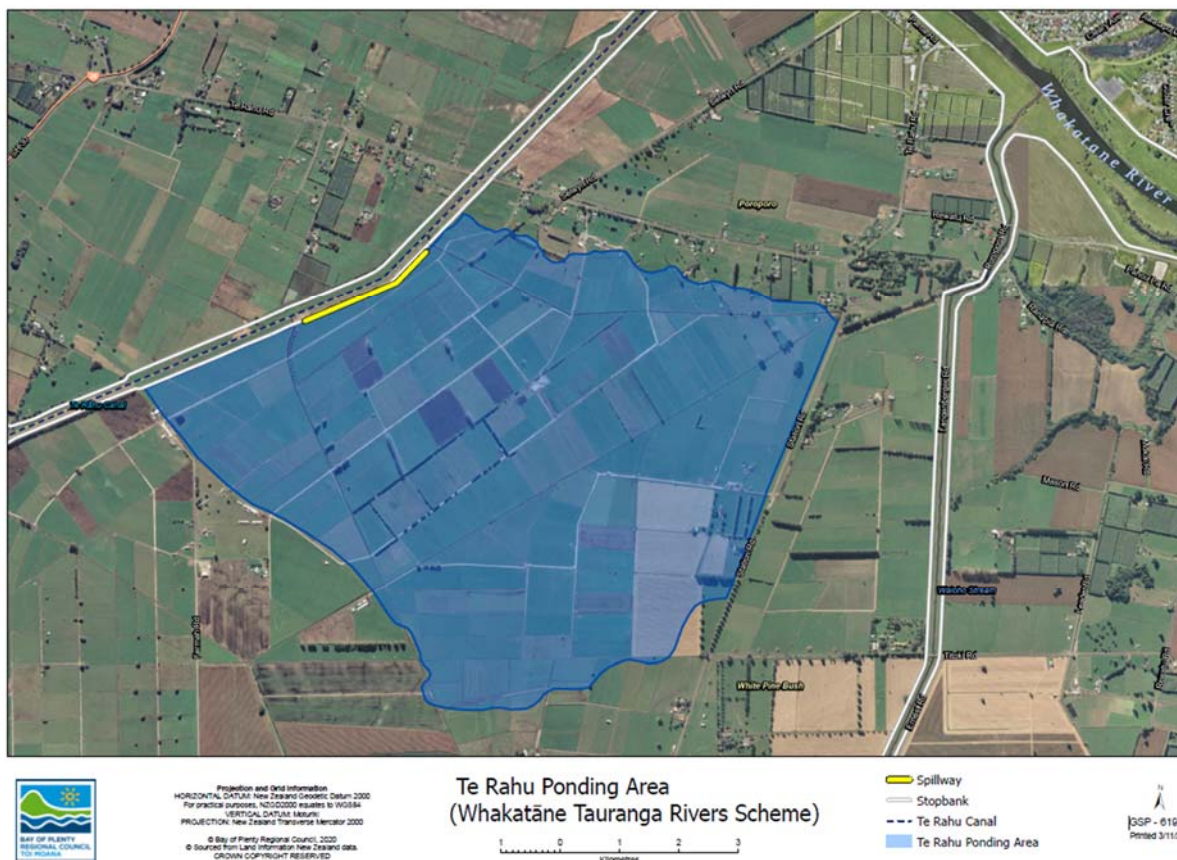


## Schedule 5 – RANGITAIKI FLOODWAY

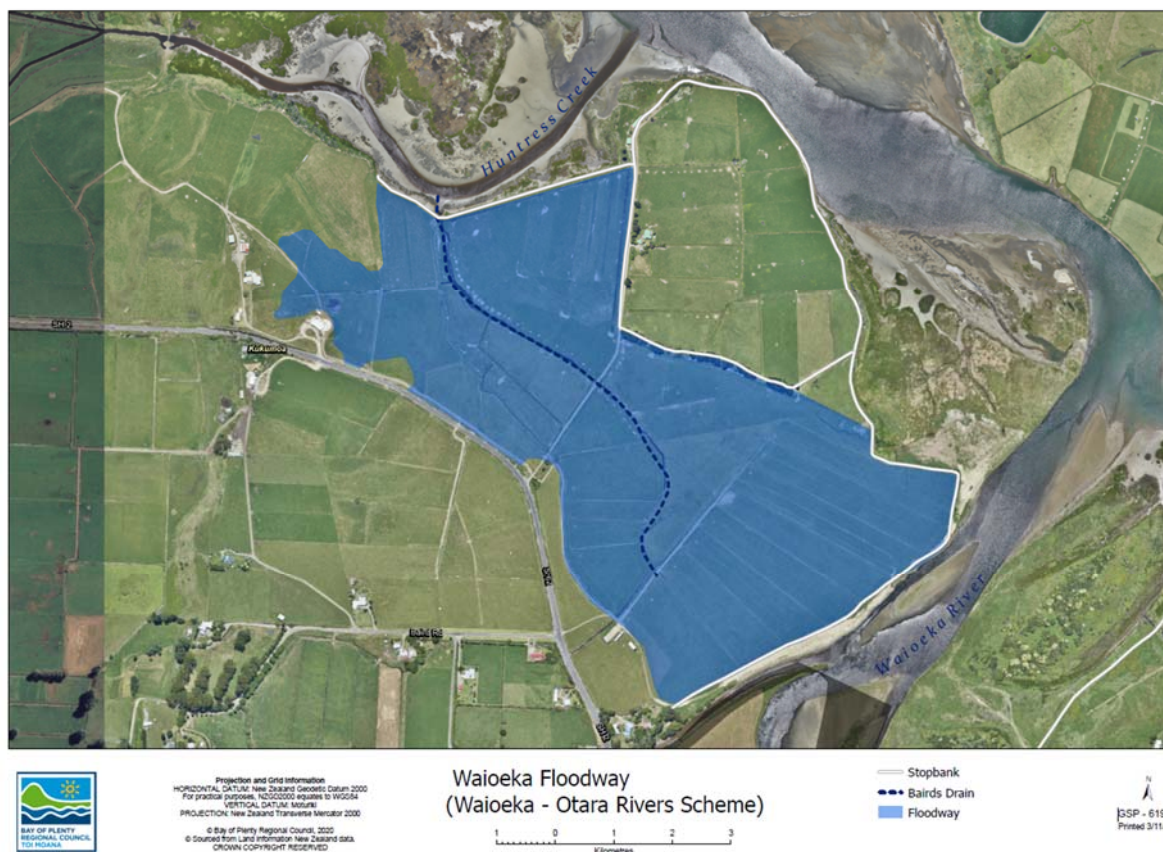




## Schedule 6 – TE RAHU PONDING AREA



## Schedule 7 – WAIOEKA FLOODWAY



## 1.4 THE HEARING PROCESS

- (43) Public submissions began on 27<sup>th</sup> March 2020 and were due to close on 28<sup>th</sup> April 2020. However, in light of the COVID-19 outbreak, it was decided that all submissions would need to be made via the Regional Council website ([www.boprc.govt.nz/bylawreview](http://www.boprc.govt.nz/bylawreview)).
- (44) The Council received a total of forty-three (43) submissions, with fifteen (15) organisations and individuals wishing to be heard at the hearing. Several submissions were received late, but the Hearing Committee determined, due to the Covid-19 Pandemic, to allow all late submissions to be admissible. A wide spread of submissions were received from across the region, with highest proportion being from the Eastern Bay of Plenty. A number of different sectors submitted but the highest proportion of submissions came from private landowners. Council received a fair number of submissions from the rural community and an almost equal number of urban submitters.
- (45) Acting under Section 149 of the Local Government Act 2002 (LGA) the Council appointed us, the undersigned, as Hearing Committee members to hear and make decisions on submissions on the Flood & Drainage Bylaws 2020; and delegated to us all the functions, powers and duties of the Council to hear and consider submissions, including requiring and receiving reports under section 149 of the LGA.
- (46) We, the Hearing Committee, conducted public hearings of the reports made under section 149 of the LGA, and of the evidence and submissions of the submitters who wished to be heard. Hearings were conducted on the 26<sup>th</sup> August 2020 at Whakatane. The parties who appeared at the hearing in support of their submissions are listed in chronological order of appearance in Table 5 (Page 24 of this report). All submitters were given the opportunity of attending hearings in person or remotely, via Zoom technology, and addressing their submission and any expert evidence they had provided in advance. Questions of clarification only were directed to witnesses by members of the Committee. No cross-examination was allowed. Verbal and written submissions were received from a number of submitters.
- (47) The hearing of submitters was conducted at 9.30 am on 26<sup>th</sup> August 2020, and the hearing was then adjourned at 12.55pm.
- (48) The hearing was formally closed at end of the deliberations Meeting on 6<sup>th</sup> November 2020.

## 1.5 CONFLICTS OF INTEREST

- (49) There were no declared nor perceived conflicts of interest identified by any of the Hearing Committee.

## 1.6 DELIBERATIONS

- (50) Deliberations commenced on Thursday 1<sup>st</sup> October 2020, at the Whakatane Office of Bay of Plenty Regional Council. Deliberations were then adjourned pending the provision of additional information requested from staff.
- (51) Most of the submissions were generally supportive of the Proposed Bylaw, although some submitters sought amendments. Constructive improvements were suggested by submitters and their counsel, expert witnesses and other witnesses. The Hearing Committee also considered a report prepared by officers of the Council. We acknowledge the suggested amendments, even

those we do not adopt, and the related evidence, have substantially helped us in coming to our recommendations.

- (52) During the course of the hearing we issued several directions requesting clarification of and caucusing on certain matters. This resulted in a number of further reports and memoranda.
- (53) The Hearing Committee met again, via Zoom Audio Visual technology, on Wednesday 21<sup>st</sup> October 2020, to continue our deliberations. This virtual meeting specifically discussed the issue of Cultural Practices and areas of Waahi Tapu.
- (54) The Hearing Committee met again at the Whakatane Office of Bay of Plenty Regional Council, on Friday 23<sup>rd</sup> October 2020, to conclude our deliberations.

## 2.0 LEGAL ISSUES

### 2.1 LEGISLATIVE MANDATE FOR EACH CLAUSE OF THE *PROPOSED* FLOOD PROTECTION AND DRAINAGE BYLAW 2020

- (55) Relevant overall Legislation included:

#### **THE LOCAL GOVERNMENT ACT 2002 (LGA 2002)**

- (56) The Local Government Act 2002 gives regional council overall mandate to direct, enforce and control certain behaviours on private land under s143:

“s143: Outline of Part 6

This Part provides the powers necessary for local authorities—

- a. to make Bylaw:
- b. in relation to enforcement —
  - i. to enforce all regulatory measures made under this Act, including Bylaw and infringement offences; and
  - ii. to undertake, or contract out the administration of, those enforcement powers:
- c. to undertake certain activities on, or in relation to, private land, including powers in relation to owners and occupiers, and powers to recover for damage to certain local authority property caused wilfully or negligently:
- d. to undertake activities in relation to water services, including discharge of sewage and trade wastes:
- e. to require development contributions:
- f. to apply for and enforce removal orders.”

- (57) Under section 155 of the LGA 2002 the Bylaw review has to consider:
  - That Bylaw are the most appropriate way of addressing a perceived problem.
  - That the proposed Bylaw are the most appropriate form of Bylaw, and
  - That the Bylaw are not inconsistent with the New Zealand Bill of Rights Act 1990.

- (58) **LAND DRAINAGE ACT 1908 (LDA 1908)**

- (59) **SOIL CONSERVATION AND RIVERS CONTROL ACT 1958 (SCRCA 1958)**



### **THE PUBLIC WORKS ACT 1981**

- (60) Note: For the purposes of the Public Works Act, the Council is a Local Authority, and its work is public work. However, with respect to soil conservation or river management or flood control works, the Soil Conservation and Rivers Control Act is the empowering legislation (some provisions of the SCRCA require matters to be undertaken in accordance with the Public Works Act).

## **3.0 STATUTORY FRAMEWORK**

### **3.1 LOCAL GOVERNMENT ACT 2002**

- (61) Under s 155(1) of the LGA, Council must determine whether a Bylaw is the most appropriate way of addressing a perceived problem. To that end, alternative methods to using Bylaw to ensure protection and efficient operation of the flood protection and drainage systems, have been investigated. These include:

#### **SECTION 149: POWER OF REGIONAL COUNCILS TO MAKE BYLAW**

- (62) (1) A regional council may make Bylaw in relation to the following matters:
- a) forests that the regional council owns or controls, whether or not the forest is within the region of the regional council:
  - b) parks, reserves, recreation grounds, or other land that the regional council owns or controls:
  - c) flood protection and flood control works undertaken by, or on behalf of, the regional council:
  - d) water supply works undertaken by, or on behalf of, the regional council.
- (63) (2) Without limiting the generality of subsection (1), Bylaw may be made in relation to the matters listed in subsection (1) for the purpose of managing, regulating against, or protecting from, damage, misuse, or loss, or for preventing the use of,—
- a) the real and personal property owned or controlled by the regional council; and
  - b) sites or places on land of the regional council that have cultural, historical, recreational, scientific, or other community or amenity values.

#### **ADDING RULES TO THE REGIONAL NATURAL RESOURCES PLAN**

- (64) The Resource Management Act 1991 (RMA) provides for the Bay of Plenty Regional Council to develop Regional Plans; for example, the Regional Policy Statement or the Regional Natural Resources Plan; to assist it to carry out its functions under the RMA.
- (65) Because these are RMA-based documents they are not considered appropriate instruments for outlining the protection and control of drains and assets, especially as Bylaw are mandated through the Local Government Act 2002, not the RMA.
- (66) Regional Plans are typically developed to manage complex natural resource issues or implement a national policy statement. The time and cost of preparing a regional plan for the addition of rules relating to the flood protection and drainage schemes would be significant and could not be justified against the lesser cost of adopting Bylaw.
- (67) The process for subsequently amending a regional plan in the future is also not considered efficient as an interim Bylaw document would still need to be adopted.

- (68) The process for establishing Regional Plans involves significant public input. The level of public consultation required for the preparation and review of Bylaw is, though still formal, a more appropriate level for this type of matter.
- (69) A Regional Plan would require a person to apply for a resource consent to authorise any non-compliance with the rules in the plan. Resource consents are costly, and take time to process, as they may require public input (hearings) depending on the significance of the consent.
- (70) A Bylaw only requires 'prior written authority' which can be negotiated between Council and the applicant. Public input into the Bylaw authority process is not necessary because it is a matter between the landowner/occupiers and Council, working on behalf of the community.
- (71) The Bylaw authority process has proven to work well in the past.
- (72) The decision-making process under the Local Government Act 2002 for preparing and amending Bylaw is robust and comprehensive. It appropriately reflects the significance of the matter to be addressed maintaining the integrity of the river and drainage schemes.

#### **ADDING RULES TO A DISTRICT PLAN**

- (73) Bay of Plenty Regional Council could transfer the responsibility for monitoring and enforcing clauses under the Bylaw to relevant territorial authorities (district councils under section 161(2) of the Local Government Act). Rules would then be enacted under the District Plan.
- (74) This raises similar concerns to establishing a Regional Plan as outlined above.
- (75) The Regional Council sees itself in a more appropriate position to protect the integrity of these assets for the benefit of the whole region because of its role as manager of the flood protection schemes.
- (76) Some territorial authorities within the region may lack the capacity and resources to successfully monitor and/or enforce such rules in their District Plans. There is also a risk of the District Plan prioritising the best interests of the district above the region.

#### **DEVELOPING STRATEGY/COLLECTIVE AGREEMENTS**

- (77) A strategy or collective agreement between landowners/occupiers and the Regional Council could be prepared with guidelines for landowners/occupiers.
- (78) A strategy or collective agreement would follow extensive public consultation to determine the roles and obligations of each party to protect the assets.
- (79) A strategy would work by relying on the goodwill of landowners/occupiers to ensure their actions are in accordance with the guidelines in the strategy. But unlike a regional plan or Bylaw, this option does not have any legal standing that could be enforced if necessary.
- (80) It is important that Council has an enforcement tool because unauthorised actions and works may result in adverse effects or damage to assets, putting lives, property and/or livelihoods at risk.

#### **DEVELOP BYLAW UNDER THE LOCAL GOVERNMENT ACT**

- (81) Bay of Plenty Regional Council considers the continued use of a Flood Protection and Drainage Bylaw document to be the most effective method for ensuring the protection and ongoing efficient operation of the schemes.

- (82) The Local Government Act 2002 **s149** outlines the power of regional councils to make Bylaw “...for the purpose of managing, regulating against, or protecting from, damage, misuse or loss...” of flood protection and flood control works.
- (83) The Bylaw Authority method is administratively quick, reasonably priced and effective. All of the other alternative methods have inherent monetary disadvantages and council considers the ongoing use of the Bylaw is the most effective for our ratepayers,

#### **MOST APPROPRIATE FORM OF BYLAW**

- (84) Under the LGA 2002, council must determine whether the Bylaw are in the most appropriate form (e.g. standalone, amendment to existing document, consolidation with other Bylaws).
- (85) There are a number of reasons why Council believes a standalone, written document is the most appropriate form of Bylaw (though this is an amendment of the previous 2008 Bylaw).

#### **A STANDALONE DOCUMENT:**

- Hold all of the regulations in one place and is easily accessible
- The document focusses only on the Flood Protection and Drainage Bylaw and cannot be confused with others
- The document is relatively short and concise and can be easily printed or referenced in its entirety
- Becomes a repository for all the legal matters associated with Flood Protection and Drainage.

### **3.2 NZ BILL OF RIGHTS ACT 1990**

- (86) Under section **155(3)** of the Local Government Act 2002 Council must determine that the Bylaw are not inconsistent with the New Zealand Bill of Rights Act 1990.
- (87) The Bill of Rights Act 1990 protects the civil and political rights of all New Zealanders. The Act covers:
- Life and security of the person
  - Democratic and civil rights
  - Non-discrimination and minority rights
  - Search, arrest and detention
  - Criminal procedure
  - The right to justice
- (88) Council considers the Bylaw as proposed here, are not inconsistent with the Bill of Rights Act 1990.

### **3.3 TREATY OF WAITANGI**

- (89) In order to recognise and respect the Crown’s responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Maori to contribute to local government decision-making processes, Parts 2 and 6 provide principles and

requirements for local authorities that are intended to facilitate participation by Maori in local authority decision-making processes.

### 3.4 STATUTORY ACKNOWLEDGEMENTS

- (90) Deeds of Settlement and Settlement Legislation achieved with each iwi, regional councils are required to include as statutory acknowledgments in relevant regional plans and policy statements, and to have regard to them in resource consent decision making.
- (91) A number of co-governance/co-management arrangements have been established as a result of treaty settlement processes.
- (92) The Integrated Planning Protocol between Tuhoe Te Uru Taumatua, Bay of Plenty Regional Council, Hawke's Bay Regional Council, Wairoa District Council and Whakatane District Council is to provide an integrated and consistent framework for all Council planning processes within the Ngai Tūhoe rohe. It seeks to promote effective engagement and prevent misunderstandings around roles and statutory obligations. The protocol includes principles and expected levels of engagement.
- (93) This Protocol is of particular relevance to this Bylaw Change as it requires Regional Council to carry out early communications and share Bylaw with Tuhoe Te Uru Taumatua for comment.
- (94) Early engagement with Tūhoe occurred in October 2019. Council provided a copy of the draft Flood Protection and Drainage Bylaw.

### 3.5 TRADITIONAL CULTURAL PRACTICES AND WAAHI TAPU SITES

- (95) Within the land affected by these Proposed Flood and Drainage Bylaw 2020 are several areas affected by traditional cultural practices and waahi tapu sites.
- (96) This Bylaw must consider these cultural needs, while ensuring that the whole community remains safe from the effects of floods and soil erosion.

#### MAP 1: KOKOHINAU (TUHIMATA) MARAE URUPA NEXT TO RANGITAIKI RIVER



### 3.6 STATUTORY SUMMARY

- (97) Table 1 (below) provides a summary of the statutory documents that are required to be met as part of Bylaw review and considered as part of any recommendations made in response to submissions.

**Table 5 SUMMARY OF STATUTORY DOCUMENTS**

Statutory Document	Requirement
<b>The Bylaws Act 1910</b>	Development of the Bylaws document must be consistent with the clauses in this Act
<b>Local Government Act 2002</b>	Consultation is completed in accordance with section 82 during development of the bylaw.
<b>Operative Regional Natural Resources Plan</b>	Provisions must be consistent with the operative provisions of this plan
<b>Operative Regional Policy Statement</b>	Provisions must be consistent with the operative provisions of this plan
<b>Land Drainage Act 1908</b>	Provisions must be consistent with the clauses in this Act
<b>Soil Conservations and Rivers Control Act 1956</b>	Provisions must be consistent with the clauses in this Act
<b>COVID-19 Response (Further Management Measures) Act 2020</b>	Schedule 16, Part 3, s160B of the Act allows for an extended review timeframe.

## 4.0 PURPOSE OF THE BYLAW

- (98) Purposes usually clearly state what is aimed for in overcoming the issue or promoting a positive outcome, or what the community has expressed as being desirable in achieving an outcome. The purpose of these Bylaw is to provide a regulatory framework to protect and control all urban and rural drains, pumping stations, defences against water, erosion protection works and floodways managed by, or under the control of the Bay of Plenty Regional Council.

## 5.0 PRE-HEARING MEETINGS

- (99) Staff held a virtual meeting, via Zoom, with the Hearing Committee on 13<sup>th</sup> May 2020. At this meeting Councillor von Dadelszen was appointed Chair of the Hearing Committee. It was decided, due to the Covid-19 Pandemic, to defer the hearing until August, to allow time for the investigation into iwi concerns.
- (100) Staff again met with the Hearing Committee on 14<sup>th</sup> August 2020, following comments received on the draft version of the Bay of Plenty Regional Council Flood Protection and Drainage Bylaw 2020. The temporary legislative changes to address issues arising from the Covid-19 emergency gave the Regional Council the opportunity to address some matters brought up by submitters during the consultation period.

## 6.0 THE HEARING OF SUBMISSIONS – MONDAY 26<sup>TH</sup> AUGUST 2020

VENUE: BOPRC, WHAKATANE

**Table 6 SCHEDULE OF THE SUBMITTERS HEARD**

#	Wednesday, 26 <sup>th</sup> August 2020 - Whakatane	Submitter
1.	Wayne Wharekura	0021
2.	Ian Gibson	0022
3.	Fish & Game – John Meikle	0016
4.	Maru Tapsell	005
5.	Christopher Peterson	0025
6.	Chris Timbs (via Zoom) & Ian Connor (in person)	0029
7.	Momentum Planning & Design	0046
8.	Fonterra	0032
9.	John Strothers	0013
10.	Federated Farmers	0028
11.	William Akel	0001
12.	Richard Weld	0015

**NOTE:** The following submitters decided not to attend:

13.	Kayreen Tapuke	0027
14.	Ian & Norma Pugh	0026

### **Submitter 1, 0021 – WAYNE WHAREKURA, OPOTIKI**

- (101) **Mr. Wayne Wharekura** submitted in person, stating that he was the owner of property described as allot 87 of sec 2 Opotiki in; saying that two thirds of this currently bare land will be adversely affected, and this will greatly affect the value of this property.
- (102) Mr. Wharekura believes that with a 40-metre setback at the northern boundary, plus a 12-metre setback at the east, because of the location of a drain, will result in his only being able to build on 30% of his property under this proposed bylaw.
- (103) When questioned, Mr. Wharekura stated that this was over and above any restrictions in the current Opotiki District Plan.

### **Submitter 2, 0022 – IAN GIBSON, EDGE CUMBE**

- (104) **Mr. Ian Gibson** stated that, due to flooding, 80 to 90% of the drains that take water to the canals are blocked, or partially blocked. He would like a law that drains are continually cleaned, and not just sprayed. He tabled photos from last year, to emphasis his point.

- (105) Mr. Gibson stated that some drains never fully open, and he has lost a lot of equipment from previous floods.
- (106) Mr. Gibson stated that he has lived at the same address for 14 years, during which time he has raised the base of his house – but this didn't save his home from flooding in last year's flood.
- (107) Mr. Gibson was adamant that spraying the drains was not a suitable solution, because to the danger to fish life. He said that these drains must be cleaned and cleared.
- (108) Responding to a question of clarification, Mr. Gibson stated that he had not spoken directly to Bay of Plenty Regional Council staff, but has spoken to Whakatane District Council staff; believing that it is to them that he pays his rates. It was pointed out to Mr. Gibson that Bay of Plenty Regional Council does also charge him rates, but contracted Whakatane District Council to collect those rates on their behalf.

### **Submitter 3, 0016 – FISH AND GAME NEW ZEALAND (EASTERN REGION)**

- (109) **Mr. John Meikle** submitted on behalf of **Fish and Game**, stated that they are not opposed to the proposed bylaw as written, but believe that additional statements must be included to address environmental issues and their mitigation.
- (110) Mr. Meikle noted that the Bylaw do refer to environmental factors, but don't mention enhancement. He was adamant that, at a minimum, they must include avoid, remedy or mitigate; noting that the Waikato Regional Council already has botulism issues, and he asked that Bay of Plenty Regional Council takes a proactive stance on this.
- (111) Mr. Meikle emphasised Section 4 in his submission.

#### **4.2 Specific Comments in relation to Environmental Issues**

What Fish and Game propose is an additional wording at the commencement of the paragraph "*While the purpose of this bylaw is asset protection*"

Many parts of the river and drainage network are environmentally and ecologically significant in their own right. The network provides significant habitat for both terrestrial and aquatic biodiversity, fisheries and spawning habitat for indigenous species and sports fish, feeding and breeding habitat for a wide range of waterfowl species, along with public access, recreation and amenity values. While the purpose of these Bylaws is asset protection, it is imperative that these functions are undertaken in a way which does not compromise environmental values. The Bay of Plenty Regional Council will follow good environmental practice in its application by operating in accordance with current national direction, other Bay of Plenty Regional Council statutory documents, the current (2019) BOPRC Environmental Code of Practice for Rivers and Drainage Maintenance Activities, and current industry standards.

**4.3** As the introduction does not form part of these Bylaws, it is important that specific mention of the BOPRC Environmental Code of Practice for Rivers and Drainage Maintenance Activities (2019) is incorporated into the body of the Bylaw. This could be as simple as including a sentence under; "**3 Purpose**" to state:

*All works will comply with the BOP RC Environmental Code of Practice for Rivers and Drainage Maintenance Activities (2019).*

### **Submitter 4, 005 – MARU TAPSELL, TAURANGA**

- (112) **Mr. Maru Tapsell** submitted that this bylaw was about environmental bottom lines. He stated that Smartgrowth was a spatial plan based on two reports; with an emphasis on protecting versatile lands. Mr. Tapsell stated that Smartgrowth has lost its way. Mr. Tapsell stated that Smartgrowth went from an environmental plan to a market plan.



- (113) Mr. Tapsell went on to talk about the need for a quadruple bottom line. He said that “Port of Tauranga was Rome, and all roads lead to Rome”. He stated that as well as economic considerations, we need to also consider social development. He went on to give a cultural history of Maori, which he is adamant that it is not a “desktop” interpretation. He said that it is based on Maori oral history.
- (114) Mr Tapsell then talked about the three Regional Parks – Papamoa Hills, the Kaituna River and the Wairoa River. He stated these three parks play a big part and could be utilised to help with wetland development.

**Submitter 5, 0025 – CHRISTOPHER PETERSON, WHAKATANE & OPOTIKI MARINA & INDUSTRIAL PARK LTD**

- (115) **Mr. Christopher Peterson:** Mr. Christopher Peterson’s property, is part of the Opotiki Harbour development. He stated that he owns 20 hectares of land adjacent to the river in Opotiki.
- (116) Mr. Christopher Peterson’s property is also part of the Opotiki Harbour development project. This property has been established in the project, as a Marine Industrial Zone, and is receiving Ministry of Business, Innovation and Employment (MBIE) funding to be developed.
- (117) Mr. Peterson said that he was an equity partner with the Crown, which has granted \$8.8m towards the development. He stated that his farm was in the process of being transferred to Opotiki Marina and Industrial Park Ltd, which is committed to development of that part of the land in the Marine Industrial Zone. Mr. Peterson stated that he was a Director of that Company.
- (118) Mr. Peterson noted that he had also received a submission by Ian Connor, and generally supports that submission.
- (119) Mr. Peterson stated that this proposed new Bylaw would definitely impinge on his property. His submission outlines his concern that the proposed Bylaw ignore the recently proposed Marine Industrial Zone project and they designation of the Floodway will negatively impact on the project.
- (120) He stated that he needs an exemption for this area because the Bylaw prevents the development without providing compensation. He stated that this proposal would cut his land in half.
- (121) Mr. Peterson stated that he has been in discussions from the Regional Council’s Drainage team, but their verbal assurances were not satisfactory.
- (122) Mr. Peterson stated that development would be required to increase the land height well over the height of stopbanks, and so stopbanks would be redundant. He noted that, as no other person would be put at risk by not providing flood protection works, the consent of the one owner should be sufficient to allow the change. He stated that his land will be raised by 4-metres from the harbour dredging’s, and this will ensure flood mitigation.
- (123) Mr. Peterson stated that no-one has shown the need for the floodway to re-route the river, and that his proposed floodway was the wrong way to do it. His view is that there is a need to make the current river path better.
- (124) Mr. Peterson noted that the Marine Precinct Development will need adequate access, and the impact of the Bylaw on the accessway would make the standards required uncertain. He further stated that any accessway works will be subject to Resource Consent, which is adequate control.



- (125) Responding to questions in clarification, Mr Peterson said that he wants to quickly develop his property into an industrial zone. He said that the floodway will never be developed, but instead could be used for parking. He stated that, as such access must not be blocked.
- (126) Mr. Peterson then responded to a question about horses on the stopbanks, saying that horses are no different to cattle or pigs etc. He went on to say that gorse should be sprayed, because of the risks from tracks being developed through the gorse.
- (127) Mr. Peterson then responded to a question regarding the industrial zoning, saying that it was zoned Industrial approximately two years ago, and he said the bay of Plenty Regional Council were supportive.
- (128) When asked about consenting for using the dredging's, Mr. Peterson said that HEB already have secured a consent, and they are currently applying for a consent to discharge to land. (up to 4-metres in height).

#### **Submitter 6, 0029 – CHRIS TIMBS (VIA ZOOM) AND IAN CONNOR,**

- (129) **Mr. Ian Connor** submitted in person and was joined by his Auckland-based legal counsel, **Mr. Christopher Timbs** of the legal firm, Berry Simons. Mr. Timbs presented via Zoom, due to Level 3 Covid-19 restrictions facing Auckland at the time.
- (131) Mr. Connor noted that he owns a property that includes the area to be designated the Waioeka Floodway. Since public consultation and submissions in March-April 2020 there have been a number of developments pertaining to the Ian Connors's property. Bay of Plenty Regional Council applied for funding from central government through the 'Jobs for Nature' infrastructure fund for the *Waioeka Floodway/Estuary Enhancement Project* with the intention of purchasing the piece of property designated the 'floodway' and enhancing this through estuary restoration plantings, thus protecting the floodway from further development.
- (132) The area shaded blue in the map below is currently farmed (dairy & dry stock) and acts as an overflow floodway for the Waioeka-Otara Rivers scheme. The area is very low-lying and protected at each end by stopbanks.

#### **Schedule 2 – Waioeka Floodway**



**Note:** The proposed Marine Industrial Zone (Peterson development) has an access road that crosses the floodway area. It is anticipated this estuary restoration project can be designed and built synergistically with MIZ proposal.

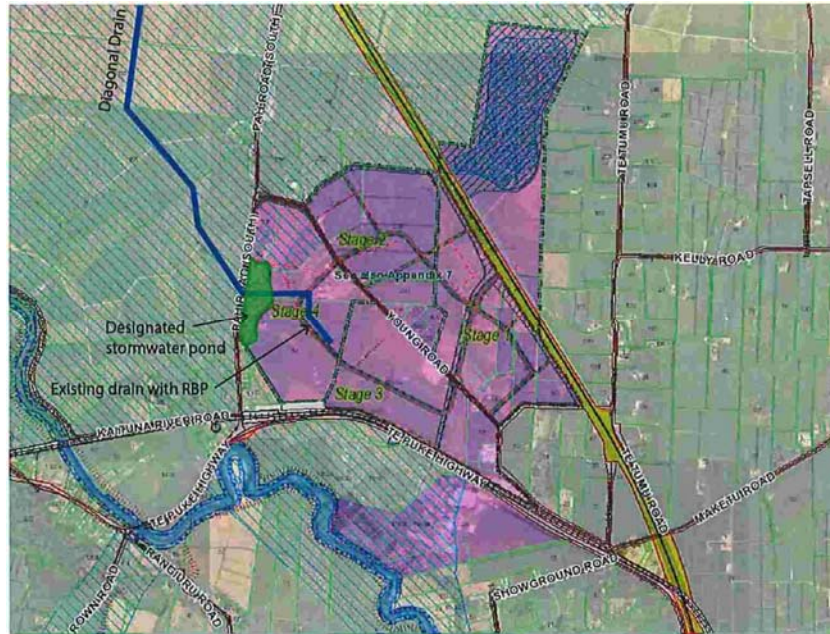
- (133) Mr. Timbs submitted that Mr. Connor's property has been subject to numerous floods historically, including in the last decade five times. He stated that these floods have significant adverse environmental and economic effects.
- (134) Mr. Timbs noted that a single flood event can have direct costs to the farm of approximately \$275,000. Mr. Connor added that his average income from the dairy farm was only \$9,000.
- (135) Mr. Connors stated that estuaries need a Maori perspective, and he questioned why there had never been a cost/benefit report.
- (136) Mr. Timbs noted that the Regional Council has the power to make Bylaw, but the key issue is the legal justification. He said that Section 149 (1c) can't be satisfied by this Bylaw. He stated that Bay of Plenty Regional Council was "putting the cart before the horse". He stated that they have an issue with this Bylaw allowing that only Bay of Plenty Regional Council owned land can be taken into account.
- (137) Mr. Timbs noted that under Asset Management definitions, there is no mention of floodways. He contended that because the Waioeka Floodway doesn't mention this floodway, and so as this doesn't exist, it can't be included in this Bylaw. Mr. Timbs asked that this floodway be removed from the Bylaw, as it is "ultra vires".
- (138) Mr. Timbs stated that during Local Government consultations, there were no reasoning for Mr. Connor's land to be included within the Bylaw.
- (139) Mr. Timbs also proposed an exemption for farm activity structures. He contended that it was much more sensible to require farmers to go to a registered engineer, rather than getting a new consent every time.
- (140) In responding to a question regarding the status of the Huntress Creek as a conservation site, and whether it will impact negatively on the site, Mr. Connor replied that the river will be totally rerouted. He then noted that there had been two sea events in the last two years, and it wasn't a case of just creating a wetland.
- (141) When asked how much of his land was under negotiation for sale to the Regional Council, Mr. Connor stated that up to 26 hectares, but that has yet to be determined.

#### **Submitter 7, 0046 – MOMENTUM PLANNING & DESIGN**

- (142) **Mr. Tim Bolton** presented for Momentum Planning & Design, on behalf of Hebland Holdings Limited, at Rangiuru Business Park.
- (143) Mr. Bolton stated that the Flood Protection and Drainage Bylaw includes the Lower Kaituna Drainage Scheme encompassing the Rangiuru Business Park (RPB). Existing drainage within Stage 4 of the RPB connects to the Diagonal Drain network, as shown on the GIS map above (Figure 1) and is currently protected by these Bylaws. The designated stormwater pond located on the boundary of the RBP intercepts the drain and provide a designed drainage catchment to the Industrial Zone. The effect of the existing drain located within Stage 4 will be minimised once the designated stormwater pond has been established and stormwater is piped directly into it. The existing open drainage could therefore be excluded from the Flood Protection and Drainage Bylaw once the stormwater drainage pond has been established. The intent would be to make efficient use of developable land within the Industrial Zone that might otherwise be adversely affected by the Bylaw i.e. 12-metre buffer zone restrictions on development (24-metres), restrictions on altering the course of the drain, and/or creating additional crossings over the drain. Any industrial development proposed near the drain can

be adequately assessed through consenting pathways under Large Scale Earthworks and Drainage Consent Applications. Mr. Bolton asked that the Bylaw be amended to exclude the Rangiuru Business Park.

**MAP 2 - Location of existing drainage within Rangioru Business Park Zone**



- (144) Mr. Bolton stated that Drain 69 is owned by the Regional Council, and this proposed Bylaw just creates unnecessary regulations. He asked that Drain 69 be exempted from this proposed Bylaw.
- (145) When asked whether the stormwater pond had been consented, Mr. Bolton said – yes, it is part of the Structure Plan.

**Submitter 8, 0032 – FONTERRA**

- (146) **Mr. Mark Chrisp** (Director, Mitchell Daysh Ltd, Hamilton); **Mr. Jonathan Richardson** (Factory Manager, Fonterra Edgecumbe Plant); and **Ms. Louann Hurrell** (Environmental Manager, Fonterra Edgecumbe Plant) each submitted on behalf of Fonterra Limited.
- (147) Mr. Chrisp stated that Fonterra recognises Bay of Plenty Regional Council's flood protection work. He said that Fonterra supports the intent of the Bylaw but wants a few minor amendments.
- i. Section 4 - Definition of terms: Needs clarification between earthworks and Small-scale backyard cultivation.  
Drains:
  - ii. Section 5.1.1 i - This would require an authority for a water-pipe leak.  
Defence against water:
  - iii. Section 5.2.1 b – No planting of a shrub, hedge or tree within 12-metres of the landward toe of any defence against water in Area 3 makes Fonterra in immediate breach of the proposed Bylaw.
  - iv. Section 5.2.1 f – Fonterra has an extensive amount of infrastructure within these areas at its Edgecumbe site.

- (148) Mr. Chrisp stated that placing a spade in the ground would require a consent, and this is clearly unreasonable. He said that the Bylaw needs immediate amendment, or the outcome will be most non-sensible.
- (149) Mr. Chrisp said that there was also an issue with the raceway at Fonterra's Awaroa Farm on East Bank Road. He said that this raceway was, in places, within 200 metres from the river.
- (150) Mr. Chrisp asked that Section 12.1 (a) be amended to provide guidance as to what information needs to be provided as part of any request for written authority under the proposed Bylaw. He asked that Section 12.1 include a new clause specifying the criteria that Bay of Plenty regional Council will apply to the assessment and determination of any request for written authority.

**Submitter 9, 0013 – JOHN STROTHERS, WHAKATANE**

- (151) **Mr. John Strothers** Submitted that the Hydro Road Floodway, East of Edgecumbe is an area where there is extensive seepage issue. He stated that this was on an earthquake crack, and while engineers know best, he has had personal observation evidence of seepage.
- (152) Mr. Strother stated that the Whakatane Bridge Island is getting bigger with each flood, and has become a major danger to the bridge, because of debris build-up. He asked that the island be removed.
- (153) Mr. Strothers also stated that the Rangitāiki River mouth needs to be widened, due to protruding sandbar.
- (154) Responding to a question, Mr. Strothers confirmed that the Edgecumbe seepage was both within and outside the 200-metre mark.

**Submitter 10, 0028 – FEDERATED FARMERS**

- (155) **Mr. Daryl Jensen** (Federated Farmers) and **Mr. Alan Law** (Farmer on the Rangitāiki Plains) presented on behalf of Federated Farmers.
- (156) Mr. Jensen submitted that Federated Farmers support the intent of the Proposed Bylaw. He stated that farmers agree that these assets need protection.
- (157) Mr. Jensen stated that Federated Farmers are concerned that organic farmers should not be able to impede spraying of drains as a clearance methodology.
- (158) Mr. Jensen said that he would like to see Territorial Authorities (TAs) being compliant with the legislation. He stated that too often TAs put culverts into stopbanks without informing anyone.
- (159) Mr. Jensen highlighted his opposition in part to Clause 5.2.2, stating that bulls running with cows during the mating period should be allowed to graze the stopbanks.
- (160) Mr. Jensen also said there needed to be flexibility around getting stock out during flood periods.
- (161) Under Part 2 13.4, Mr. Jensen stated that there needs to be a time limit for Bay of Plenty Regional Council to respond to a request. He also advocated to use a midway point of a stopbank as the measure. This, he said, just makes common sense.
- (162) Mr. Jensen questioned, when this Proposed Bylaw become law, will Bay of Plenty Regional Council audit the status quo to see what is within zones (for example: haybarns).



- (163) With regards to Part 3, Mr. Jensen sought that the Bylaw added “other plastics/tyres, as these block drains etc.
- (164) Mr. Jensen stated that the Regional Council should not be shy to use the Public Works Act to protect the whole community.
- (165) Mr. Jensen stated that he was up in a helicopter with then Minister Nathan Guy, at the time of the 2017 flood, and the spillway wasn’t working. He asked that drain cleaning be a permitted activity within the 200-metre zone.
- (166) Mr. Jensen then stated that distances are too onerous in some areas, and that this rule would rule out maize growing for farmers in some areas. He also stressed the need to be able to stump removal, as these pop up from time to time. Mr. Jensen also said that with modern technology can use alternative ploughing systems.
- (167) Mr. Jensen also asked who will pay for fencing protection, saying farmers don’t want preferential treatment, but they need pragmatic decision making.
- (168) In response to a question as to the best method of communication with Federated Farmers members, Mr. Jensen stated that farmers would like to sit down with Councillors and staff. He said that there was also a need to utilise social media, for younger farmers – whereas older farmers want face to face and newspaper communications.
- (169) Mr. Law was asked to comment on an assertion from a previous submitter that spraying of drains be denied, because it was harmful to fish, and denuded the drain bank cover. Mr. Law responded, saying that spraying should be limited to the bottom of the drain, and not the sides of the drain. He said that by spraying the drains twice yearly, this limited the need to use a digger to clear the drain.

**Submitter 11, 0001 – WILLIAM AKEL, AUCKLAND**

- (170) **Mr. William Akel** stated that he and his family have farmed his property at 108 College Road, Edgumbe since the 1950’s.
- (171) Mr. Akel said that Federated Farmers have said everything that he wanted to say, and hence he supported their submission.
- (172) Mr. Akel stated that his farm borders Edgumbe township, and that the land is now used for growing maize. His concern centred around the 200-metre setback from the Rangitāiki River, and how this affects earthworks. He stated that another factor that needs to be taken into account when considering the likes of ploughing is the weather. He stated that farmers need flexibility, as farming is not dictated to by set hours.
- (173) Mr. Akel was also concerned about the 12-metre setback from drains. He stated his concern about established shelterbelts for kiwifruit protection and said that 5.1.1 (e) did not seem to protect existing use rights.
- (174) Mr. Akel concluded by saying that everyone wants to protect our environment, and this makes for difficult decision-making.
- (175) Responding to a question regarding his current setback, Mr. Akel responded that the current Bylaw has a setback of 150-metres from the Rangitāiki River. However, he said that his main issue regarded the drains.

**Submitter 12, 0015 – RICHARD WELD, TE PUKE**

- (176) **Mr. Richard Weld** submitted that he has no problem with protecting assets, but wants existing setbacks to be retained, noting that his current setback from the Kaituna River is 20-metres, and this proposal will extend that to 140-metres.
- (177) Mr. Weld questioned the methodology for measuring the setback. He stated that the toe of any stopbank depended on the angle of the slope of the stopbank, and this provided no consistency.
- (178) Mr. Weld said that there has never been an issue over the past 40 years and questioned the need for such a large setback. He stated that above the bridge (and the railway line) the stopbank has never been an issue. He said he has never seen a need to increase the setback and stated that the Regional Council has too much to say.
- (179) Mr. Weld asked, if these proposed Bylaw were introduced and enforce – how will wetlands operate?
- (180) Mr. Weld stated that someone needs to fund this. He said that he had a problem with the lack of compensation for the loss of productive land.
- (181) Mr. Weld asked whether farmers who grew maize would have to apply annually or is it a one-off application.
- (182) Mr. Weld noted that Council owned assets were actually ratepayer own assets, and Bay of Plenty Regional Council needs to listen more carefully to their community.
- (183) Mr. Weld closed by asking exactly where the toe of a stopbank was, as on his property it was 60-odd metres out.
- (184) **The hearing was concluded at 12:55pm.**

## **7.0 SITE VISIT**

- (185) The Hearing Committee conducted a site visit to Opotiki Harbour. This site visit looked at the Waioeka Floodway, and its inter-relationship with the proposed Opotiki Harbour Redevelopment plan.
- (186) The Hearing Committee met at the property owned by Mr. Ian Connor, and after initial discussion in his office, Mr. Connor drove to a high point of his property (a Pa site), which overlooked the Waioeka Floodway. The Committee were then shown the western aspect of the floodway, where it meets Huntress Creek.
- (187) The Hearing Committee were then shown the land where the proposed Opotiki Marine and Industrial Park is planned to be situated. Following this, the Committee was shown the eastern aspect of the Waioeka Floodway.

## **8.0 MATTERS FOR CONSIDERATION**

### **8.1 KEY POINTS RAISED**

- (188) Submitters raised a range of points, many of which relate to the Bylaw provisions and matters within the Bylaw document. Some matters brought up were outside the scope of the Bylaw and these will be addressed in individual submission responses.
- (189) Without derogating from the details contained in the submissions, the following are considered to be the key issues arising in submissions.

### **8.2 THE BYLAW APPLICABLE AREAS WILL MAKE MY LAND UNWORKABLE /WILL DECREASE THE VALUE OF MY LAND**

- (190) A common theme in many of the submissions was that the new Bylaw Applicable Areas would make the land within unworkable, and that many activities would be prohibited. There was a general misunderstanding of the concept of 'written authority' and how applying for one works. And many submitters seem to be under the impression that these Bylaw are new – that there were no Bylaw before the 2020 proposed Bylaw.
- (191) There may be several reasons for this thinking. The paradoxical outcome of undertaking a comprehensive engagement and consultation package for the draft Bylaws 2020, was that many landowners were being made aware of the Bylaws for this first time. This was also evident at community open days in 2019.
- (192) The community, generally, do not have awareness of the Bylaw themselves and how assets may affect them. This may be because in the past information on the Bylaw was not well disseminated, as a smaller number of landowners were affected.

#### **STAFF RESPONSE**

- (193) Staff recommended that as part of an Implementation Plan for the 2020 Flood Protection and Drainage Bylaw a comprehensive Education Plan be developed. This would include communication and key messaging around what the Bylaw are, why we have them, and information around undertaking certain activities in the Bylaw Applicable Areas. An ongoing engagement plan will also be developed for specific community groups, sectors and activity practitioners.

### **8.3 BYLAW APPLICABLE AREA PROPOSED CHANGES**

- (194) A few submitters did not agree to the new Bylaw Applicable Areas. Some interpreted this to mean they would not be able to undertake *any* activity within this area (see response to 3.1 above). Some did not understand the need for the substantial increases in some of the Bylaw Applicable Areas, particularly next to the Rangitāiki and Kaituna Rivers.
- (195) Since the development of the 2008 Bylaw new technology (in the form of Seepage analyses performed using the *SEEP/W* and heave assessment with the *SIGMA/W* (Geo-slope, 2020) computer modelling programme) has allowed engineers to run simulated scenarios of various flood conditions and site parameters including soil type and profile, rainfall rates, vegetation effects and land to climate interactions.

- (196) Using this computer modelling *The Flood Protection and Drainage Bylaw 2020 Technical Report* outlines the scientific basis for the changes proposed.
- (197) *“There is a history of failures of stopbanks and other flood defences throughout the Bay of Plenty region. A significant proportion of these failures have initiated beyond the embankments themselves, on land not owned by the Bay of Plenty Regional Council. The Floodway and Drainage Bylaw was enacted to enable the Bay of Plenty Regional Council to control selected activities within potential failure zones.”*

**STAFF RESPONSE**

- (198) Staff recommended that the Bylaw Applicable Areas, though conservative, be adopted to encourage those undertaking selected activities, that may cause asset failure within these zones, to work with Council (through the Bylaw Authority Application process) to apply best practice mitigation measures to those activities. For example, applying filter collar aggregate to fence posts penetrating permeable soil to mitigate seepage path development and subsequent piping failures under flood conditions.

## **8.4 EXEMPTIONS**

- (199) Territorial Authorities, Industry and various Sectors have submitted on a common theme. The need for multiple Bylaw Authorities for routine and emergency maintenance; and infrastructure installation and repairs. They also thought that creating wider Bylaw Applicable Areas would create an increase in the number of Bylaw Authorities needed and this would result in undue delays of this work.

**STAFF RESPONSE**

- (200) Staff recommended building relationships with these sectors to develop bespoke written authorities that have specific, best practice mitigations for a type of work being undertaken, and apply a time limit for a particular work period, e.g.
- Regional Council works with territorial authorities to develop written authorities for annual maintenance programmes.
  - Regional Council works with territorial authorities to develop written authorities for best practice operations for emergency works.
  - Regional council works with NZTA to develop written authorities for maintenance programmes.

- (201) A number of submitters asked for a number of other activities to be exempt, including ‘good farming practices’, urban properties, and ‘properties higher than stopbanks’.

**STAFF RESPONSE**

- (202) Staff recommended not making blanket exemptions in the Bylaw and prefer that these matters be dealt with on a case-by-case basis as the Authority Application process allows. There are several reasons for this:
- Council endeavour to treat people equitably and fairly and make every effort to ensure fairness in regulatory documents. The fundamental premise of regulatory documents is to treat all community members the same in the first instance.
  - To manage the outcome equitably– protection of the assets that protect communities from widespread flooding events - the foundation principle is that all members of that community have a part to play. If everyone has a part to play, no matter how small, then the rules should also apply to everyone.



- The engineering modelling has developed baseline Bylaw Applicable Areas given a range of variables (see 3.1 above), however, in nature these variables may continually vary along a river reach i.e. each property may have individual idiosyncrasies for each variable. Impractically, infinite models would be needed to reflect this (or each property would need to be surveyed, soil profiles, slope gradient measures etc. which would be cost and time prohibitive. Through the Bylaw Authority process an individual can be investigated by an engineer and the idiosyncrasies taken into account. Thus, if mitigation measures, are needed, they can be developed relevant to the exact site. Over time, staff hope to develop a database of on-ground data which will build a real picture of variables with a certain area. This could lead to less Bylaw Authorities being needed as property-scale data is collected.

- (203) A number of maize contractors submitted that maize ploughing and growing is seasonal work and "... is very much climate, machinery, and contractor dependent." Again, the process of apply for an Authority for each and every job would be time prohibitive. These contractors state they follow 'good farming practice' and therefore should not have to apply for written authority.

#### **STAFF RESPONSE**

- (204) Staff recommended adopting specific rules around soil-penetrating activities such as ploughing. Specific Geo-Slope Seep/W modelling was carried out (Marianne O'Halloran, IceGeo&Civil February 2020) and revealed the potentially detrimental nature of some ploughing practices to soils in Bylaw Applicable Areas. The rule of thumb would be that each contractor should apply for Bylaw Authority for ploughing in BAA areas, work with Council engineers on site specific investigations that would then determine any mitigation measures, **if needed**.
- (205) Staff also recommended developing a similar system to that outlined above for other sectors, in that ploughing contractors could apply for 'seasonal' authorities based on location, soil properties of land and ploughing methods. Developing the procedure for this would be done as part of the Implementation Plan, engaging with ploughing contractors to develop 'best practice' for ploughing with Bylaw Applicable Areas.

## **8.5 "EXISTING USE RIGHTS"**

- (206) Several submitters asked about the effect the new Bylaw would have on their 'existing use rights'.
- (207) "Existing use rights" are created under section 10 of the *Resource Management Act 1991* to protect land uses under District Plans which may have been permitted under one version of a Plan but after review are no longer permitted.
- (208) The proposed Flood Protection and Drainage Bylaw are developed under the *Local Government Act 2002*, which does not consider existing use rights. In a legal sense – existing use rights do not apply.
- (209) However, there are circumstances in which this *concept* of 'existing use rights' may be applied (see diagram below).
- (210) The Bylaw regulate activities which may have a detrimental effect on regional council flood protection and drainage assets. The new Bylaw rules do not exist retrospectively and can only be applied to new activities after the Bylaw legal commencement date.

- (211) There are some scenarios, however, where a ‘use’ may be interpreted as ‘existing’:

For example:

In 2008 a farmer wished to build a shed. He applied for a Bylaw Authority because the shed was within the 2008 Bylaw Applicable Area. It was granted, with some mitigating actions to be put in place when building. In 2020 the shed is still there, and the Bylaw Applicable Area is increased. However, the farmer does not need to do anything as the shed already ‘exists’. The shed can stay where it is. He does not need a new Authority. The activity (building the shed in a Bylaw Applicable Area) is time bound. Once the building is completed the activity stops.

If the farmer wants to extend his shed in 2020 however, he will need a new Bylaw Authority for the extension.

	In 2008 Needed a BA Got one	In 2008 Didn't need BA	In 2008 Didn't get BA But needed one
2020 Example: Structure e.g. fence	Got Bylaw Authority Built it - its still there. 'existing use right'	Built it - its still there Now in BAA 'existing use right'	Not legal No 'existing use rights' Compliance Issue
2020 Example: Activity e.g. ploughing	Got Bylaw Authority Was it time bound? 'existing use right' Time bound?	Still undertaking activity NO 'existing use right' New rules apply once in effect	Not legal No 'existing use rights' Compliance Issue

- (212) 5.1.1(e) “No person will plant, or allow to grow, any tree, shrub, hedge, or any part thereof, within 12 metres of a drain (measured from the lip of the drain)
- (213) There is little explanation within the Bylaw as to why the distances imposed in the bylaw have been selected.

#### Submitter 0023 – TERENCE & MELISSA WHITE (GWYN TRUST)

- (214) Section 5.2.2 - Explanation: Stock on stopbanks is not ideal but grazing is sometimes used as a method to maintain the grass cover height e.g. long grass restricts inspections and condition assessments, is a fire hazard during summer, can hide rabbit holes and bank erosion. Controlled grazing by young cows is allowable with prior written authority. Grazing by bulls, horses and pigs is not permitted. Clause is unclear. What does Young cows mean? With prior written authority? What this means is unclear.
- (215) Mr Connor considers that the identification of the ‘Waioeka Floodway’ (“Waioeka Floodway” or “Proposed Floodway”) in the Proposed Bylaws is *ultra vires* the Council’s powers under section 149 of the LGA and inconsistent with Council’s position on those assets to which the Proposed Bylaws are intended to apply.
- (216) Despite that, Mr Connor’s farm is used as a floodway now, in the absence of any formal identification, agreement or compensation being paid. Further, in the event that concentrated floodwaters are discharged onto Mr Connor’s farm, Mr Connor is required to bear those costs. Naturally, this has resulted in a number of adverse effects on Mr Connor and the environment

which are addressed below and forms the basis of Mr Connor's fundamental opposition to the identification of the Waioeka Floodway in the Bylaw.

## 8.6 TRADITIONAL CULTURAL PRACTICES AND WAAHI TAPU SITES

- (217) Several submitters raised the issue of "Traditional cultural practices and waahi tapu sites. The Hearing Committee asked staff to supply a report to specifically address these issues, recognising the need to keep all of our community safe, by the use of these Bylaw.

### **Submitter 0005, Mr. Maru Tapsell**

- (218) **Mr. Maru Tapsell** submitted in person, that it was necessary to take into account Waita Settlement; Ngāti Tunohopu Treaty Claim 1101; saying that economic development should take into account social, environmental and cultural aspects; encourage riparian planting along waterways; maintaining and enhancing wetlands.

### **Submitter 0027 – KAYREEN TAPUKE**

- (219) **Ms. Kayreen Tapuke** submitted in writing that no asset should be placed in an area of waahi tapu or site of cultural significance or sites of environmental significance for flora and fauna and protection of the whenua and moana and the Bylaw presented does not ensure the protection of this areas.
- (220) Ms. Tapuke stated that land adjacent to and surrounding many of their Ngāti Awa ki Rangitāiki marae is Maori Reserve, utilised for maara kai. Again, he questions the application for authority to carry out cultural practices (seasonal planting) on our Whenua Maori. He said that they have a Rangitāiki River Baseline Report that is recognised by BOPRC. This document outlines waahi tapu, wai-koukou and waahi karakia in the lower reaches of the river, below the Matahina dam. Again, they take exception to having to apply for authority if they need to upgrade these areas to combat erosion.

### **Submitter 0030 – NGATI AWA KI RANGITAIKI**

- (221) **Mr. Tu O'Brien** submitted as a representative of Ngāti Awa Ki Rangitāiki, stating that the Marae sits within the lower reaches of the Rangitāiki River, and have urupa within the Bylaws Applicable Areas. He asked: "Does this mean that every time we dig a grave in our urupa we have to apply for authority? Does this mean that every time we dig a hole for our hangī, dig a fencepost or plant harakeke to help mitigate erosion? - Never has happened and never will."

### **Submitter 0031 – TE RŪNANGA O NGĀTI AWA (TRONA)**

- (222) **TRONA** is a post settlement entity that represents the 22 confederate hapū of Ngāti Awa. The rohe of Ngāti Awa lies on the east coast of the Bay of Plenty.
- (223) TRONA supplied written submission that the Ngāti Awa Claims Settlement Act 2005 and Te Runanga o Ngāti Awa Act 2005 give recognition to the status of Ngāti Awa as kaitiaki and mana whenua of the natural resources within our rohe boundaries. These legislations also give rise to our statutory acknowledgment over three rivers in our rohe- Whakatāne, Rangitāiki and Tarawera.
- (224) It is TRONA's expectation that the Bay of Plenty Regional Council have direct engagement with us to co-design and co-develop any rule framework that affects our rohe. The Bay of Plenty Regional Council has failed in its duties to date and we do not support the current proposal.

(225) Ngāti Awa identified the following issues:

- i. There has been inadequate discussion at a partnership level to understand what implications the bylaw may have. In particular how the bylaw might impact on key Ngāti Awa projects including their PGF projects; and
- ii. There has been inadequate recognition of Ngāti Awa values, interests and mātauranga, in relation to their waterways.

(226) TRONA claims that a significant number of Maori landowners are adversely affected. They state that the proposal will add extra regulation limits and restriction on their ability to use their land. They maintain that:

- i. Maori Lands Trusts should be treated as their own entity and liaised with separately as a group.
- ii. Lack of consultation with marae which are located within close proximity of the rivers.
- iii. The 200m setback from the Rangitāiki River affects Maori landowners' ability to utilise their lands and access economic opportunities.
- iv. TRONA are unclear as to the assumptions used to inform the policy direction and development of the bylaw.
- v. TRONA seeks clarification about the extent to which the recommendations in the Cullen report has been implemented.

#### **NEXT STEPS**

(227) TRONA expects direct engagement with the Bay of Plenty Regional Council to discuss how their values and expectations can be recognised within the Bylaw review.

(228) David Te Marama Peters, Chair Ngai Tai Iwi Authority stated that they wish to raise a complaint to the process of consultation. There should also be the acknowledgement and inclusion of Mātauranga Maori and application of our Tikanga to ensure that areas within the River Schemes of significant cultural and historical importance are given a high level of protection.

(229) As Ngai Tai Iwi they also believe that no asset should be placed in an area of waahi tapu or site of cultural significance or any site of environmental significant for flora and fauna and protection of the whenua and moana, and the Bylaw presented does not ensure the protection of this areas.

(230) The Hearing Committee asked staff to seek expert opinion to give advice on a recommended outcome to ensure that both iwi and the whole community involved are best protected, acknowledging the cultural sensitivities that this issue has raised. Staff undertook to seek expert advice on this matter.

## 9.0 THE DELIBERATIONS PROCESS

- (231) The Deliberations continued on 1<sup>st</sup> October 2020, at the Bay of Plenty Regional Council office at 5 Quay Street, Whakatane. The meeting commenced at 9.30am.
- (232) During the Site Visit, the Hearings Committee identified several areas where further information was sought. These included:
- i. Crest versus Toe measurement for stopbanks
  - ii. A legal opinion as to the status of the Waioeka Floodway
  - iii. Flood Protection Asset advice
  - iv. How to deal with traditional cultural practices and waahi tapu sites.
- (233) At the 1<sup>st</sup> October Deliberations Meeting, staff recommended that this Bylaw comes into force on 1<sup>st</sup> February 2021. The reason given was to allow for the Regional Council shutdown over the Christmas period. The Hearing Committee agreed with this.
- (234) Staff then indicated that they were still awaiting a report giving recommendations on how to deal with traditional cultural practices and waahi tapu sites.
- (235) The first three issues raised on the Site visit were addressed at this deliberations meeting.

### 9.1 CREST VERSUS TOE MEASUREMENT FOR STOPBANKS

- (236) During the Site visit, the Hearing Panel reflected upon the determination as to where the distance actually measured from – the toe or the crest of the stopbank. The Hearing panel believes that we need to have consistency in these measurements. The Hearing Panel asked staff to investigate whether this was feasible to do so, as requested by several submitters.

#### **STAFF RESPONSE**

- (237) Key Points raised by staff included:
- A loaded toe was uncommon and there were few in the region.
  - Each stopbank had its own specific design in order to build its integrity to stop water.
  - Theoretically, the design of the stopbank remained the same regardless of toe loading, and engineers could quickly calculate the location of the toe from the design drawing for each stopbank.
  - Landowners trying to perform any activity within the bylaw area should approach council to arrange a site-specific investigation, with a geotechnical engineer where appropriate.
  - The specification for toe loading soil allowed seepage to pass through it in a controlled manner.
  - The 12 metre rules were the core reason for staff's recommendation to remain with measuring from the toe. The complexity in applying these with measuring from the crest was demonstrated through diagrams of different scenarios.
  - Outlined the differences in the Bylaw Applicable Areas (BAAs) and the specific rules in the bylaw to protect each area
  - With the individual stopbank designs came variable crest widths and incorporating different measurements in the bylaw to allow for this would create further confusion for landowners.

- Design levels and measurements could vary down the reach on the same river and even on the same property, highlighting additional complications for measuring from the crest.

(238) Staff advised that:

- The desired outcome over time was that as landowners applied for Bylaw and the properties were surveyed, a database of site-specific information would be compiled to start mapping and could be used to build into Farm Environment Plans.
- The issue of measuring from the crest vs toe had arisen through three submissions expressing concern over not being able to distinguish where the toe was located
- These Bylaw were consistent across New Zealand in that all Bylaw in other regions measured from the toe of the stopbank.
- Raised the question of how accurate the measuring would be, which would be more critical within an urban environment.

## 9.2 LEGAL REVIEW FOR THE FLOODWAY IN WAIOEKA

(239) Both Chris Peterson and Ian Connor stated that the Waioeka Floodway is called a floodway, but this has never been formally determined. Mr. Peterson noted that his land has its own stopbanks, so is not part of the Floodway. The Hearing Committee asked staff to get a legal opinion on whether this is, in fact, a floodway.

(240) Chris Peterson's submission outlines his concern that the proposed Bylaw ignore the recently proposed Marine Industrial Zone project and they designation of the Floodway will negatively impact on the project.

### STAFF RESPONSE

(241) Staff do not consider that the designation of the Waioeka Floodway will negatively impact on the development of the Marine Industrial Zone and are working with Chris Peterson to develop a plan going forward.

(242) At the request of the Hearing Committee, Regional Council staff sought a legal opinion from Mr. AJ Logan of Ross Dowling Marquet Griffin. Their advice is CONFIDENTIAL AND LEGALLY PRIVILEGED and will remain as a publicly excluded report.

(243) In summary, Mr. Logan noted that, while the Waioeka Floodway has never been formally identified, documents from the 1960's described this flow-path as the Waioeka Floodway; and that description has persevered. Mr Logan stated that while it was not, for example, subject to the current Floodway and Drainage Bylaw 2008; nor was it designated in the District Plan. He stated that the Regional Council and its predecessors have not acquired any property rights in the land comprising the Waioeka Floodway, either under the Public Works Act or otherwise.

(244) Mr. Logan, in considering the question of the Waioeka Floodway being "Ultra Vires", concluded that it is not. He stated that the key words are "A regional council may make Bylaw in relation to .... Flood protection and flood control works undertaken by .... The regional council."

(245) "The Waioeka-Otara Scheme is a flood protection and flood control work undertaken by the Regional Council. The Scheme is designed, constructed and maintained in a way that a preferential flood-path through the Connor property was and is an integral element."

(246) Mr. Logan concluded:

- i. The inclusion of the Waioeka Floodway in the Bylaw is not ultra vires.
- ii. The provisions are not unreasonable.
- iii. The bylaw will not create any liability to compensate Mr Connor.
- iv. Mr Connor may have remedies for the water crossing his land – but if they arise, they do so regardless of the bylaw.
- v. Designating the floodway in the District Plan is a further or alternative protection.

(247) The key points of the Ross Dowling Marquet Griffin opinion included:

- Outlining the details of the legal opinion that had been requested by the panel. The premise was twofold – whether to formally name the floodway in the Bylaw and whether it was legal to do so, including potential liability resulting from the decision made. The legal opinion stated that the correct process was followed, and the right clauses had been used within the Local Government Act (LGA) to be able to formalise the floodway.
- Noted that It was very difficult to appeal an LGA based document, a reasonably high standard must be met, and it would have to go through the District Court rather than the Environment Court.
- The full picture had to be taken into consideration including potential liability, the reputation of Council and protecting the community.
- It was important that this was designated as a floodway either way as no matter what happened to the land it protected the overflow of the river in a flooding situation.
- Mr Peterson had to go through the RMA process to build a road or causeway on his property, the bylaw authority required would make it more difficult for him and the mitigation measures would cost more.
- Formalising Waioeka Floodway would not hold back the progress of either Mr Connor or Mr Peterson, but it would allow Council to protect that land so the flow of water continued to go where it has always gone and help to alleviate flooding in the area.
- No contrary opinion resulted from the discussion to designate this as an official floodway and members agreed there were enough significant scientific and engineering reasons to do so.

**POINT OF CLARIFICATION SOUGHT REGARDING LEGAL OPINION**

(248) The Hearing Committee were obliged to follow the independent legal opinion and going against this could put Council at risk. The conflicting legal advice was in a submission written by a lawyer rather than a formal legal opinion.

**KEY POINTS**

(249) Mr Peterson's issue was more around timing for his project, rather than financial implication.

(250) The weighting of adverse effects of not putting the floodway into the bylaw were significant.

(251) Mr Peterson's project was integral to other things going on in the area, and it was important to find a successful solution.

(252) The Hearing Committee's primary obligation was to protect the community, Opotiki township in this instance.

(253) Mr Peterson would still have to follow all the bylaw rules, with the road constructed in such a way that it did not impede the flow of water.



### 9.3 LEGAL OPINION – FLOOD PROTECTION ASSET ADVISE

- (254) The Hearing Committee asked for advice in relation to Council’s liability if flood protection assets fail and cause damage, including in situations where adjacent landowners have allowed the stopbanks to be damaged or have constructed unconsented structures.

#### STAFF RESPONSE

- (255) Staff advised that they had sort an independent legal opinion on this from Tompkins Wake, Hamilton. The opinion was received from JA McGillivray (Partner) and MS Crocket (Senior Associate). Their advice is CONFIDENTIAL AND LEGALLY PRIVLEDGED and will remain as a publicly excluded report.

- (256) In summary, Tompkins Wake advised that:

- (a) Council has a statutory duty to prevent or lessen the likelihood or damage from flooding, however its liability for any breach of this duty is limited to situations in which Council has been negligent.
- (b) Council can mitigate this risk of liability by:
  - i. having a reasonable and responsible programme of works in place;
  - ii. by consulting on the Rivers and Drainage Asset Management Plan (‘AMP’), which includes levels of service, as part of the LTP consultation; and
  - iii. by including a reference to the AMP levels of service in the LTP.
- (c) Council could be liable for flood damage as a result of unconsented structures or stock damage to flood protection assets if it was negligent in responding to these risks.
- (d) Council can improve its position by creating a register of landowner damage to flood protection assets and putting landowners on notice that they are obliged to fix damage they have caused.

- (257) Tompkins Wake noted that the extent of a local authority’s liability under section 148(1) of the SCRCA was considered by the High Court in *Easton Agriculture Limited v Manawatu-Wanganui Regional Council*<sup>1</sup>.

- (258) Tompkins Wake further considered “If a duty of care is owed, what is the standard of care that is required of Council”. This was considered in *Easton*, the Court cited *Body Corporate 189855 v North Shore City Council*<sup>2</sup>, where the standard of care owed by Council is not to be assessed after an event with the benefit of hindsight.

- (259) Tompkins Wake also contend that the issue of standard of care was also considered by the High Court in *Atlas Properties v Kapiti Coast District Council*<sup>3</sup>.

- (260) Tompkins Wake recommended that the next steps be:

- (a) To advise Elected Members of the means of managing Council’s risks with regard to flood protection assets.
- (b) To ensure that there is in place an updated programme of repairs and maintenance that reflects and documents reasonable and responsible decision making as to which assets have greatest priority.

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<sup>1</sup> CIV-2008-454-31 HC Palmerston North, 7 September 2011.

<sup>2</sup> CIV-2005-404-5561 HC Auckland, 25 July 2008.

<sup>3</sup> High Court Wellington CP 172/00 19 December 2001.



- (c) Create a register of landowner damage to flood protection assets.
- (d) To put landowners who have encroached or allowed stock damage on notice of their obligation to repair the flood protection assets.
- (e) To address levels of service and the location of critical assets in the next AMP/LTP consultation round.

(261) This Deliberations meeting adjourned at 12.05pm.

## 9.4 TANGATA WHENUA ENGAGEMENT REPORT – TRADITIONAL CULTURAL PRACTICES AND WAAHI TAPU SITES

- (262) In response to the Hearing Committee asking staff to report “How to deal with traditional cultural practices and waahi tapu sites”, staff stated that an independent contractor, **Dr. Kura Paul-Burke** of MUSA Environmental, had been engaging with iwi in the region regarding potential wording for the Bylaws, focusing on traditional cultural practises and Waahi Tapu areas.
- (263) Dr. Paula-Burke supplied a report to the Hearing Committee on 21<sup>st</sup> October 2020, entitled “Flood Protection and Drainage Bylaw Review – Tangata Whenua Engagement Report, October 2020”. The Reference to this report is: MUSA Environmental client report 2020 014 and was prepared for the Bay of Plenty Regional Council.
- (264) Dr. Paul-Burke stated that the purpose of the project was to identify any potential implications that the proposed changes to the Toi Moana, Bay of Plenty Regional Council (hereafter Council) Bylaw Review may have on traditional cultural practices, and sites and significance of tangata whenua with the Waioweka, Rangitāiki and Lower Kaituna rivers.
- (265) Dr. Paul-Burke noted that the project used a whanaungatanga approach to research, prioritising a culturally appropriate and flexible kaupapa Māori methodology<sup>4</sup> whereby tangata whenua positioned the engagement process in ways that was appropriate and relevant for them.
- (266) The engagement process had been rigorous and involved meeting with various iwi, hapu and tangata whenua and allowed them to provide a wide range of feedback on the Bylaw. There had also been site visits and follow up hui which all informed the notes sent back to participants for review before being finalised.
- (267) Dr. Paul-Burke said that focussed hui/discussions were held with tangata whenua members from Kōkōhinau Papakāinga Trust (Rangitāiki River); Taupara Eruera Ngāti Awa Hapū Coalition member (Rangitāiki River); Ngā kaimahi whenua ō Ngāti Ira (Waioweka River); and Te Maru o Kaituna members (Lower Kaituna River), between June and October 2020.
- (268) Further consultation was initiated with Tapuika and Tūhourangi Marae (Lower Kaituna River) however, due to capacity issues and the closing of the tipuna whare, engagement was paused in respect of iwi/marae circumstances.

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<sup>4</sup> Kaupapa Māori research methodologies have arisen out of mātauranga Māori as a theory and analysis of the approaches to research which involve Māori. It does not exclude a wide range of other methods but rather signals the interrogation of methods in relation to cultural sensitivities, cross-cultural reliability, and meaningful outcomes for Māori and our wider communities.

(269) Tangata whenua provided written feedback concerns relating to the proposed changes in the Bylaw review including:

- The proposed bylaws were constructed with no prior consultation or engagement with tangata whenua.
- Council failed to follow their own internal engagement toolkit and mātauranga Māori framework documents for consulting and engaging with tangata whenua at the beginning of the Bylaw review process.
- The proposed bylaws impose new, increased, ongoing and unforeseen intergenerational costs (financial, compliance and others) upon tangata whenua.
- Mātauranga Māori concepts, processes, and practices have not been provided for and are urgently required in the co-development, co-implementation of all bylaw developments and review.

(270) The Report stated that Recommendations received from tangata whenua include:

*“Council to give serious consideration to extending the current Bylaw review timeframe and to consider establishing an active, collaborative, resourced, engagement working party with relevant tangata whenua to; a) identify co-developed options and actions for the proposed Bylaw review and; b) to enable the promotion, practices and principles of Kaitiakitanga”.*

(271) Dr. Paul-Burke’s Report made recommendations based on tangata whenua responses. These included:

- That Council extend the current Bylaw review timeframe to establish an active, collaborative, resourced, engagement working party with relevant tangata whenua to:
  - Identify co-developed options and actions for the proposed Bylaw review and;
  - Enable the promotion, practices and principles of kaitiakitanga.
- Council to work directly with individual hapū/iwi to co-develop unique mitigation plans for cultural practices, flood protection and drainage options on ancestral Māori owned land; and
- Council staff to align co-developed engagement practices with Iwi Management Plans; the internal Council Engagement Toolkit and He Korowai Mātauranga Māori; and
- That serious consideration be given to looking at the other side of the river for flood protection and drainage options.
- That land with the Bylaw Applicable Areas be made unrateable.
- That Council pay rent and obtain written approvals from tangata whenua for activities undertaken on Māori owned land.
- In the spirit of kaitiakitanga and manaakitanga, Council work with tangata whenua to co-develop proposed options rather than confiscate land and impose blanket costs and rules on affected tangata whenua landowners.

(272) A Zoom meeting was be organised prior to the 23 October deliberations for Dr. Paul-Burke to provide a walkthrough of her report to the Committee.

#### **STAFF RESPONSE**

(273) Staff recognised that engagement was inhibited due to the timeline involved (including the effects of the Covid-19 lockdown) and had only occurred with those who had made submissions or were part of the same hapu. Staff recommendations would include consideration of the independent report and how the information could be applied to these bylaws.

- (274) Broad enabling clauses could be included in the bylaw to allow detailed engagement with different hapu and iwi groups on their land to discuss how the bylaw affected them on that particular scheme. Each would have their own priorities, issues and questions that would not be resolved through blanket clauses.
- (275) The enabling clauses would provide a mechanism to have some of the fundamental questions answered and allow for conversation to find the best outcomes for both sides on a case-by-case basis.
- (276) It was important not to be overly prescriptive in these Bylaws and to allow for discretion to have mitigating actions that still protected the community.

**KEY POINT**

- (277) Staff stated that no national precedent existed. However, The Hearing Committee produced evidence that in fact there is precedence, as evidenced in the Ministry for the Environment and Statistics NZ Report<sup>5</sup> "Our atmosphere and Climate 2020". This Report cited a case study of Hiramua Community, Wairoa where local Iwi/hapu needed to make the tough decision. When an encroaching river threatened their ancestral urupa (burial ground), this community took the difficult decision to dig up and move their tipuna (ancestors) to a brand new site.
- (278) The Hearing Committee were concerned that engagement with stakeholders (including Iwi and Hapu) began in July/August 2019 but struggled to get Iwi engagement. Due to the Covid-19 lockdown engagement was constrained, but active engagement was attempted between June and October 2020.
- (279) The Hearing Committee did not believe that it was a reasonable proposition (as requested by some Iwi) to delay the implementation of this Bylaw, due to a lack of consultation. The Committee recognise that there may be some dissatisfaction at the lack of consultation, but the risk to our communities requires that this Bylaw be updated with urgency, to mitigate risk of future flood effects.
- (280) The Hearing Committee, in fact applauded Regional Council staff for their attempts at engagement. They did, however, encourage staff to upgrade their communications plan, to ensure that all stakeholders more clearly understand the issues involved.

## **9.5 OTHER CONSIDERATIONS**

**GIS DESKTOP MAPPING**

- (281) Staff noted that desktop mapping was completed as part of the process when a bylaw authority application was received. The maps were a part of the bylaw and were indicative only – staff were working with a GIS team to get them as accurate as possible. The maps would be updated, enlarged and would include the actual locations of the schemes as a strong visual reference.

**COMMUNICATION PLAN**

- (282) Many people were unaware of the existing measurements and rules. A period of amnesty could be considered and addressed through clear communication with people to query whether the bylaw would apply to any existing work they had undertaken.

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<sup>5</sup> "Our atmosphere and Climate 2020", Ministry for the Environment & Statistics NZ, Pages 49-50  
The link to this report is: <https://www.mfe.govt.nz/publications/environmental-reporting/our-atmosphere-and-climate-2020>

- (283) An engagement plan around the floodway existed with a list of stakeholders, which could include communication about the bylaw itself and how it affected those landowners.
- (284) A future project had been identified to address non-compliance around Council assets and would require careful consideration.
- (285) A performance assessment of Council's critical assets had recently been undertaken (these had a higher consequence of failure so were more related to the urban area) and landowner encroachment was highlighted as an issue.
- (286) A legal opinion had been received on the matter and Council would likely be found liable (though a 'duty of care' premise) if it was aware of an issue and did not do anything about it. Making a plan to fix the issue moving forward and involving the community would reduce that liability.
- (287) Being able to monitor and enforce the Bylaw was very important.

## **9.6 STAFF RECOMMENDATIONS AND BYLAW TRACK CHANGES**

### **KEY POINTS - STAFF**

- (288) Submission responses were as standardised as possible, with answers kept consistent where there were similar questions and alignment with recommendations.
- (289) The final responses would be available after the adoption of the Bylaw to ensure the correct information and responses were received.
- (290) The Bylaw had to be endorsed and witnessed by two councillors and would be affixed with Council's Common seal. They would come into force on 1 February 2021. The document was titled Bay of Plenty Regional Council Flood Protection and Drainage Bylaw 2020 due to being developed in 2020 and to keep them on the original review timeline.
- (291) The term 'carriageway' was used historically and still one of three types of road identified by the New Zealand Transport Act.
- (292) The Bylaw were not the only thing used to control Council's assets – there were a suite of documents used including an Environmental Code of Practice, the latest stopbank design standards and industry guidance.
- (293) It was desirable to use other processes to work with the community before getting to the regulatory tool or enforcement pathway.

### **KEY POINTS - COMMITTEE**

- (294) Would include a communications plan in the recommendations report.
- (295) Suggested adding information to the introduction regarding Covid-19 impacts and delay.
- (296) New legislation relating to essential water that did not apply to the Bylaw but did have implications had been taken into account with a clarification statement.
- (297) Requested measurements in Part II of the bylaw be more specific with exact measurements and clearer maps that were more in context.

#### **IN RESPONSE TO QUESTIONS**

- (298) Council managed some assets that were externally owned.
- (299) The formal process was that Council would provide an explanation and rationale for the decision in response to the submissions, then an ongoing process would occur to accommodate the rules with the landowners' requirements.
- (300) The Deliberations meeting adjourned at 12.05pm.

### **9.7 A FURTHER DELIBERATIONS MEETING (VIA ZOOM)**

- (301) A further Deliberations Meeting was held on Friday 6<sup>th</sup> November 2020. This was a virtual meeting, held using Zoom technology.
- (302) This meeting considered both the issues around traditional cultural practices and waahi tapu sites, and all the required adjustments as per the "track change" version of the Bylaws.

## **10.0 COMMITTEE RECOMMENDATIONS**

- (303) In making its recommendations, the Committee considered written submissions and further submissions, the council summary report of these submissions, verbal submissions, the staff-produced an Officers Report and evidence presented at the hearing.
- (304) In terms of "reasons" for its decisions, the Committee has considered the Officers Report discussion and recommendations and, where appropriate, made reference to that report. Where changes to the Officers Report recommendations have been made, the Committee's report notes both the change and reason. Where no change to Proposed Flood Protection and Drainage Bylaw 2020 is recommended over the notified version and no comment is provided the Committee relied on Council's section Officers Report.
- (305) The Committee has considered and supports the Officers Report prepared by staff in relation to the more significant changes recommended by the Committee.
- (306) The following recommendations are made by topic as detailed below.

### **10.1 BYLAWS TRACK CHANGES**

- (307) The Final Track Change version used colour coding to identify the timing of the three versions. These include:
- **Changes in red: Version 2 post- Submissions/Hearings – 26 August 2020**
  - **Changes in green: version 3 post-deliberations meeting 1 – 1 October 2020**
  - **Changes in blue: version 4 post-deliberations meeting 2 – 23 October 2020**
  - **Changes in purple: version 5 post-deliberations meeting 3 (Zoom) – 6 November 2020**

- (308) Responding to Hearing Committee concerns, staff included further clarity within the PART III of the “Introduction” of the Bylaw, to include:

These Bylaws include the fundamental principle that *only tangata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga*

Council does not wish to prevent the undertaking of cultural practices or direct tangata whenua on how to manage waahi tapu areas therefore, specific clauses have been developed to encourage the co-design of specific management plans between council and tangata whenua.

Council recognise that mātauranga māori and the expertise of tangata whenua will add greater value to management and protection of council flood protection and drainage assets.

These Bylaws also give landowners the opportunity to co-design specific management plans for activities that may otherwise necessitate multiple bylaw authority applications. These may include seasonal activities, new capital works, routine maintenance, and emergency works.

These Bylaws include the ability for landowners who undertake seasonal activities, new capital works, routine maintenance, emergency works, traditional cultural practices or manage areas of waahi tapu (e.g. ploughing contractors, territorial authorities, utilities providers, industry or iwi/hapu) that require multiple Bylaw Authority Applications, the opportunity to co-design specific management plans of those activities.

- (309) Staff noted that this wording has been taken directly from Bay of Plenty Regional Council’s Regional Policy Statement - RPS Policy IW 2B (b); with additional wording post Tangata whenua Engagement Report, Oct 20.

- (310) Staff further recommended strengthening Section 3 “Purpose”, to read:

**1. Purpose**

The purpose of these Bylaws is to provide a regulatory framework to protect and control flood protection and drainage assets managed by, or under the control of, the Bay of Plenty Regional Council whether they are in a rural or urban environment, whilst balancing risk, safety to communities, and the unique relationship tangata whenua have with culture and tradition.

- (311) Staff recommended a further inclusion into Section 12 “Applying for Prior Written Authority”, to cover discretion in relation to Culturally sensitive areas. This includes:

**12.1. Written Authority**

**Prior Written Authority** must be sought and obtained before undertaking any activity requiring written authority, as specified in these Bylaws unless an agreed Management Plan Bylaws Authority has been co-designed with Bay of Plenty Regional Council.

....

Note: All advice given under written authority will also consider the Bay of Plenty Regional Council Environmental Code of Practice for Rivers and Drainage Maintenance Activities.

**12.2 Written Authority Management Plan**

Landowners who undertake activities that could necessitate multiple Bylaws Authority Applications will be provided with the opportunity to co-design specific management plans of those activities.

These activities could include seasonal activities, routine maintenance, emergency works, traditional cultural practices or manage areas of waahi tapu (e.g. ploughing contractors, territorial authorities, utilities providers, industry or iwi/hapu).

- a. An application to the Council for an authority management plan under these Bylaws will be made in writing. Council will then work with the entity to co-design a specific plan.

- b. An authority management plan will be time-bound, contain agreed management protocols, and be signed by both parties
- c. Every authority management plan that is agreed will be produced for inspection upon request from council.
- d. Until such time as an agreed authority management plan is in place, all other Bylaws clauses apply (unless clause 12.2.1 (a) applies).
- e. Unless otherwise specified in a plan, all other Bylaws clauses apply.

#### **12.2.1 Iwi/Hapū Management Plans**

- a. Iwi/hapū who exercise traditional Cultural Practices or manage waahi tapu in Bylaw Applicable Areas, may co-design an Iwi/Hapū Management Plan to provide for the ongoing management and protection of both council assets and cultural practices.
- b. A plan developed under (a) must include specific mitigation measures for activities that disturb soil deeper than 300mm.
- c. Any Mātauranga Māori will be recognised and protected in accordance with *He Korowai Mātauranga* and applicable intellectual property provisions.

#### **12.2.2 Cultural Practices and Waahi Tapu Permitted Activities**

Traditional Cultural Practices and management of areas of waahi tapu by Iwi/hapū, shall be deemed a permitted activity for the purpose of these Bylaws, until:

- a. A relevant Iwi/Hapū Management Plan under (12.2.1) takes effect; or
  - b. 31 January 2023,
- whichever event first occurs.
- c. This clause (12.2.2) will cease in effect from 1 February 2023.

#### **12.2.3 Routine Maintenance Management Plan**

Routine maintenance authority management plans can be developed for industry, utility providers and territorial authorities who undertake annual maintenance programmes within Bylaw Applicable Areas, which would otherwise necessitate multiple Bylaw Authority Applications.

#### **12.2.4 Seasonal Workplan Management Plans**

Seasonal Workplan management plans can be developed with those landowners/ lessees who have **seasonal workplans** (e.g. ploughing) that include activities within Bylaw Applicable Areas **which would otherwise necessitate** multiple Bylaw Authority Applications.

#### **12.2.5 Emergency Works Management Plans**

Emergency Works Management Plans can be developed for industry, utility providers and territorial authorities who anticipate they may have to undertake emergency works on existing infrastructure within Bylaw Applicable Areas, which would otherwise necessitate post-emergency Bylaw Authority Applications.

An Emergency works management plan will give the entity the ability to undertake agreed emergency works without prior notice, however the entity will:

- a. Co-design a specific written authority management plan for agreed emergency repairs of infrastructure with the potential to fail and need immediate repair, prior to carrying out any emergency works.



- b. Undertake any and all agreed standard procedures and guidelines outlined in an agreed Emergency Works Authority when undertaking Emergency works.
- c. Notify Bay of Plenty Regional Council as soon as possible after the emergency works actions taken.

## **10.2 DEFINITIONS OF TERMS**

(312) The Hearing Committee decided that amended Definition of Terms were required to better describe these proposed Bylaws. However, none of four amendment were considered significant.

## 11.0 CONCLUSIONS AND RECOMMENDATIONS

(313) The Hearing Committee appreciates the time and expertise that have been dedicated by all parties to ensuring the outcome is one which will add to the effectiveness of the Regional Flood & Drainage Bylaw 2020 update. In particular, we wish to acknowledge the efforts of staff and all submitters during the hearing, and in particular the helpful and positive approach all parties adopted throughout the process.

(314) We are satisfied that our final recommended amendments to this proposed Bylaw change (as set out in Appendix A to this report) are the most appropriate for giving effect to Council's statutory and legal responsibilities.

(315) We recommend to the Regional Council:

- (a) That it has particular regard to the Final Officers Report under the LGIOMA (Appendix C) when making its decision on submissions.
- (b) That the Hearing Recommendations, as outlined in this report with recommendations on provisions with submissions and further submissions, and the reasons, including those set out in this report, be adopted;

Dated 11<sup>th</sup> November 2020



**Andrew von Dadelszen**, Councillor and Hearing Committee Member (Chair)




**Kevin Winters**, Councillor and Hearing Committee Member



**Norm Bruning**, Councillor and Hearing Committee Member



**Bill Clark**, Councillor and Hearing Committee Member



**David Love**, Councillor and Hearing Committee Member



**Toi Kai Rākau Iti**, Councillor and Hearing Committee Member