

Decision Report

Bay of Plenty Regional Council – Integrated Catchments Group

Application to replace 64684
to
Bay of Plenty Regional Council

26 December 2022

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Appendix 1	Consent Conditions
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1 Introduction

[001] In October 2020 the Bay of Plenty Regional Council – Integrated Catchments Group (Applicant) applied to the Bay of Plenty Regional Council (BOPRC) to replace existing resource consent 64684 which authorises erosion and flood protection works outside of identified River Scheme Maintenance Areas.

[002] A duration of 15 years was sought.

The application is granted for the reasons herein.

2 Appointments

[003] The BOPRC, acting under s34A of the Resource Management Act 1991, appointed Independent Hearing Commissioners Rob van Voorthuysen¹ and Poto Davies² to hear and decide the application.

3 Description of the Proposal

[004] The proposal is described in the Applicants AEE³ and the BOPRC s42A Report.⁴ By way of brief summary the activities for which a ‘global’ consent is sought are small in scale and are undertaken primarily in streams adjoining rural production land to remedy bank erosion, protect people and property from flooding and to enhance riparian habitats. The works include:

- Riparian earthworks to repair stream banks;
- Channel maintenance;
- Erosion protection structures in stream beds;
- Vegetation clearance and maintenance of riparian areas;
- Riparian planting; and
- Occasional stream mouth opening and realignment within the coastal environment;

[005] In recent years such works are undertaken around six times per annum.⁵ The cost of the works is generally co-funded by landowners and the Applicant.

[006] Importantly, large parts of the region are excluded from the area for which consent is sought:

- The Maintenance Areas of River Schemes and Land Drainage Schemes identified in Schedule 5 of the Regional Natural Resources Plan (RNRP);
- Rivers and streams within the boundaries of Te Urewera, Whirinaki Te Pua-a-Tane Conservation Park, the Raukumara Conservation Area and the Kaimai-Mamaku Forest Park;
- The Rotorua Lakes; and
- Those sections of rivers and streams within the Coastal Marine Area, except within the sections of coastline between Otamarakau and Matata and between the eastern side of the Ohiwa Harbour entrance and Cape Runaway as well as the rivers and streams which flow into the Ohiwa Harbour.

[007] Additionally, as a result of the Applicant’s engagement with Submitter Ngāti Manawa, the application now also excludes gravel extraction activities within the rohe of Ngāti Manawa.

¹ Commissioner van Voorthuysen is an experienced Independent Commissioner, having sat on over 345 Hearings throughout New Zealand since 1998. He has qualifications in natural resources engineering and public policy. In 2020 he was appointed as a Freshwater Commissioner by the Minister for the Environment.

² Commissioner Davies is an Independent Commissioner (since 2013): grounded in Mātauranga Māori and currently working with elected members of local body government.

³ Non-Scheme Erosion Protection Works within the BOP, Resource Consent Application and Assessment of Environmental Effects Reports, HG, October 2021, section 2.1 The Proposal.

⁴ Bay of Plenty Regional Council, Officer’s Report for notified resource consent application, Section 42A Resource Management Act 1991 (RMA), David Greaves, Consultant Consents Officer, October 2021. Section 2 Summary of the proposal.

⁵ Peter Blackwood, verbal response at the Hearing.

4 Process Issues

4.1 Notification and submissions

[008] The application was publicly notified at the Applicant's request. Eight submissions were received and they are summarised in the Section 42A Report.⁶ We adopt that summary but do not repeat it here for the sake of brevity.

[009] Submitters Jet Boating New Zealand and the Department of Conservation withdrew their wish to be heard.

4.2 Officer's recommendation

[010] The BOPRC s42A Report author, Consultant Consents Officer David Greaves, recommended that the application be granted for a duration of 10 years.

4.3 Hearing, appearances and site visit

[011] We held a Hearing in the BOPRC offices in Whakatane on Thursday, 25 November 2021.

[012] Evidence and legal submissions from the Applicant and evidence from Submitter the Royal Forest and Bird Protection Society was pre-circulated in conformance with procedural Minutes that we issued. Evidence from Fish and Game, Ngāti Pūkiao Environmental Society and Ngai Te Rangī⁷ was tabled at the Hearing. We posed written questions to the Applicant's witnesses which were helpfully answered in writing prior to the Hearing. Copies of the legal submissions and briefs of evidence are held by BOPRC. We do not separately summarise the matters covered here, but we refer to or quote from that material as appropriate in the remainder of this decision. We took our own notes of any answers given to verbal questions that we posed to Hearing participants.

[013] We adjourned the Hearing to enable the Applicant to finalise conditions with the BOPRC as consent authority and to undertake further discussions with Submitter Ngai Te Rangī.

[014] The Applicant's written Reply submissions were provided to us on 20 December 2021.⁸ We closed the Hearing on 21 December 2021, having concluded that we required no further information from any of the parties.

[015] We conducted a site visit on the afternoon of Wednesday, 24 November 2021 accompanied by Charles Harley, BOPRC's Team Leader Eastern Catchments. We viewed three locations, one where works⁹ had previously been undertaken and two where works were intended.¹⁰

4.4 Consent category

[016] As set out in the application and the Section 42A Report, a range of consents are required under the RNRP, the Bay of Plenty Regional Coastal Environment Plan (RCEP) and the Bay of Plenty Gravel Management Plan (GMP).¹¹ It was common ground that under the bundling principle the overall consent category was a discretionary activity.

[017] It was also common ground that the activities requiring consent met the permitted activity standards of Regulations 51 and 72 of the National Environmental Standards for Freshwater 2020 (NES-F) and so no consents were required under the NES-F.

⁶ Section 6, Submissions.

⁷ The two iwi Submitters appeared over Zoom and spoke to PowerPoint presentations.

⁸ Applicant's Reply, 17 December 2021.

⁹ Rock riprap, berm shaping and riparian planting.

¹⁰ Areas with active bank erosion.

¹¹ RNRP Rules LM R4, BW R36 and WQ R21; RCEP Rules DD 11, DD12 and DD14; GMP Rule 4.

4.5 Permitted baseline

[018] When forming an opinion for the purposes of subsection 104(1)(a) of the RMA we may disregard an adverse effect of the activity on the environment if a national environmental standard or a plan permits an activity with that effect.¹² Consistent with the advice provided by Mr Greaves,¹³ we have not disregarded any effects associated with the application.

4.6 Code of Practice and other guidelines

[019] The Application intends to undertake the authorised works in accordance with the Environmental Code of Practice for Rivers and Drainage Maintenance Activities 2019 (CoP) which was developed for works within river schemes and drainage control schemes managed by BOPRC. We find that to be appropriate and note that to be an approach commonly adopted in other regions that we are familiar with.

[020] In addition, the works will be required to conform with BOPRC's Erosion and Sediment Control Guidelines for Land Disturbing Activities ('ESCG') and Hydrological and Hydraulic Guidelines ('HHG'). The Section 42A Report author's rivers engineering technical reviewer Robbin Britton concluded that compliance with those guideline documents would ensure that the potential effects from the proposed works were appropriately mitigated. We agree.

[021] Some Submitters suggested that the CoP required reviewing and updating and sought to have that addressed as part of this consent process. We record that to be outside the scope of our jurisdiction.

5 Section 104 and 104B matters

[022] We now address the relevant aspects of the application in terms of sections 104 and 104B of the RMA.

5.1 Actual and potential effects on the environment

[023] Having reviewed the documentation we find that we should address the following matters:

- Traffic light ecological assessment;
- Natural character and landscape; and
- Otamarakau Marae stream works.

[024] We record that granting the application would have a range of positive effects in terms of arresting river bank erosion and the loss of production land and structures and the flow on economic benefits of that.

5.1.1 Traffic light ecological assessment

[025] As outlined in the evidence of Ricard Montgomery,¹⁴ the Applicant employed a risk-based approach to the assessment of potential ecological effects using GIS mapping to identify streams with high, moderate and low ecological values. The ecological sensitivity of the streams was given a 'traffic light' coding system ranging from potentially highly sensitive (red), potentially moderately sensitive (amber) to potentially low sensitivity (green). That coding is used to inform the protection of ecological values within each catchment. The catchments are divided into four areas – Tauranga, Central, Ohiwa and East Cape.

[026] Ecological sensitivity was determined using five key criteria – notified significant areas, land cover, threatened fauna, native fish and trout. Water quality and benthic invertebrate indices were not included because the Applicant considered that any effect from stream works would be localised and short-term. Instead, the focus was given to ecosystems and species that have a greater risk of being adversely affected by drainage and erosion control works.

[027] Submitter Forest and Bird was critical of the 'traffic light' approach, but we consider it to be a suitable screening mechanism for a 'global' or region-wide consent. Importantly, in response to comments from Mr Greaves, the Applicant has decided to prepare a detailed environmental management plan (DEMP)

¹² Section 104(2) of the RMA.

¹³ Section 42A Report, section 7.1 Permitted Baseline.

¹⁴ A freshwater scientist and environmental consultant and owner and managing director of Freshwater Solutions Limited.

for each works site. The DEMP would be subject to BOPRC certification to ensure that it appropriately gave effect to the conditions of consent and was essentially 'fit for purpose'. As described by Mr Montgomerie, and as detailed further in the Applicant's recommended consent conditions, the DEMP will include the:

- Location of the stream works inputted into GIS so that works can be cumulatively summarised and mapped over time;
- Timing and duration of works *including their scale, purpose and timing (duration and time of year)*;
- Roles and responsibilities for undertaking the works;
- A record of engagement with tangata whenua and consultation with the *Department of Conservation and Forest and Bird. Fish and Game would be consulted when stream works were proposed in areas identified as having significant trout habitat*;
- Brief description of the nature of the works;
- *An engineering assessment with a preference for 'soft engineering' solutions*;
- Ecological values at the works site and the sensitivity of those values to the proposed works;
- Proposed mitigations including additional mitigations to address site specific potential effects (e.g. inanga spawning);
- Proposed monitoring;
- Summary of outcomes; and
- Recommendations for improvements.

[028] In section 3 of this Decision, we noted that the stream works consent would not apply in a number of areas. We note that the Applicant's recommended conditions of consent invoke a wide range of additional ecological safeguards, including:

- Precluding works on the Motu River, except for river mouth openings and erosion control structures 100m upstream and downstream of the State Highway 35 Bridge;
- Precluding groynes in areas identified in district or regional plans as Outstanding Natural Features or Landscapes (ONFLs);
- Precluding works within Outstanding Natural Character Areas in the Coastal Environment;
- Within the Rangitāiki River Catchment all stream works will include measures to protect or enhance tuna habitat;
- Except where necessary to protect property or infrastructure from flooding, no works will take place at river mouths or within the Coastal Marine Area during the bird nesting season;
- No works will be undertaken in potential whitebait spawning zones between 1 March and 31 May;
- No instream works will take place during the trout spawning season (May-Sept) of each year in areas identified as providing trout spawning habitat; and
- Where practicable, avoiding works during fish spawning and migration periods.

[029] The above safeguards were informed by the Applicant's engagement with interest groups and by their response to submissions. They were generally well supported by Submitters at the Hearing.

[030] The primary residual matter of contention involved whether or not a freshwater ecologist should be required to undertake an ecological assessment for all proposed stream works. Nicola Pyper, BOPRC's consultant ecologist and a member of the Section 42A Reporting team, considered that should be the case. That was a view shared by Forest and Bird representative Linda Conning. Conversely, Mr Montgomerie considered that the majority of the stream works would be in insensitive (green) or moderately sensitive (amber) locations. He suggested that when coupled with the infrequent and small-scale nature of the proposed works, this would result in those works having low or negligible adverse

effects, meaning that a site-specific ecological assessment would not be needed.¹⁵ We understand his view to be that would only be required in a 'red' area.

- [031] To help us to resolve this matter we asked how often the replacement consent might be utilised in the future and as we noted earlier, Mr Blackwood suggested it would probably be around six times per annum. On that basis we do not consider it to be overly onerous to require an ecological assessment for each proposed stream works site. We suggested to the Applicant that this could be by way of a joint site visit involving the affected landowner, the Applicant's engineering or land management officer, the BOPRC ecologist and local tangata whenua (should they wish to be involved). In our view that would facilitate the "co-design" approach that it seemed to us was being advocated by the Applicant.
- [032] The conditions referred to us in the Applicants Reply specified the use of suitably qualified and experienced ecologist to identify the ecological values present in a works area. The conditions also require a record of any engagement (including any site visits) with local iwi or hapu who are mana whenua to be contained in the DEMP. We find that to be appropriate.
- [033] Subject to the imposition of appropriate conditions of consent we find that potential adverse effects on ecological values will be no more than minor.

5.1.2 Natural character and landscape values

- [034] Submissions¹⁶ identified a lack of emphasis on the potential adverse effects of stream works on natural character and landscape values. Notwithstanding the small-scale nature of most of the historical and future works, the Applicant engaged Rebecca Ryder¹⁷ to consider and address the Submitter concerns. We understand that response was mainly in relation to potential cumulative effects of stream works on those matters. Ms Ryder concluded that the variance of methods and locations of the works proposed under the Application created potential for adverse landscape and natural character effects to occur. She proposed a series of spatial and temporal limits and management outcomes to manage the scale, nature and location of particular works¹⁸ and their cumulative scale.¹⁹
- [035] More specifically, those limits included how many times per annum the works could be undertaken at a particular site, the number of works sites that could be undertaken within a 3 km or 5 km stretch of river throughout the duration of the consent, the maximum scale (lineal extent or area) of activity allowed for each 'job' and the outcomes to be achieved in scheduled regional and district Outstanding Natural Features and Landscape (ONFL) areas.
- [036] We understand that the spatial and temporal limits and management outcomes developed by Ms Ryder satisfied the concerns of Fish and Game²⁰ and the Department of Conservation.²¹
- [037] At the Hearing we queried why Ms Ryder's 'outcomes' were not included in the Applicants recommended conditions. This was also a matter of concern to Ms Conning. For the Applicant Mr Ferguson²² advised that Ms Ryder's full table would be appended to the consent and when we suggested that could create confusion Mr Ferguson agreed it would be better to include those outcomes in the conditions. The

¹⁵ EIC Montgomerie, paragraphs 93 and 94.

¹⁶ Including Forest and Bird, Fish and Game and the Department of Conservation.

¹⁷ A Landscape Architect and Director, of the firm Boffa Miskell Limited.

¹⁸ Groynes, gabion baskets, rock riprap edge protection, gradient control structures, poplar willow planting, gravel management, earthworks.

¹⁹ EIC Ryder, Annexure 1.

²⁰ EIC John Meikle (Fish and Game), paragraph 4.2.

²¹ In a letter dated 16 November 2021 the Department withdrew its wish to be heard stating "Following the lodging of a submission by the Director-General of Conservation on this application, DOC staff have had further discussions with the applicant. As a result of that, the applicant has included several provisions in evidence and accepted provisions in the Council s42A report to address the Director-General's concerns ..."

²² A self-employed planning consultant based in Whakatane.

conditions that we have imposed adopt that approach. We understand that would address the concerns expressed by Forest and Bird.²³

[038] Subject to the imposition of appropriate conditions of consent we find that potential adverse effects on natural character and landscape values will be no more than minor.

5.1.3 Otamarakau Marae river mouth works

[039] At the Hearing representatives of Submitters Ngāti Pīkiao Environmental Society and Ngai Te Rangi spoke at length about the adverse effects of historical river mouth opening of the Otamarakau Stream adjacent to the Otamarakau Marae. There was concern that those works were undertaken with the authorisation of the landowners²⁴ and the works resulted in severe coastal foreshore and dune erosion.

[040] We understand that those works were not undertaken by the Applicant and anecdotal evidence was that they had been undertaken by a local farmer. Accordingly, while we acknowledge the adverse effects of those works (as graphically illustrated by the images shown by Pia Bennet) that matter is not directly relevant to our assessment of the application. In saying that we note that any such future works could not be undertaken by the Integrated Catchments Group without the approval of the affected landowners.

5.1.4 Māori cultural values and interests

[041] In the preceding section we addressed specific concerns relating to the Otamarakau Stream. We record that at the Hearing Māxeen Newton representing Submitter Te Runanga o Ngāti Manawa advised, in response to our questions, that she was satisfied that the Applicant had appropriately addressed all of Te Runanga o Ngāti Manawa's concerns, including by way of proposed conditions of consent.

[042] As noted in section 4.3 of this Decision we adjourned the Hearing to enable the Applicant to undertake further discussions with submitter Ngai Te Rangi. In their Reply submissions²⁵ the Applicant offered to two (although we understand there are three) additional conditions²⁶ to address issues of concern to Ngai Te Rangi²⁷ and that those conditions provided for:

- the exclusion of Structures within Outstanding Natural Features and Landscapes and High or Very High Natural Character Areas in the Coastal Environment within the Ngai Te Rangi Area of Interest; and
- for works within the Ngai Te Rangi Area of Interest, a record of consultation with the Tauranga Moana Advisory Group or representative iwi members/manua whenua at the location of the proposed works, in addition to any relevant hapu representative(s), will be required. The outcomes from that process would be documented and implemented to the greatest extent practicable.

[043] We accept the Applicant's offer to impose these conditions.

[044] Apart from the matters of the river mouth opening of the Otamarakau Stream and the resolution of the concerns of Te Runanga o Ngāti Manawa (both of which we discussed above), we find that there are no other matters relating to Māori cultural values and interests that would either weigh against the grant of consent or occasion the imposition of additional conditions of consent.

5.2 National environment standards and other regulations

[045] The NES for Sources of Human Drinking Water (NESDW) is potentially relevant. However, as noted by Mr Greaves, the DEMP requires the identification of registered drinking water supplies and includes a

²³ Presentation to the Hearing Panel, Linda Conning, paragraph 15.

²⁴ It appears that the beach and foreshore area within which the river mouth meanders is in fact in private title.

²⁵ Reply Submissions, paragraph 5.

²⁶ We understand those conditions are 2.1(h), 3.1(n) and 15.10.

²⁷ In a 23 December 2021 Addendum to the Reply submissions counsel for the Applicant advised that notwithstanding that Ngai Te Rangi had clarified that it had not agreed to the imposition of these conditions, the Applicant remained willing to offer them as a means of addressing potential cultural effects on Ngai Te Rangi.

methodology for ensuring that the contamination of the water supply is avoided. Certification of the DEMP by the BOPRC in its regulatory capacity will ensure that appropriate water quality criteria are met.

[046] We discussed the NES-F in section 4.4 of this Decision. No other relevant national environmental standards or regulations were brought to our attention and we are not aware of any.

5.3 National policy statements

[047] The NPS for Freshwater Management 2020 (NPSFM) is applicable. The NPSFM 2020 was assessed by both Mr Ferguson²⁸ and Mr Greaves.²⁹ We have had regard to those assessments which concluded that the application was consistent with the objectives and relevant policies. Our own assessment follows.

[048] The sole Objective 2.1(1) of the NPSFM 2020 is:

The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:

- (a) first, the health and well-being of water bodies and freshwater ecosystems
- (b) second, the health needs of people (such as drinking water)
- (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future

[049] The application is primarily directed at achieving to meet Objective 2.1(1)(c). However, we are satisfied that the DEMP process will ensure that Objective 2.1(1)(a) will also be met.

[050] We consider that most relevant NPSFM policies are Policy 1, 2, 7, 9 and 15.³⁰

[051] Policy 1 is to manage freshwater in a way that gives effect to Te Mana o te Wai. The NPSFM states that Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. This largely replicates Objective 2.1. We find that the conditions of consent that we have imposed will adequately prioritise the health and well-being of the affected river ecosystems where works will be undertaken.

[052] Policy 2 is that tangata whenua are actively involved in freshwater management (including decision making processes) and Māori freshwater values are identified and provided for. In this case that will be achieved by the involvement of tangata whenua in site visits and the co-design of appropriate works and mitigation measures.

[053] Policies 7, 8, 9 and 10 relate to avoiding the loss of river extent and values the extent practicable, protecting the significant values of outstanding waterbodies and the habitats of indigenous freshwater species and trout. We are satisfied that will occur through the DEMP process and the compliance with consent conditions, including those relating to inanga spawning sites and the avoidance of trout spawning areas and fish migration periods.

[054] Policy 15 is that communities are enabled to provide for their social, economic, and cultural well-being in a way that is consistent with the NPSFM. Granting the application would achieve that outcome for the landowners whose land is threatened by erosion and flooding.

[055] In overall terms we find that the application is consistent with the NPSFM 2020.

²⁸ EIC Ferguson, paragraphs 7.8 to 7.20.

²⁹ Section 42A Report, section 8.3.1.

³⁰ The remaining policies relate to procedural matters; BOPRC plan making, the use and development of land, monitoring and information provision; or features that are not present here (natural inland wetlands and outstanding water bodies).

5.4 New Zealand Coastal Policy Statement

[056] Mr Greaves considered that the requirements of the New Zealand Coastal Policy Statement were encapsulated within the RCEP. We agree.³¹

[057] Mr Ferguson separately assessed the NZCPS³² and concluded that the proposed activities were consistent with its objectives and policies. He considered that the proposed works were appropriate in the coastal environment and the effects of them were generally transient and could be adequately managed through the proposed consent conditions. In particular, Mr Ferguson suggested that the minor and transitory nature of the proposed works ensured that the Applicant would be able to give effect to Policies 13 and 15 of the NZCPS. In that regard he considered that avoidance was not necessary to preserve the natural character of the coastal environment or to protect natural features and natural landscapes.

[058] We heard no evidence to the contrary and so we accept Mr Ferguson's conclusions.

5.5 Regional Policy Statement

[059] The Bay of Plenty Regional Policy Statement (RPS) became operative on 1 October 2014. The RPS provisions were comprehensively assessed by Mr Ferguson³³ and Mr Greaves.³⁴ Both of those assessments concluded that the application was consistent with the direction provided by the RPS. We agree, particularly in relation to safeguarding the life supporting capacity of coastal ecosystems, encouraging tangata whenua to identify measures to avoid, remedy or mitigate adverse cultural effects; protecting significant indigenous habitats and ecosystems and mitigating of natural hazards.

[060] We note that the application is contemplated by Method BW M18 which states that BOPRC will undertake stream maintenance and restoration works in conjunction with landowners.

5.6 Regional plans

[061] The relevant regional plans were outlined in section 4.4 of this decision. The provisions of those plans were comprehensively assessed by Mr Ferguson³⁵ and Mr Greaves.³⁶ Both of those assessments concluded that the application was consistent with the relevant provisions.

[062] We agree, particularly regarding taking into account and addressing water and land concerns of tangata whenua; appropriately managing riparian margins to protect and enhance their soil conservation and water quality; protecting vulnerable areas from erosion; complying with identified environmental standards; maintaining or enhancing aquatic ecosystems, aquatic habitats of indigenous species, spawning areas and migratory pathways of fish and significant aquatic vegetation; ensuring that the diversion of natural watercourses in the Coastal Marine Area is only undertaken where necessary to protect people and property from flooding; and safeguarding of community assets from flooding and erosion.

5.7 Iwi and hapū management plans

[063] The Applicant identified, in Appendix 9 of the AEE, a large number of iwi and hapū management plans that are relevant to the application. Mr Greaves advised that he considered that to be comprehensive and that it identified all of the documents that are relevant to the application. Mr Greaves considered that the inclusion of the DEMP process, specifically the requirement to identify specific site values and to actively engage with tangata whenua regarding proposed works and possible mitigation or enhancement provided a response that was consistent with the general direction of the iwi and hapū management plans.³⁷

[064] We agree and note the iwi submitters did not suggest otherwise.

³¹ Commissioner van Voorthuysen chaired the first instance Hearings on the RCEP and so is familiar with its relevant provisions.

³² EIC Ferguson, paragraphs 7.21 to 7.26.

³³ EIC Ferguson, paragraphs 7.27 to 7.55.

³⁴ Section 42A Report, section 8.2.

³⁵ EIC Ferguson, paragraphs 7.56 to 7.90.

³⁶ Section 42A Report, section 8.1.

³⁷ Section 42A Report, section 8.7 Section 104(c) – Other Matters.

5.8 Sections 105 and 107

[065] Under s105 of the RMA we must have regard to the nature of the discharge and the sensitivity of the receiving environment, the Applicant's reasons for the proposed choice and any possible alternative methods of discharge including into another receiving environment.

[066] In this case the stream works have the potential to result in a temporary discharge of sediment to rivers. However, we agree with Mr Ferguson that the purpose of the works is to remedy the discharge of sediment to those rivers. In that regard we also agree that appropriate regard has been had to the sensitivity of the receiving environments and to the potential for alternatives through the inclusion of a variety of exclusions (see section 5.1.1 of this Decision) and the proposed DEMP process which will require consideration of options and methodologies based on the circumstances of each stream works site and be guided by the COP, engagement with relevant stakeholders and expert assessment.³⁸

[067] Section 107 requires that no discharge permit shall be granted that allows certain listed effects in the receiving waters after reasonable mixing. Mr Ferguson advised that it is possible that some works may generate unavoidable temporary sediment discharges and that may lead to a change in the colour or visual clarity of water at the point of discharge. He considered that none of the other effects listed in Section 107 were likely to arise. He concluded that met the requirements of s107(2) which allows a discharge that is unable to meet the standards in s107 in exceptional circumstances, including where the effects would be temporary or where the discharge is associated with necessary maintenance works.³⁹

[068] We agree.

5.9 Duration

[069] As noted earlier the Applicant sought a duration of 15 years and Mr Greaves initially recommended a duration of 10 years. The basis for Mr Greave's recommendation was to accommodate possible changes in policy direction arising from the freshwater planning instrument required to be prepared under section 80A clause 5(d) of Part 5 Subpart 4 of the RMA by December 2024.

[070] Upon reading the application documentation and the Section 42A report we were of the opinion that the 15-year term sought was appropriate, particularly in light of the comprehensive suite of recommended consent conditions. Accordingly, we asked Mr Greaves if he could foresee any situation whereby the consent would not be renewed (replaced) in ten years' time, the context to that question being our view that any matters relating to the management of effects could more properly be dealt with by way of section 128 reviews. Mr Greaves advised that he could not foresee any such circumstances.

[071] In that regard, we note that at the Hearing Submitter Fish and Game supported a 15-year duration⁴⁰ and we understand that term was not opposed by the Department of Conservation.

[072] However, several submitters sought shorter durations. We acknowledge that section 128 reviews are optional and there can be no certainty that they would occur. Accordingly, we asked the Applicant to consider offering (on an Augier basis) a condition whereby a section 127 application to change conditions would be lodged if the freshwater planning instrument referred to above (once operative) imposed different policy outcomes compared to the current suite of regional plans.

[073] In Reply the Applicant advised:⁴¹

The Applicant has carefully considered this suggestion but does not consider it necessary or appropriate to offer up a s127 review. While historically it may be accurate that consent authorities have not regularly undertaken s128 reviews, the position is expected to be different in relation to consents which are

³⁸ EIC Ferguson, paragraphs 7.91 to 10.8 (sic). Paragraph 10.8 should be 7.8.

³⁹ EIC Ferguson, paragraph 7.11.

⁴⁰ Verbal comment by John Meikle.

⁴¹ Reply submissions, paragraph 7.2.

impacted by the plan changes required to give effect to the NPS-FM, given the importance of that national policy direction and its potential to impact on a number of existing consents. The amended s128 review condition offered by the Applicant closely reflects a standard condition now imposed by BOPRC as consent authority on consents which are likely to be impacted by the upcoming NPS-FM plan changes, and it is anticipated that such consents will be reviewed as appropriate upon those plan changes becoming operative (or at an appropriate time thereafter).

[074] Having examined the now offered s128 review condition we accept the Applicant's submissions on this matter, and note that we have further amended that condition, as we discuss in section 8 of this Decision.

[075] In its Reply the Applicant maintained their request for a 15-year duration. Included in the Reply was an email from Mr Greaves stating that he now also supported that term. That reinforced our initial view that a 15-year duration was appropriate and that is what we have imposed.

5.10 Other matters

[076] No other relevant matters were brought to our attention and we are not aware of any.

6 Part 2 matters

[077] Following the Court of Appeal's judgement on *RJ Davidson Family Trust v Marlborough District Council* we have not separately assessed Part 2 matters as we consider that the relevant plan provisions have clearly given effect to Part 2 and so assessing the Part 2 matters "would not add anything to the evaluative exercise".

7 Determination

[078] Pursuant to the powers delegated to us by the Bay of Plenty Regional Council under section 34A(1) of the Resource Management Act 1991, we record that having read the Applicant's application documents, evidence and legal submissions; the BOPRC Section 42A Report; the submissions and submitter evidence, and having considered the various requirements of the RMA, we find that:

- a) Based on the evidence before us, the actual and potential adverse effects of the application are either no more than minor or can be suitably avoided, remedied or mitigated by readily enforceable consent conditions;
- b) The application if granted will have positive effects in terms of reducing stream bank erosion and flooding;
- c) The application is consistent with the provisions of the relevant statutory instruments, and
- d) The purpose of the RMA would be best achieved by granting the application.

[079] We therefore **grant** the application lodged by the Bay of Plenty Regional Council – Integrated Catchments Group to replace existing resource consent 64684 which authorises erosion and flood protection works outside of identified River Scheme Maintenance Areas.

[080] Our reasons are set out above and are expanded upon in the body of this Decision.

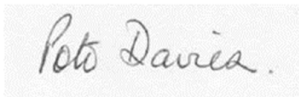
8 Conditions

[081] As referred to in Section 4.3 of this Decision, we asked the Applicant to attach a revised suite of conditions to their written Reply that would address matters raised during the Hearing and which clearly showed areas of residual disagreement as between the Applicant and the Section 42A Report authors. The Reply submissions advised that all of the changes proposed to the revised conditions attached to the Reply had been agreed to by Mr Greaves.⁴²

⁴² In an email dated 17 December 2021.

- [082] We have carefully examined the agreed conditions attached to the Reply and have made numerous amendments to them, including:
- correcting grammar;
 - consistently referring to a “river or artificial watercourse” given the rules that occasion the need for consent and the fact that a river includes a modified watercourse but not an artificial watercourse;
 - omitting references to streams as under the RMA a river includes a stream;
 - omitting references to a “water body”;
 - using consistent condition sub-clause numbering;
 - correcting internal condition cross-references;
 - using consistent phraseology in the conditions;
 - using the standard format for conjunctive clauses (only using “and” for the penultimate clause);
 - clarifying the intent and meaning of numerous conditions and the contents of what are now Tables 1 and 2;
 - clarifying the period of time that the annual report relates to and the need for any auditing of work activities;
 - clarifying periods of time that span calendar years;
 - using the word “must” in place of the word “shall” where appropriate in conformance with contemporary drafting principles;
 - amending the review condition to refer section 80A clause 5(d) of Part 5 Subpart 4 of the Resource Management Act 1991 regarding the freshwater planning instrument required to be prepared under that Subpart, as was discussed during the Hearing; and
 - listing in an appendix the documents to be attached to the consent (to be undertaken by the BOPRC upon the issuing of this Decision)
- [083] The conditions imposed are attached as Appendix 1 to this Decision. We have not shown our amendments using a ‘track changes’ format given their large number. We acknowledge that this will require the Applicant, the Council as regulator, and Submitters to undertake a careful reading of the conditions.
- [084] Given the above discussion, it is conceivable that the conditions may contain minor errors or omissions. Accordingly, should the Applicant or the Council as regulator identify any minor mistakes or defects in the attached conditions, then we are prepared to issue a revised schedule of amended conditions under s133A of the RMA correcting any such matters. Consequently, any minor mistakes or defects in the amended conditions should be brought to our attention prior to the end of the 20-working day period specified in section 133A of the RMA.

Signed by the commissioners:



Poto Davies



Rob van Voorthuysen (Chair)

Dated: 26 December 2022