

**BAY OF PLENTY REGIONAL COUNCIL AND WESTERN BAY OF PLENTY  
DISTRICT COUNCIL**

**DECISION OF HEARING PANEL**

<b>IN THE MATTER OF:</b>	<b>The Resource Management Act 1991</b>  <b>and</b>  <b>A joint hearing for an application to create new public walking access and an associated tourist and recreation activity</b>
<b>APPLICANT:</b>	Tauranga City Council and Ngāti Hangarau
<b>SITE:</b>	Omanawa Falls, 1031 Omanawa Road, Omanawa.
<b>PROPOSAL:</b>	To establish and operate physically and culturally safe walking access to Omanawa Falls (including provision of on-site car parking and toilet facilities) and to provide a comprehensive tourist and recreation facility.
<b>HEARING DETAILS:</b>	<p>The publicly notified application was heard by a Hearing Panel consisting of Independent Commissioners Gina Sweetman (Chair) and Russell De Luca, under authority delegated by the Bay of Plenty Regional and Western Bay of Plenty District Councils, on Monday 11<sup>th</sup> and Tuesday 12<sup>th</sup> April 2022 at Trustpower Bay Park, 81 Truman Lane, Mount Maunganui, Tauranga.</p> <p>The Panel visited the site on the afternoon of Monday 11<sup>th</sup> April 2022.</p> <p>The hearing was adjourned on 12<sup>th</sup> April and closed on 22<sup>nd</sup> April 2022.</p>
<b>DECISION SUMMARY:</b>	<b>Consent is approved for the reasons given in this decision.</b>

## HEARING ATTENDANCE

The following people attended and presented evidence at the hearing:

### **For the Applicant, Tauranga City Council (TCC) and Ngāti Hangarau**

- Ms. Mary Hill, Counsel
- Ms. Ana Hancock, Design Lead and Project Manager, TCC
- Mr. Warren Aitken, Manager – Parks and Recreation, TCC
- Koro Nicholas, Chair of the Ngāti Hangarau Hapu Trust
- Tim O’Brien, Ngāti Hangarau<sup>1</sup>
- Mr. Jason Wright, CEO and Business Development Manager, Kaitiaki Adventures
- Mr. Skip Fourie, Transportation Planner
- Ms. Paula Golsby, Planning Consultant

### **For Bay of Plenty Regional Council (BOPRC):**

- Ms. Lucy Holden, Senior Consents Planner
- Mr. Reuben Fraser, Consents Manager
- Ms. Heather MacKenzie, Ecologist
- Ms. Anna McKay, Environmental Engineer

### **For Western Bay of Plenty Council (WBOPDC):**

- Mr. Bevan Hudson, Senior Consents Planner
- Mr. Chris Watt, Environmental Consents Manager
- Ms. Alison Curtis, Compliance and Monitoring Manager
- Mr. Jim Paterson, Transportation Manager
- Mr. Ken Lawton, Senior Development Engineer

### **Submitters:**

- Ms. Sarah Cornelius
- Ms. Margaret Murray-Benge

### **Others in attendance:**

Ms. Melanie Jones and Ms. Rachel Musgrave from BOPRC provided hearing support. Ms. Jemma Hollis was also in attendance for the applicant.

The applicant had several people attend in support.

## **1 Description of the proposal**

1. The application is described in Section 3 of the Applicant’s Assessment of Environmental Effects (AEE) dated July 2021, and the further information dated 3 December 2021, 16 February 2022 and 8 March 2022, and in paragraphs 6 to 8 of WBOPDC’s s42A report and Section 3 of the BOPRC’s s42A report. For the sake of brevity, we adopt these descriptions.
2. In summary, the application is to establish and operate a physically and culturally safe public trail to Omanawa Falls, to provide guided tours of the trail and establish a visitor centre to support guided tours. The project is to be staged, with the immediate priority

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<sup>1</sup> Both Mr. Nicholas and Mr. O’Brien hold a number of roles relating to Ngāti Hangarau

being the construction of the physically and culturally safe public trail, including the provision of on-site car parking and toilet facilities. The project includes:

- Vegetation clearance and earthworks to create a public walking trail down to the edge of the waterfall pool. The public trail will be safe but considered challenging, with a number of stairs and ladders. The more challenging parts of the public trail are classified as 'Easy Tramping Track' in terms of the Department of Conservation (DOC) walking track categories.
  - Three viewing platforms; one at the historic "*cutting*" looking out over the falls (near the eastern end of the 4WD track), another platform part way along the public trail at the high point, and a third adjacent to the pool at the bottom of the waterfall.
  - A car parking area for 77 vehicles, including two accessible spaces, and 4 minibus loading and drop-off spaces, with a new gated vehicle entrance to the car parking area off Omanawa Road.
  - Public toilets with holding tanks to be installed next to the car park area.
  - Design elements referencing the cultural significance of the site (e.g. pou, palisade fencing, waharoa and ātea).
  - Paid guided tours of the public trail.
  - On-site signage, including one sign up to a height of 3.0m (located within the frontage of the site), interpretive and storyboard signage panels and information regarding the site along the public trail, hazard signage, directional signs located within the car park and vehicle access areas.
  - Re-purpose the existing building as a Visitor Centre or replace this with a purpose-built building with a similar footprint and location.
  - Use of the site for small hui or wānanga and larger special events.
3. Through the hearing process, it was clarified that:
- The walking track is to be publicly accessible (free to the public). Paid guided tours would also be available, which would be supported by the visitor centre.
  - There would be up to two special events with up to 200 people per annum
  - There would be up to six hui/wānanga for up to 30 people per annum
  - The diverging lane initially intended to allow vehicles to pull off Omanawa Road before turning left into the site would not be provided
  - The minibuses would be "midi-buses"
  - An Operations Management Plan (OMP) would be implemented by the consent holder to ensure that all recommended conditions would be met and adhered to on an ongoing basis. This would be a living document that would be updated as activities are introduced over time.
4. Construction is expected to take approximately 10 months. The applicant sought a 10-year lapse period for the district consent.
5. From a regional council perspective, the project would involve:
- Earthworks associated with rock scaling to stabilise a cliff face and to form a car park, with approximately 2,500m<sup>2</sup> proposed for the car park area
  - Vegetation clearance of approximately 994m<sup>2</sup> associated with the cliff stabilisation and rock scaling and to construct parts of the walking track; and
  - The construction of a wooden platform next to the Omanawa waterfall pool within the bed of the Omanawa River.
6. The applicant has requested a five-year consent duration for the regional consents.

## 2 The Site and Background

7. The site and surrounding area is described in Section 6 of the applicant's Assessment of Environmental Effects (AEE) dated July 2021 and in paragraphs 17 to 23 of the WBOPDC's s42A report and Section 8 of the BOPRC's s42A report. For the sake of brevity, we adopt these descriptions. Section 2 of the AEE, paragraphs 24 and 25 of the WBOPDC s42A report and section 2 of the BOPRC s42A report provide a useful background context which underpins the purpose of the application.
8. Of particular note are:
  - The ongoing operation of the Omanawa Falls Power Station on the site, which is accessed by way of the 4WD track and tunnel access
  - That TCC owns the site, and it is managed in association with McLaren Falls Park
  - While the site is managed as a reserve, it is not registered under the Reserves Act 1977
  - The area is within the rohe of Ngāti Hangarau, and the Falls are tapu and of high cultural significance to them.
  - The site is closed to the public, but there is regular ongoing illegal access occurring through to the Falls. This is leading to associated issues with illegal parking on the road, vandalism and trespass of private property
  - The access to the falls is informal and generally unsafe, resulting in some serious injuries and fatalities occurring
  - Ngāti Hangarau kaitiaki have been present on site for most of summer and will be through most of the winter period, with reduced hours. Their presence has assisted to manage illegal access and antisocial behaviour, but these are still occurring.

## 3 Procedural Matters

### Prehearing

9. All relevant expert evidence was pre-circulated in advance of the hearing and taken as read.
10. Evidence circulated by the parties is outlined below as stated in the hearing.
11. Ms. Holden, the BOPRC reporting officer, circulated an addendum to her s42A report on 8<sup>th</sup> April 2022. This addendum addressed effects on historic heritage and archaeology and confirmed that draft conditions had been agreed between Heritage New Zealand and the applicant which had been included on the recommended WBOPDC consent conditions and that the same condition was not required to be included on the regional council consent.
12. Also received on the 8<sup>th</sup> April 2022 was a set of recommended conditions for the regional consents, as agreed between Ms. Holden and Ms. Golsby.

### The Hearing

13. The hearing was held on 11<sup>th</sup> and 12<sup>th</sup> April 2022. The Panel adjourned the hearing after hearing from the applicant, Ms. Cornelius and Ms. Murray-Benge, and undertook a site visit. Koro Nicholas welcomed the Panel to the site and then the Panel was escorted

around the site by two TCC park rangers. The hearing reconvened on the morning of the 12<sup>th</sup> April 2022.

14. Koro Nicholas opened the hearing with a mihi and karakia.

Applicant Evidence Summary

15. *Ms. Hill* provided opening submissions, addressing the statutory considerations, the existing environment, the assessment undertaken by the applicant, the matters raised in submissions, and evidence in support of the applicant.
16. Particular points she expressed included:
- If granted, the land use consent would run with the land and bind TCC as landowner and consent holder. TCC would be consent holder for the regional consents.
  - There had been refinements made to the proposed activities since the application was first lodged, which are within the scope of the application as lodged. These included:
    - The walking track will be publicly accessible, and both free public access and paid guided tours would be offered
    - Confirmation of the likely activities in the visitor centre
    - Examples of how the commercial tourism enterprise (CTE) would operate
    - A reduction of special events from six events of up to 200 people, to two events of up to 200 people and six hui of up to 30 people annually
    - Refinements to the proposed measures to monitor and manage parking
    - Removal of the proposed diverging lane.
  - While further details of the CTE activity had been provided, the operation of these activities should not be managed through the conditions of consent. Rather, the conditions should manage the effects anticipated to arise from the activities, principally being noise, traffic and parking
  - The applicants have applied for a discretionary activity consent for a place of assembly, rather than rely on the temporary activity permitted activity rule. That temporary activity rule forms part of the permitted baseline.
  - The applicants propose to manage effects through a regularly reviewed Operations Management Plan (OMP), which will work in conjunction with the conditions of consent
  - The OMP would be resubmitted to the WBOPDC for certification as new activities are introduced, or if a car parking trigger or review timeframe is met
  - It is appropriate that the term “certification” rather than approval is used in respect of the management plans (and subsequent amendments) and other operational matters that require a future input from consent authorities.
  - The conditions of consent would provide an envelope of effects.
17. In respect of matters raised by submitters, she submitted that:
- The video of antisocial behaviour submitted by Ms. Cornelius are not effects associated with the proposal and not relevant for the Panel’s consideration.
  - The proposal would result in an increase of people onsite, and therefore an increase of passive surveillance.
  - The applicant has sought to proactively engage with submitters, and the application includes key measures to address their concerns:
    - The use of natural materials and native vegetation

- Construction of a safe pathway, managing access through guided tours, education on cultural values, passive surveillance by kaitiaki, signage and tours prohibiting swimming, to address visitor safety
  - Noise controls and noise managements plans, hours of operation, the OMP and complaints procedures to address amenity effects
  - Mitigation planting and fencing
  - Parking monitoring and management tools to address traffic generation and onsite parking
  - Strategies to manage antisocial behaviour
  - The scale and frequency of the special events is less than what is permitted through the temporary activity permitted rule
  - The condition sought by Omanawa Falls Hydro Limited for a comprehensive risk management process and safety management plan complying with NZS 7901 could be ultra vires as it requires on compliance by a third party.
18. Ms. Hill also confirmed that mitigation planting within private property is not required in order to mitigate landscape effects arising from the proposal.
19. Ms. Hill concluded that the proposal would result in significant benefits to the community by reinstating physical and culturally safe public access to the Falls. It would also provide Ngāti Hangarau with practical opportunities to exercise kaitiakitanga and manaakitanga at the Falls. There would also be economic development opportunities for Ngāti Hangarau and the wider community.
20. In response to a question about the relationship between permitted activities and a consent, Ms. Hill advised that the consent is what limits what can happen on the site.
21. *Ms. Ana Hancock* spoke to her evidence, providing a project overview. In summary, she addressed the Governance of the project and the background to the site and the project. This included the commitment since 2008 to provide improved public access to the reserve, the Falls and historic features. She identified four key pressures in respect to the project:
- The safety concerns
  - The interest from the public and in particular tourists to visit the site, exacerbated through social media. This led to increased serious accidents and helicopter rescues and resulted in the site being closed for access.
  - Complaints from neighbours about illegal and unsafe parking, and trespassing
  - The desire to establish CTE.
22. Her evidence also addressed the outcomes agreed by the governance group, the seven Omanawa Principles specified by Ngāti Hangarau and how these are translated through the application, and the role of the Council.
23. Ms. Hancock also addressed how submitters concerns regarding the following matters had been addressed through the application and recommended conditions of consent:
- Guest safety, by providing a safe public track
  - Preventing swimming and protecting the pool area, through signage, behaviour change and education, and the OMP
  - Use of a booking system to reduce and control numbers
  - Control of casual visitors, through the OMP

- Control of antisocial behaviour through the provision of facilities and increased people on site
  - Control of rubbish and providing sufficient facilities for the public
  - Control of noise through management plans and complaints procedures
  - Control of overnight / after-hours and freedom campers by locking the carpark and using CCTV
  - Screening of neighbouring property boundaries
24. Her evidence concluded by setting out the positive benefits she considered would arise, and her conclusion that the potential amenity effects would be significantly less than the nuisance effects that neighbours had been experiencing.
25. In response to questions, Ms. Hancock advised that:
- there had been ongoing discussions with some of the neighbouring submitters on landscaping and fencing.
  - Visitor numbers have dropped since the presence of kaitiaki on site, but that this is not sustainable. It is likely that nuisance behaviours would continue and most likely increase
  - The number of safety incidents have increased in the last 10 years, with few incidents reported prior to that.
26. In speaking to his evidence, *Mr. Warren Aitken*, TCC Parks and Recreation Manager, outlined the functions of the TCC Parks and Recreation Division, the background to TCC's ownership of Omanawa Falls and the Division's role and responsibilities in respect of management of the site. He then spoke to a number of issues which had arisen which had led to the closure of the 4WD access to the cutting and the track along to the entrance of the tunnel and how the current proposal is intended to address those issues thereby enabling public access to resume. Matters of particular note he referred to are:
- Previously, public access to the site was restricted to use of an existing 4WD track and then a pedestrian trail leading to an area where people could view the falls and the pool below
  - Growing public awareness of the existence of the Falls through social media led to an increased use of the site by the public, including unauthorised access to restricted areas
  - Use of the unmanaged restricted areas was unsafe and in recent times resulted in people being seriously injured and/or lost, and requiring to be rescued. In two cases fatalities occurred
  - Increased access to the Falls by the public also resulted in road safety issues being created, including unauthorised parking along the verges of Omanawa Road
  - The foregoing issues resulted in the access being closed to the public in January 2016
  - The current proposal is intended to resolve the above issues by providing safe foot access to the Falls by members of the public (including through commercially operated tour groups) as well as providing safe vehicle access and onsite parking
  - Ongoing maintenance of the site is to be undertaken by a team of TCC park rangers.
27. In response to questions, Mr. Aitken advised:
- Social media has played a massive part in promoting the Falls by way of videos and explaining how to get down there
  - Whatever TCC did, people are determined to access and even if stopped at the entrance, people will try and get through via private property

- Public vehicle access will be down the road from the neighbouring property that TCC owns, vehicle access to the 4WD track will still be used but will be closed to the public.
- Given the narrowness of the land which on which the 4WD access is provided, it would be difficult to realign the track.

28. *Mr. Koro Nicholas* spoke to his evidence on the Ngāti Hangarau perspective and cultural values, covering their historical association and cultural connection with the Falls and position and role in the proposal. He quoted Kaikohe Roretana, who explained his disdain of people who remained ignorant to the special character of the Falls:

*We are proud of our fortune tellers which foretold the luck of the Tribe. When you go into this land and treat it as common earth you make yourselves vandals in our eyes.*

29. In terms of its cultural associations, he advised that the Falls have always been known as a place of healing, where ceremonies were conducted to heal and purify travellers between the foreshore and hinterlands, as well as warriors returning from battlegrounds. Kawakawa and karamu are also often harvested for rongoa. He also addressed traditional practices to ensure that the mauri of the Falls is maintained.

30. Mr. Nicholas spoke of Ngāti Hangarau's desire to express their cultural traditions through the proposed activity and the current role of kaitiaki, as well as their involvement in the project, including the CTE. He expressed concern that the recommended WBOPDC conditions of consent would limit conducting karakia and traditional cultural activities in this area. Ngāti Hangarau are the largest landowner in the Western Bay of Plenty, with their lands having thousands of hectares of native forest, native species and waterways. He sought that Ngāti Hangarau should not have to justify karakia.

31. *Mr. O'Brien* also spoke of the importance of this kaupapa for Ngāti Hangarau and how it carries the dreams of their whānau. Ngāti Hangarau have never lost their connection and this project is an avenue to grow the connection with the Falls.

32. In response to questions, Mr. Nicholas advised that:

- Kaitiaki are there most days within daylight hours in summer, which will reduce to weekdays in winter
- Kaitiaki provide visitors with a cultural narrative, which de-escalates situations
- To limit karakia disrespects the culture and the land; for instance, the conditions as proposed may limit karakia occurring outside of the set hours and therefore miss the point of karakia being carried out. For instance, when someone died there in January 2021, Ngāti Hangarau needed to be there immediately to consider its cultural implications and the mauri of the Falls
- While McLaren Falls is a far more appropriate place to conduct cultural expressions for large groups, it does not hold the same cultural significant to Ngāti Hangarau as Omanawa Falls does.
- Lake McLaren is not an appropriate place for their cultural activities, as Ngāti Hangarau disagree with the Lake being there, as it is man-made
- The two special events would be primarily for Ngāti Hangarau
- Providing education and enabling people to interact with the Falls in a safe way would assist to remove peoples' ignorance and help them to understand the special nature of the Falls.



33. *Mr. Jason Wright* of Kaitiaki Adventures advised that his company's role will be to manage and lead the Omanawa Falls CTE under a joint venture structure with Ngāti Hangarau so as to deliver a "culturally infused tourism product". The benefits of this will involve:
- training and employment of Ngāti Hangarau rangatahi
  - investment of profits into "further generation of the whenua, the awa, maintenance, enhancements and people"
  - a visitor information centre which will provide the opportunity to educate members of both tour party patrons and the general public who are not participating in the CTE
  - future opportunities.
34. In response to questions, Mr. Wright advised that the CTE would have sufficient flexibility for the tours to operate in a manner which enables the peak general public visiting times and the holding of CTE events to be avoided by adjusting customer bookings accordingly.
35. In speaking to his evidence, *Mr. Skip Fourie* (consultant transportation engineer) advised that:
- The volumes of traffic generated by the proposal would have an insignificant effect on the adjacent road network. The road has sufficient capacity to cater for the development's traffic generation
  - For the majority of operations, the proposed provision of onsite parking will be sufficient
  - Times when shortfalls in parking occur are likely to be short-term and infrequent
  - The recommendations of the Traffic Impact Assessment forming part of the application (which it is understood will be the subject of consent conditions) are appropriate
  - Traffic and carparking monitoring over the first year of the proposed activities (as envisaged under the OMP, which is intended to be the subject of consent conditions) will enable changes to be made to the OMP so as to address any traffic and parking issues as well as address the concerns expressed in the submissions opposing the proposal
36. In response to questions from the panel, Mr. Fourie advised that:
- The proposed limiting of the size of vehicles associated with the CTE visiting the site will adequately mitigate any issues relating to the current construction standard of Omanawa Road
  - Monitoring of traffic and carparking activities and traffic direction over the first month of operation will identify any operational issues and enable appropriate remedial action to be taken
  - Regarding matters raised by submitters, most relate to the existing traffic and roading issues currently being experienced.

#### Submitter Evidence Summary

37. *Ms. Cornelius* spoke to her submission and pre-provided evidence. This included a video that participants were able to watch in advance. Ms. Cornelius has been in the area since 2018 and her and her husband's property is adjacent to the site. She expressed their main concerns as being the place of assembly, noise, the use of the centre and the track. They would like to be considered in the management of these concerns due to their close

proximity and for all negative impacts to be mitigated as much as possible. She expressed particular concern about how noise would be mitigated beyond the hours of operation.

38. Through questioning, Ms. Cornelius advised that she would like to see a finalised proposal for planting and fencing and that she remained concerned about noise levels, particularly with the special events.
39. There were ongoing discussions through the course of the hearing, which involved the applicant and council officers engaging with Ms. Cornelius to clarify the relief she was seeking and what particular effects she sought to be mitigated. The Panel provided some leeway for this to occur, to ensure that there was clear understanding of her concerns and how these may be addressed.
40. By the conclusion of the hearing, we understood Ms. Cornelius sought a deer fence, extensive planting for the public trail on the council property between the neighbour's driveway and the 4WD track. The reasons she sought this were to provide privacy, mitigation of visual effects, noise and separation; rather than for security reasons. Her primary concern is the proximity of the public trail to her boundary.
41. *Ms. Murray-Benge* spoke to her submission and pre-provided evidence. She clarified that she was there representing the Kaimai Ward and local community and that she had permission to speak on behalf of Ms. Pritchard. In her view, Matariki and wānanga should be conducted at McLaren Falls. Having these at Omanawa Falls was a serious issue for residents if insufficient parking is available. She also raised concern that the Power Station had been vandalized, and that vandals and anti-social behaviour needs to be controlled. She supported that there be no swimming.
42. In response to questions, Ms. Murray-Benge advised:
  - That she and others she had talked to were generally supportive of the proposal and Ngāti Hangarau undertaking activities on site.
  - That in terms of traffic accidents, locals were concerned that there is a hump in the road so the access way can't be seen quickly enough. Things needed to be kept an eye on outside of hours.
  - That she did not agree with Historic Places Trust in respect of the protection of the hydro station and that they have not respected what has happened there to date. In her view, it is very unique, and the local iwi should recognise that.
  - That her concerns remained about holding events at Omanawa Falls, and that they can swim in the rivers at McLaren Falls, not just the lake.
43. The Panel adjourned the hearing at this point and undertook the site visit.
44. *Ms. Paula Golsby*, planner for the applicant, appeared at the beginning of the second day of the hearing. She tabled a replacement table for page 12 of her evidence and an updated recommended district council condition suite. Her evidence, which we took as read, covered an overview of the project and how it had evolved, the consents required, the existing environment, a summary of effects, consistency with the statutory planning documents and comments on the conditions of consent. Her overall conclusions were that there would be positive effects generated and that any adverse effects would be managed through the conditions, and any remaining adverse effects would be environmentally acceptable. She also considered the proposal to be consistent with the relevant planning documents and therefore the purpose of the RMA, and that consent could be granted.

45. Ms. Golsby summarised that there was general agreement between the planners about effects and agreement with the BOPRC on conditions. In terms of the WBOPDC conditions, there was general agreement, except around limits for tours and special events. She advised that she and Mr. Hudson had agreed that it was appropriate to remove karakia from the noise condition.
46. In response to questions, Ms. Golsby advised:
- That the approach proposed was to allow flexibility rather than arbitrary numbers in terms of guided tours
  - How the OMP was intended to work in conjunction with the conditions of consent, with it setting out how the conditions were practically going to be met
  - If the parameters in the OMP were identified as being unsuitable, the OMP would be updated
  - How the conditions were intended to work in respect of the number and size of special events and the time and noise limits, including the requirement for an event noise management plan and advance notice to neighbouring properties, and how these relate to the District Plan rules for temporary activities
  - The recommended noise conditions for the special events are within the baseline for District Plan temporary activities
  - There are no parking requirements for temporary activities
  - It would be appropriate for a longer time to be included for advising neighbours of special events
  - That further consideration was needed:
    - to ensure that any parking or traffic issues could be addressed in a timely manner, rather than by annual review of the OMP
    - to how to provide for karakia and
    - for the planting and fencing sought by Ms. Cornelius.

#### BOPRC Evidence Summary

47. *Ms. Lucy Holden, Ms. Heather MacKenzie and Ms. Anna McKay* all confirmed that they were satisfied with the recommended conditions of consent. Ms. MacKenzie, who also represented the WBOPDC, confirmed she had also viewed the district council conditions and was satisfied with them.

#### WBOPDC Evidence Summary

48. In his RMA section 42A report *Mr. Bevan Hudson* set out the detail of the application, the site and its surrounds, the submissions received, an assessment of the effects of the proposal and the environment and an assessment of the proposal against the relevant provisions of the Operative District Plan, other relevant statutory planning instruments and of Part 2 of the RMA. He concluded that the adverse effects on the environment relating to rural character and amenity and those relating to the proposed special events would be “minor” but able to be appropriately managed and mitigated through consent conditions. Other effects would be “less than minor”. He also concluded that the proposal would not be contrary to the objectives and policies of the Operative District Plan nor to the provisions of the relevant National Policy Statements and of the Regional Policy Statement and regional plans. Attached to Mr. Hudson’s report was a set of

recommended consent conditions to cover the eventuality that it was deemed appropriate to grant consent to the application.

49. In response to questions at the hearing Mr. Hudson advised that:
- He did not consider specific consent to the accommodation component of the proposed visitor centre was necessary as it was not an “accommodation facility” in the context of the District Plan. However, he considered that there would be no adverse consequences to the granting of such consent
  - His recommended conditions relating to ecology should be removed as these were more appropriately covered under the regional consent conditions
  - The outstanding areas of disagreement were in respect of appropriate conditions to be imposed on special events and on the proposed commercial tourism activity. Mr. Hudson considered that specific consent conditions were required so as to provide some certainty to submitters on the expected scale of these activities
  - In the case of the proposed commercial tourism activity, Mr. Hudson advised that his recommended conditions should be amended so as to provide for 11 tours per day.
  - With regard to special events, a maximum of 200 people is too many for the site and such events should conclude by dusk
  - Reducing the hours would also address the noise issue
  - There is little value in the deer fence (requested by Ms Cornelius) other than for security purposes as it would not provide visual effects mitigation.
50. *Ms. Alison Curtis* (Council Compliance and Monitoring Manager) responded to questions as follows:
- The principal area of disagreement between the Council and the applicant is around special events. No acoustic assessment was provided with the application so Council staff made their own assessment based on the District Plan Rural Zone noise limits and concluded that nighttime noise could be unacceptable
  - A special event finish time of 10.00pm is likely to result in neighbour complaints. A finish time of 8.00pm is more acceptable and in line with other activities which will be occurring on the site
  - The District Plan temporary activity provisions allow a finish time of 10.00pm but that is not considered appropriate to apply to the current application
  - An advance notice to neighbours for the holding of a special event of at least 14 days is appropriate
  - Addressing the issue through the OMP may be appropriate but she considered that WBOPDC had sufficient information about the events and how any adverse effects will be mitigated.
51. *Mr. Jim Paterson* (Council Transportation Manager) responded to questions as follows:
- There is a concern in respect of overspill parking on to the Omanawa Road verge when the onsite parking area is full and how this will impact on other road users. However, the traffic management plan should address that concern
  - There is also a concern about the proposed review and response period provided for under the recommended consent conditions which should be shortened up if problems are occurring on a regular basis
  - Albeit that much of Omanawa Road does not comply with the Council’s current roading standards, the limit on the size of vehicles visiting the site should address any concerns which might otherwise arise.

### Adjournment

52. The hearing was adjourned on Tuesday 12<sup>th</sup> April 2022 after hearing from the Council officers and a closing karakia from Mr. Nicholas.
53. The Panel accepted the applicant's request to adjourn the hearing to allow them to prepare and provide a written right-of-reply and a suite of district council conditions to the matters raised during the hearing.
54. The applicant advised that the right-of-reply and updated suite of conditions would be provided by Thursday 14<sup>th</sup> April 2022. They also advised that they would work with the WBOPDC to provide the updated suite of district council conditions.

### Post Adjournment

55. The applicant's reply submissions and an updated suite of district council conditions were received on Thursday 14<sup>th</sup> April 2022.
56. Points raised in the reply submissions were:
  - That all conditions were now agreed between the applicant, the BOPRC and WBOPDC. An accompanying email from Mr. Chris Watt of WBOPDC confirmed this.
  - The amended WBOPDC conditions addressed the following:
    - Clarifying that karakia are enabled outside of special events
    - Ensuring leaseholders and licensees comply with consent conditions
    - The timing of certain steps required under the conditions
    - Including timing of actions required in response to any events occurring, such as a traffic incident
    - A noise management plan for special events addressing noise effects after 8pm and noise mitigation measures to manage and reduce noise after that time
    - The OMP governing tour numbers and size, with the first OMP being required to be generally in accordance with the draft OMP attached to the consent
  - That an advice note to acknowledge that the WBOPDC consent governs all place of assembly activities was more appropriate than a consent condition and responded to Commissioner De Luca's question as to whether a consent would exclude the ability to rely on the permitted activities in addition to those consented.
  - That an *Augier* condition was offered to retain existing vegetation to the south of the visitor centre building and to carry out infill planting of any gaps, except where necessary to provide pedestrian access from the ātea to the 4WD access track.
  - That the fencing sought by Ms. Cornelius would be addressed by a separate side agreement to the consent, as such a fence was not required to mitigate effects directly connected to an adverse effect of the proposed activity.
  - That because of the requirements of Policy 11 of the National Policy Statement on Urban Development 2020, there were no longer any minimum parking standards in the District Plan. However, the parking proposed exceeded the former District Plan requirements.
57. The Panel issued a third minute on the 21<sup>st</sup> April 2022, querying why an advice note rather than a consent condition had been offered to address the issue of the ability to carry out permitted activities not associated with the consented activity on the site. The response received (also on the 21<sup>st</sup> April) was that the note is explanatory rather than operative, stating the intent of the consent holder to not rely on permitted activities that sit outside the scope of the consent. It was also submitted that it would not be legally possible, even

under the *Augier* principle, to seek to regulate through a condition on an activity which cannot be consented.

58. The hearing was closed on 22<sup>nd</sup> April 2022.

## 4 Relevant Planning Provisions and Reasons for Consent

### Bay of Plenty Regional Natural Resources Plan 2008 (RNRP)

59. Section 4 of the BOPRC's s42A report sets out the following reasons for resource consent under the RNRP:
- Under section 9(2)(a) of the Resource Management Act 1991 (RMA) and rule LM R4 of the RNRP to undertake a discretionary activity to disturb land and soil as a result of earthworks because the proposal includes rock scaling within the Riparian Management Zone of the Omanawa River on slopes exceeding 35 degrees.
  - Under s9(2)(a) of the RMA and rule LM R10 of the RNRP to undertake a discretionary activity to disturb land and soil as a result of vegetation clearance because parts of the walking track are likely to exceed 1.5 metres and for vegetation clearance in the Riparian Management Zone of the Omanawa River on slopes exceeding 35 degrees.
  - Under s13(2)(a) of the RMA and rule BW R36 of the RNRP to undertake a discretionary activity to construct and use a wooden platform in, on, under or over the bed of the Omanawa River. The platform is outside the wetted part of the river but is within the bed and banks of a river.
60. Ms. Holden bundled the consents as a discretionary activity. We agree.

### Western Bay of Plenty District Plan 2012 (the District Plan)

61. The site is located in the Rural Zone of the District Plan. The eastern half of the site is an Identified "Significant Ecological Feature U15/18 – Puwhenua Forest" and "Built Heritage Feature 18 – Omanawa Falls Power Station" is shown towards the Omanawa River. Archaeological site "U15/714 (Power Station)" is shown within the northern boundary of the site, but Mr. Hudson noted in his S42A report that this is incorrectly located and differs from its actual location. There are no other hazards, archaeological sites or other features shown on the District Plan Maps.
62. Ms. Golsby and Mr. Hudson agreed that consent is required under the following rules of the District Plan, bundled as a discretionary activity:
- A discretionary activity for the establishment and use of a Place of Assembly (including public trail support infrastructure, guided tours, a visitor centre, Special Events, hui, wānanga and karakia) in accordance with Rule 18.3.4(e);
  - A discretionary activity for the establishment and use of a staff accommodation facility) in accordance with Rule 18.3.4(c);
  - A restricted discretionary activity for the establishment and use of a Public Trail (including signage and maintenance activities) located within 30m of the title boundaries in accordance with Rule 10.4;
  - A restricted discretionary activity for the establishment of a Public Trail within Identified Significant Ecological Feature U15/18 in accordance with Rule 10.3(bc);
  - A restricted discretionary activity for earthworks within Identified Significant Ecological Feature U15/18 in accordance with Rule 5.4.2(b);

- A restricted discretionary activity for the removal, destruction and clearance of native vegetation within Identified Significant Ecological Feature U15/18 in accordance with Rule 5.4.2(a);
- A discretionary activity for noise exceeding the Rural Zone noise limits set out in Rule 4C.1.3.2(a) during Special Events and Karakia in accordance with Rule 4C.1.3;
- A discretionary activity for signs on site associated with the activities authorised above in accordance with Rule 4D.4.2.1;
- A discretionary activity for earthworks associated with the Place of Assembly car parking area and toilet facility in the Rural zone in accordance with Rule 4A.5(b).

## 5 Notification and Submissions

63. The applicants, at the time of lodgment, requested that the application be processed under public notification pursuant to Section 95A of the Act.
64. The notice was served by the Regional Council on identified affected persons, including those on the WBOPDC and BOPRC list of external parties (such as DOC, Waka Kotahi, Heritage New Zealand), on 13 August 2021 via email. It was published on both Council websites and in the local Bay of Plenty Times newspaper on the same date. The notice was further published in The Weekend Sun newspaper on the 20 August 2021.
65. The period for making submissions on the application closed on 17<sup>th</sup> September 2021. Twelve submissions were jointly received by the WBOPDC and BOPRC, within the statutory time period. Six submissions were in support (two conditional support), four in opposition, one not specified and one neutral.
66. In paragraphs 31 to 66 of the WBOPDC s42A report, Mr. Hudson identifies the key issues raised in submissions. In summary, those points covered:
- Earthworks, construction and geotechnical effects
  - Cultural effects
  - Archaeological and heritage, in particular disturbance to and the protection of the Omanawa Falls Power Station
  - Vegetation, habitat and ecosystems
  - Transportation, access and parking, including adequacy of parking, traffic generation and increase in accidents
  - Public safety and security, including that access should not be provided to the base of the Falls as it would encourage swimming
  - Landscape and natural character effects
  - Rural character and amenity, including the appropriateness of a place of assembly in this location and amenity impacts on neighbouring properties
  - Signage
  - Special events, in terms of the number of events, the number of attendees, and the appropriateness to have them there
  - Servicing
  - Anti-social behaviour
  - Positive effects
67. Section 7 of the BOPRC s42A records the issues raised relating to regional planning matters as being:

- Concerns about effects on historic heritage, including unrecorded archaeology and built historic heritage;
- Protecting the pool at the base of the waterfall, including its water quality;
- Protecting/retaining as many trees as possible;
- Effects related to clearance of native plants and earthworks; and
- Health & safety of the public accessing the hydro operations area.

## 6 Statutory Framework

68. Section 104 of the Resource Management Act 1991 (the RMA) sets out the matters we must have regard to when considering the application, as set out below:

### **104 Consideration of applications**

- (1) *When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—*
- (a) *any actual and potential effects on the environment of allowing the activity; and*
  - (ab) *any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and*
  - (b) *any relevant provisions of—*
    - (i) *a national environmental standard:*
    - (ii) *other regulations:*
    - (iii) *a national policy statement:*
    - (iv) *a New Zealand coastal policy statement:*
    - (v) *a regional policy statement or proposed regional policy statement:*
    - (vi) *a plan or proposed plan; and*
  - (c) *any other matter the consent authority considers relevant and reasonably necessary to determine the application.*
- (2) *When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.*
- (2A) *...<sup>2</sup>*
- (3) *A consent authority must not,—*
- (a) *when considering an application, have regard to—*
    - (i) *trade competition or the effects of trade competition; or*
    - (ii) *any effect on a person who has given written approval to the application:*
  - (c) *grant a resource consent contrary to—*
    - (i) *section 107, 107A, or 217:*
    - (ii) *an Order in Council in force under section 152:*
    - (iii) *any regulations:*
    - (iv) *wāhi tapu conditions included in a customary marine title order or agreement:*
    - (v) *section 55(2) of the Marine and Coastal Area (Takutai Moana) Act 2011:*

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<sup>2</sup> Not relevant to this application.



- (d) *grant a resource consent if the application should have been notified and was not.*
- (4) *A consent authority considering an application must ignore subsection (3)(a)(ii) if the person withdraws the approval in a written notice received by the consent authority before the date of the hearing, if there is one, or, if there is not, before the application is determined.*
- (5) *A consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, a discretionary activity, or a non-complying activity, regardless of what type of activity the application was expressed to be for.*
- (6) *A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.*
- (7) *In making an assessment on the adequacy of the information, the consent authority must have regard to whether any request made of the applicant for further information or reports resulted in further information or any report being available.*

69. Section 104B of the RMA outlines the matters for which the Council can have regard to when considering an application for a discretionary activity.

*After considering an application for a resource consent for a discretionary activity or non-complying activity, a consent authority—*

- (a) *may grant or refuse the application; and*
- (b) *if it grants the application, may impose conditions under section 108.*

70. Section 105 of the RMA sets out matters relevant to certain applications, in this instance being the discharge permits sought from the BOPRC:

- (1) *If an application is for a discharge permit or coastal permit to do something that would contravene section 15 or section 15B, the consent authority must, in addition to the matters in section 104(1), have regard to—*
  - (a) *the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and*
  - (b) *the applicant's reasons for the proposed choice; and*
  - (c) *any possible alternative methods of discharge, including discharge into any other receiving environment.*
- (2) *If an application is for a resource consent for a reclamation, the consent authority must, in addition to the matters in section 104(1), consider whether an esplanade reserve or esplanade strip is appropriate and, if so, impose a condition under section 108(2)(g) on the resource consent.*

71. Section 107 of the RMA sets out restriction on grant of certain discharge permits:

- (1) *Except as provided in subsection (2), a consent authority shall not grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A allowing—*
  - (a) *the discharge of a contaminant or water into water; or*
  - (b) *a discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or*

- (ba) *the dumping in the coastal marine area from any ship, aircraft, or offshore installation of any waste or other matter that is a contaminant,— if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:*
  - (c) *the production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials:*
  - (d) *any conspicuous change in the colour or visual clarity:*
  - (e) *any emission of objectionable odour:*
  - (f) *the rendering of fresh water unsuitable for consumption by farm animals:*
  - (g) *any significant adverse effects on aquatic life.*
- (2) *A consent authority may grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A that may allow any of the effects described in subsection (1) if it is satisfied—*
  - (a) *that exceptional circumstances justify the granting of the permit; or*
  - (b) *that the discharge is of a temporary nature; or*
  - (c) *that the discharge is associated with necessary maintenance work— and that it is consistent with the purpose of this Act to do so.*
- (3) *In addition to any other conditions imposed under this Act, a discharge permit or coastal permit may include conditions requiring the holder of the permit to undertake such works in such stages throughout the term of the permit as will ensure that upon the expiry of the permit the holder can meet the requirements of subsection (1) and of any relevant regional rules.*

## **7 SECTION 104 ASSESSMENT**

### **Section 104(1)(a) Effects on the Environment Assessment**

#### **Existing environment:**

72. The existing environment is well described in the two s42A reports and the AEE. We adopt those descriptions and refer back to them as necessary.

#### *Permitted baseline*

73. Sections 4.3.1 and 4.3.2 of the application AEE report set out components of the proposal which are provided for as permitted activities under the District and Regional Plans. However, there is no assessment of or reliance placed on any relevant “permitted baseline” which may be applicable to the assessment of the current proposal under RMA section 104(2).

74. In paragraphs 86-87 of his section 42A report Mr. Hudson states:

*86 Pursuant to Section 104(2) of the Act, a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect. This is the permitted baseline.*

*87 Having reviewed the District Plan, I have not been able to find a relevant and credible permitted baseline that would assist the Commissioners. Accordingly, no permitted baseline will be applied in the forthcoming assessment in determining the magnitude of effects on the environment.*

*Temporary activities*

75. Notwithstanding the foregoing, we note that temporary *places of assembly* are specifically provided for as permitted activities under rule 4A.2.3.1(b) of the District Plan subject to compliance with five listed standards. This provision was referred to during the course of the hearing in both legal submissions made on behalf of the applicant and by the expert planning witnesses for both the applicant and the District Council.
76. We consider that this provision has some relevance to the assessment of activities proposed in the current application, in particular special events.
77. Ms. Hill referred to this matter in her opening legal submissions as follows:
16. *The general provisions of the Western Bay of Plenty District Plan provide a permitted activity status for “temporary activities held on a site which falls within the definition of a place of assembly” within any zone. However, a discretionary activity status for a “place of assembly” within the rural zone is also provided for.*
  17. *Although these activity statuses do not sit easily together, the Applicants have approached the proposal on the basis that the permitted activity rule is designed to apply to the situation where there is a spontaneous event which it is not practicable to require consent for. However, where the site has been identified for the specific activity of holding events (among other activities), and there is an advanced understanding of the number and type of events likely to be held on site, as in this case, then it is appropriate for a resource consent to govern the activity.*
  18. *Therefore, the Applicants have applied for a discretionary activity consent for a place of assembly in the rural zone. It is acknowledged that, if granted, the consent will comprehensively govern activities on site, and the temporary activity provisions cannot be utilised to hold additional events above those consented for. The Applicants consider that applying for a comprehensive discretionary activity consent is preferable as it gives certainty to the consent holder, the consent authority, and the public about activities to be undertaken on site.*
  19. *Although a discretionary activity consent has been applied for, the permitted activity rule for temporary activities forms part of the permitted baseline for activities within the site, as described in the AEE.<sup>15</sup> The proposed special events will comply with the conditioned noise limits, and are less in scale, frequency and duration than those activities which could be undertaken as of right as a temporary activity.*
78. There was also discussion on the potential for the District Plan permitted activity provision relating to temporary activities to be used to hold additional special events not provided for under the current application. Ms. Hill confirmed the applicant’s position on this matter in her reply which was to “offer up” an advice note to be included in the District Council consent as follows:

*The consent holder acknowledges that this resource consent governs all place of assembly activities undertaken on the site and accepts that it cannot rely on the permitted temporary activity rules within the District Plan to undertake activities in addition to those provided for under this consent.*

79. We agree that the offered advice note is appropriate.

### **Effects in contention**

80. After analysis of the application and evidence (including the offered and proposed mitigation measures), undertaking a site visit, reviewing the two s42A reports, reviewing the submission and concluding the hearing process, we consider that the proposed activity raises the following principal effects in contention:

- a) Cultural effects
- b) Historic heritage and archaeology
- c) Ecological effects
- d) Natural hazard effects
- e) Earthworks, construction and geotechnical
- f) Public safety and security
- g) Water quality effects (erosion and sedimentation)
- h) Dust effects
- i) Landscape and visual effects
- j) Rural character and amenity
- k) Traffic and parking effects
- l) Noise effects
- m) Servicing effects
- n) Positive effects

81. Of the above, we have adopted and accepted the officers' recommendations in respect of natural hazards, earthworks, construction, geotechnical, water quality, dust and servicing effects and we do not address them further. We address the remaining effects below.

#### *Cultural effects*

82. The applicant addresses cultural effects in section 7.5 of the AEE. As identified in the AEE, the site is located within the rohe of Ngāti Hangarau, who are co-applicant to the proposal. While Ngāti Hangarau are co-applicants, cultural effects remain relevant considerations. In particular, ensuring that the values that the area and in the Falls are recognised and appropriately addressed and that Ngāti Hangarau are able to undertake their role as kaitiaki and exercise manaakitanga.

83. Two submissions were received in support of the proposal, from Ngāti Hangarau Hapū Trust and Whitiara Rangimarie McLeod. While there were no submissions on the proposal which directly raised cultural effects, we consider that the submissions that sought that there be no special events, hui or wānanga on the site are relevant. This is because they are direct expressions of cultural values by Ngāti Hangarau. During the hearing we also questioned whether the drafting of the conditions may be seen to preclude karakia from occurring where and when necessary, rather than limited to only those associated with special events, hui or wānanga.

84. Ms. Murray-Benge and Ms. Pritchard expressed that it was more appropriate that Ngāti Hangarau held their special events at McLaren Falls as there were the facilities there already. On the other hand, we received evidence from Mr. Nicholas and Mr. O'Brien on

the longstanding cultural relationship of Ngāti Hangarau with the Omanawa Falls. We address the management of noise and traffic, amenity and rural character and amenity effects associated with special events, hui or wānanga elsewhere in this decision. In regard to those effects, we have found them to be acceptable.

85. Both reporting officers were of the view that cultural effects of the proposal were acceptable. We agree with the reporting officers. We also prefer the evidence of Mr. Nicholas and Mr. O'Brien that this site is an appropriate location for Ngāti Hangarau to express their cultural values through special events, hui or wānanga. We have also reviewed the revised recommended conditions of consent and find that they appropriately provide for karakia to occur as and when required. Accordingly, we find that the cultural effects are acceptable and positive as a whole.

*Historic heritage and archaeological effects*

86. The proposal has the potential to result in adverse effects on the Omanawa Falls Power Station, due to the proximity of the proposed works to it. The applicant addressed this in sections 7.3 and 7.7 of the AEE. Mr. Hudson addressed these in paragraphs 114 to 125 of his s42A report and Ms. Holden in section 9.2 of her s42A report.
87. Ms. Lesley Pritchard was concerned that uncontrolled access to the Omanawa Falls Power Station would result in further damage to this historic site and there were no reasons to disturb its surrounds. Ms. Murray-Benge considered that the bottom viewing platform was too close to the fragile environment around the power station; which she expanded on during the hearing. Heritage New Zealand Pouhere Taonga (HNZPT) supported the proposed activities, subject to the appropriate ongoing management of historic heritage.
88. Prior to the hearing commencing we were provided with recommended conditions of consent to address potential effects on historic heritage and archaeology, which had been agreed with the HNZPT. Both the WBOPDC and BOPRC reporting officers were satisfied that any adverse effects would be appropriately and adequately managed through these conditions. We agree with Ms. Holden that it is appropriate that the relevant conditions be included only in the WBOPDC conditions, rather than being duplicated in the BOPRC consent conditions.
89. We queried Ms. Murray-Benge if her concerns were now satisfied, but she remained of the view that they were not adequate. We prefer the advice from HNZPT and the WBOPDC and BOPRC reporting officers and find that any effects on historic heritage and archaeology are acceptable.

*Public safety and security*

90. The AEE sets out in section 7.11 the public safety and security issues that have and are currently being experienced with unlawful access and trespass to the Falls, and how the proposal would address these. We heard more about these effects at the hearing, from the applicant and from the submitters.
91. Concerns about public safety and security were expressed through the submissions from Ms. Pritchard, Ms. Murray-Benge and Mr. and Mrs. Ostermeyer. Ms. Cornelius provided a video showing anti-social behaviour occurring on Omanawa Road itself. The submitters were concerned that these anti-social behaviours would continue, and that there would be potential for trespassers and freedom campers. Fire and Emergency New Zealand

submitted in support of the proposal, acknowledging that the works will provide safer access for the public and emergency services.

92. Kane Henderson, Director of the Omanawa Falls Hydro Limited, sought that a comprehensive risk management process and subsequent safety management plan be implemented by the applicants, meeting the requirements of NZS 7901. Ms. Hill addressed this in her opening submissions, as did Mr. Warren Aitken in his evidence. We accept the applicant's position that the preparation and implementation of such a plan rests with the generator (in this case the submitter) themselves, rather than the applicant, and we are unable to impose a condition of consent which would bind the generator. We agree with Ms. Hill that any assistance that TCC gives to the generator in this regard best sits outside of this process.
93. We accept the submitters concerns about anti-social behaviour and the potential for nuisance. From our own site visit, we were able to observe evidence of unauthorised access and the risk to personal life that people take trying to access the Falls. We heard that the presence of kaitiaki on the site had resulted in an improved situation and that the presence of more people on site would further reduce the adverse safety and security effects of concern to submitters, and to the applicants themselves.
94. As these effects fall within the district council's functions, Mr. Hudson addresses these matters in paragraphs 179 to 187, where he concludes that there will be a positive effect on public safety with the improvements to the public trail, CCTV monitoring and the OMP. We accept Mr. Hudson's conclusion. We also consider that these effects will be addressed through the conditions that require the carpark and toilet facilities to be locked outside of operating hours, no freedom parking and no swimming. We find that the public safety and security effects will be overall positive.

#### *Ecological effects*

95. These are addressed in section 7.6 of the AEE (and supporting technical assessments), section 9.4 of Ms. Holden's s42A report, paragraphs 126-139 of Mr. Hudson's s42A report and in paragraphs 40-51 of Ms. Golsby's evidence. Actual and potential adverse ecological effects arise from the earthworks and vegetation clearance (including tree removal) necessary to construct the proposed viewing platforms and form tracks providing safe access to those platforms. Such effects include:
  - Loss of bat roosts
  - Loss of bird and lizard habitat
  - Injury/death of native bats, birds and lizard species.
96. Proposed effects mitigation/avoidance measures include avoidance of the clearance of vegetation providing important habitat, implementation of accidental discovery protocols and adherence to an Ecological Management Plan.
97. Concerns about impacts on ecological values were raised through submissions. While initially there was some disagreement among the technical experts about the appropriate measures to implement, ultimately draft consent conditions addressing all matters in contention were agreed and a final set of conditions agreed by the applicant and the District and Regional Councils was tabled at the hearing. This included agreement that the conditions be imposed only on the regional council consent

98. Subject to compliance with the foregoing, we find that any adverse ecological effects will be able to be managed to an acceptable level and are acceptable.

*Landscape and visual effects*

99. These are addressed in section 7.9 of the application AEE and in Appendix O to that document which comprises an expert Landscape Assessment prepared by Isthmus. In paragraphs 188-194 of his s42A report Mr. Hudson refers to and agrees with the findings of the Isthmus report. In respect of the concerns raised by the submitters he notes that *“the public trail and viewing platforms will mostly be in the midst of the bush area on the site and will be largely screened”*. Ms. Golsby discusses landscape effects in paragraphs 52-56 of her evidence and also relies on the Isthmus assessment to conclude that *“the proposal will not result in any unacceptable adverse effects on the landscape and natural character values of the site”*.
100. We agree that in the context of the wider site and its surrounds, any adverse effects on landscape and natural character values will be minor and overall acceptable. However, we discuss the specific concerns of the neighbours below under *“rural character and amenity effects”*.

*Rural character and amenity effects*

101. Four submissions were received opposing the application, three of which were from neighbouring property owners. All opposing submitters raised concerns in respect of adverse effects on rural character and amenity including the following:
- A large visitor centre (including accommodation) and an unmanaged carpark is inappropriate in a rural setting
  - There should be no provision for “special events” catering for up to 200 people.
102. Ms. Cornelius and Mr. Levers also raised concerns in respect of the close proximity of the proposed activities to their property at 1049 Omanawa Road which had the potential to create adverse effects on them, including:
- Noise
  - Overlooking from people using the public trail resulting in loss of privacy. They sought appropriate screening to address this matter.
103. In his s42A report, Mr. Hudson refers to the Isthmus Group Landscape Visual Assessment (LVA) report submitted with the application (Appendix O), the conclusion of which is:

*Overall, the proposal will change the existing rural amenity values of the site, and the effect of this will differ among different neighbours. Overall design measures discussed above and limitations on activities are proposed to minimize actual and potential adverse effects of proposed activities on neighbours’ amenity values.*

104. Mr. Hudson concludes at paragraph 205 that:

*Having regard to the concerns of submitters, I am satisfied that by conditioning the design mitigation measures outlined in the LVA report, along with implementation of the operational management plan and other conditions, that any adverse effects on rural character and amenity will be minor.*

105. Ms. Golsby discusses character and amenity effects in paragraphs 76-89 of her evidence, including reference to the Isthmus LVA report. At paragraph 85 she also refers to the range of consent conditions proposed by the applicants and recommended in Mr. Hudson's s42A report, which she considers "*will ensure an appropriate level of amenity for residents of surrounding properties and the broader rural setting.*"

106. With respect to noise, Ms. Golsby also states in her paragraph 85 that:

*Noise limits for special events and karakia are also included in the District Council conditions generally in line with the temporary activity noise limits in the District Plan, and the Applicant intends to comply with the Rural Zone noise limits in all other situations.*

107. At paragraph 89 Ms. Golsby concludes that "*adverse effects on rural character and amenity can be managed to an acceptable level through the recommended conditions of consent*".

108. We note that over the course of the hearing, further discussions between Ms. Cornelius, the applicants' representatives and Council staff, agreement was reached on consent conditions which would address Ms. Cornelius' concerns. It was also agreed that outside of the resource consent process, other matters would be addressed through further discussions between Ms. Cornelius and Tauranga City staff.

109. Given the foregoing, we are satisfied that any adverse effects on rural character and amenity values (including noise) will be controlled and managed such that the level of the effects will be no more than minor and therefore acceptable.

*Traffic and parking effects*

110. Historically, (including after access was officially closed to the public) the increasing popularity of Omanawa Falls as a recreation destination resulted in illegal and unsafe vehicle parking on the roadside verges of Omanawa Road.

111. The proposed access and parking components of the current application are addressed in the application AEE report, in paragraphs 140-187 of Mr. Hudson's s42A report, and in the evidence of Ms. Golsby (paragraphs 69-71) who relies on the evidence of the applicant's transportation expert, Mr. Fourie.

112. The principal issues raised by the current proposal relate to the capacity of Omanawa Road to safely accommodate the additional traffic generated by the proposed activities, the adequacy of the proposed onsite parking and the provision for access from Omanawa Road to that parking. These are issues that were raised by submitters opposed to the application.

113. In his s42A report, Mr. Hudson refers to the applicant's Traffic Impact Assessment report (TIA) which had been reviewed by the District Council's in-house transportation and engineering staff and roading consultants (WestLink).

114. At paragraph 171 of his s42a report, Mr. Hudson refers to the following advice received from WestLink:

*"From a road safety and efficiency perspective, the issues stemming from the popularity of Omanawa Falls were significant amounts on roadside parking,*



*inconsiderate behaviour from some visitors (including parking in driveways, following Google Maps to resident's houses, using the roadside as a toilet, and large amounts of pedestrians walking along and across Omanawa Road). The proposal makes significant improvements by providing an off-road carpark, toilet facilities and fundamentally changing the nature of Falls by banning swimming so I am satisfied that the applicants have a reasonable proposal that, in general, removes the existing issues. I am satisfied with the proposed access design; a left turn bay was considered but the geometry of the curve relative to the access position introduces sight line challenges so on balance, the proposed simple left turn taper is acceptable. I have residual concerns about the right turn in; widening to provide evasive manoeuvre space would be preferable but it is difficult to justify widening at this stage. The main area of doubt though is parking, particularly during large special events, and after hours in summer (i.e. if the swimming ban is not respected) so a monitoring condition based on parking observations is recommended."*

115. Regarding the capacity of Omanawa Road to safely accommodate the additional traffic generated by the proposed activity, at paragraph 173 of his s42A report, Mr. Hudson cites the following advice received from the District Council's Senior Transportation Engineer:

*"the existing carriageway width of Omanawa Road does not meet the requirements of the Development Code, Design Standard 4 (Transportation), Table 2: Rural Roads for the current estimated traffic volume. The carriageway width should be widened to 8.5m however it is not reasonable for the Applicants to carry the burden for rectifying pre-existing deficiencies in the road network."*

116. At paragraph 68 of his evidence Mr. Fourie stated that:

*I consider that, for the reasons outlined in this evidence, through the imposition of conditions of consent as proposed the effects of transportation, access and parking of the Applicant's activities can be mitigated to acceptable levels.*

117. In response to questions, Mr. Fourie further advised:

- Use of the track will be limited to maintenance purposes and kaitiaki use. Any risk associated with the existing standard of Omanawa Road will be adequately mitigated by the proposed limitation on the size of vehicles associated with the CTE travelling to and from the site
- Regarding submitter concerns, the existing 4WD track is in the best location in terms of vehicle site distances and moving the track would create further safety concerns in respect of vehicle access.

118. On the basis of the foregoing, we find that any adverse traffic and roading effects created by the proposal are able to be managed so as to be no more than minor and are therefore acceptable. In particular, we are satisfied that the conditions of consent, coupled with the adaptive nature of the OMP and monitoring requirements provides both certainty in terms of the measures required to be implemented, as well as flexibility to respond and adapt to and address any changes that may occur in operation, within the scope of the consent.

#### *Positive effects*

119. The applicant addressed the positive effects arising from the proposal in section 7.16 of the AEE, which were adopted by Ms. Holden in her s42A report for BOPRC. Mr. Hudson

addresses positive effects in paragraph 233 of his s42A report for WBOPDC but does not come to a conclusion. Ms. Hancock<sup>3</sup> and Ms. Golsby<sup>4</sup> also addressed positive effects in their statements of evidence, as did Ms. Hill in her submissions.

120. There were six submissions in support of the proposal. Positive effects cited in the reasons for support included:

- the ability for local iwi to develop expressive ecological, cultural and heritage interpretation and an experience that is unique to the region
- safer access for the public and emergency services
- giving effect to iwi and hapū aspirations for the site.

121. We have considered these positive effects cited by the Councils, the applicant and submitters. We find that the proposal will result in positive effects, both on the site, for the local community and for the general public as a whole, through the creation of physically and culturally safe access to the Falls and providing for Ngāti Hangarau to express their cultural heritage and identity in traditional and contemporary ways.

### **Conclusion - Section 104(1)(a) Effects on the Environment**

122. In respect to those matters requiring consent from the BOPRC, for the reasons outlined above, we adopt and accept Ms. Holden's opinion that the effects are acceptable and there are adequate consent conditions to address the site specific activities. Based on the evidence before us, we do not consider that the effects requiring regional consent are unacceptable.

123. In respect to those matters requiring consent from WBOPDC, Mr. Hudson was of the view that the actual and potential effects were minor, focussing on the adverse effects of the proposal. However, this is not the test under s104(1)(a), which requires a consideration of all effects, which therefore includes positive effects as well as negative effects. We find that the effects requiring consent from WBOPDC are acceptable and that there are adequate and appropriate consent conditions to address the site specific activities.

### **Section 104(1)(ab) Ensuring Positive Effects Through Offsets and Compensation Assessment and Conclusion**

124. The applicant did not offer or agree to any measures for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity. In our view, there are no adverse effects that warrant any offsetting or compensation beyond what is already set out in the conditions of consent.

### **Section 104(1)(b) Relevant Planning Documents Assessment**

125. In accordance with section 104(1)(b)(i)-(iv) of the RMA, we have had regard to the relevant standards, policy statements and plan provisions of the following documents:

- National Policy Statement on Freshwater Management 2020 (NPS-FM)
- The Bay of Plenty Regional Policy Statement 2014 (RPS)

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<sup>3</sup> Paragraph 30 of her statement of evidence

<sup>4</sup> Paragraph 94 of her statement of evidence

- The Bay of Plenty Regional Natural Resources Plan 2008 (RNRP)
- The Western Bay of Plenty District Plan 2012 (District Plan)

126. Ms. Golsby undertook a thorough assessment of these planning documents in Section 8.3 and Appendix P of the AEE and again in paragraphs 96 to 98 and Appendix 5 of her statement of evidence.

#### NPS-FM

127. Mr. Hudson addressed the NPS-FM in paragraph 249 of his s42A report and Ms. Holden does the same in section 10 of her s42A report. Not having received any evidence to the contrary, we accept and adopt Ms. Golsby, Ms. Hudson and Mr. Holden's opinions that the proposal is consistent with the NPS-FM.

#### RPS and RNRP

128. Ms. Holden addressed the RPS and RNRP in section 10 of her s42A report. Again, not having received any evidence to the contrary, we accept and adopt Ms. Golsby and Ms. Holden's opinions that the proposal is consistent with the RPS and RNRP. We note that Mr. Hudson did not address either of these documents, relying on Ms. Holden's s42A report to do so.

#### District Plan

129. Mr. Hudson refers to what he considers to be the relevant objectives and policies of the District Plan in paragraphs 236-237 of his 42A report. His overall conclusion is that the proposal is consistent with these objectives and policies. Again, not having received any evidence to the contrary, we accept and adopt Ms. Golsby and Mr. Hudson's opinions that the proposal is consistent with the District Plan.

### **Conclusion - Section 104(1)(b) Relevant Provisions**

130. Overall, we find that the proposal as a whole is consistent with the relevant planning instruments.

### **Section 104(1)(c) Other Matters**

131. In her AEE, Ms. Golsby does not identify any other relevant matters for consideration. However, in her statement of evidence she identified both the Tauranga Moana Iwi Management Plan and the Tauranga Reserve Management Plan (TRMP) as being relevant. The Tauranga Moana Iwi Management Plan is a Joint Environmental Plan for Ngāti Ranginui, Ngai Te Rangi and Ngāti Pukenga iwi. Ngāti Hangarau do not have a publicly available management Plan. The TRMP includes a specific section on the Omanawa Falls Reserve.

132. Mr. Hudson also identifies the TRMP as being relevant, drawing our attention in paragraph 253 of his s42A report to four specific management statements relevant to this application. We agree that these are relevant to this application, and that the proposal is consistent with them.

133. In section 10.1 of her s42A report, Ms. Holden also identified the Stormwater Strategy for the Bay of Plenty as being relevant. She found that the proposal is consistent with the relevant objectives of that Strategy. We accept and adopt her advice on this matter.

134. Neither Ms. Holden nor Mr. Hudson address the Tauranga Moana Iwi Management Plan. Noting that the application is a joint application with Ngāti Hangarau, we accept Ms. Golsby's advice that the proposal is consistent with this document.

### **Sections 105 and 107**

135. There was no evidence presented at the hearing that would lead us to not accept Ms. Holden's conclusions that the levels of any contaminants from the temporary stormwater discharge will likely be low and matched to the receiving environment and that the discharge should not result in effects listed in s107(1) of the RMA.

### **Subject to Part 2:**

136. Ms. Golsby addresses Part 2 in Section 10 of the AEE and again in paragraph of 107 of her statement of evidence, whereby she concludes that there is no uncertainty, invalidity or incomplete coverage in the planning documents that would warrant a detailed analysis against Part 2, and that one would not add value. In the AEE, she concludes that the proposal achieves the purpose of sustainable management in the Act.

137. In section 10.4 of her s42A report, Ms. Holden adopts Ms. Golsby's view that it is not necessary to revisit Part 2 of the RMA or make an overall broad judgement pursuant to the Court of Appeal direction in *R J Davidson*.

138. Mr. Hudson states in paragraph 255 of his s42A report that Part 2 should prevail over other provisions of the Act and other planning documents in the event of there being a conflict between them. Mr. Hudson does not draw our attention to any particular conflict but goes on to undertake a thorough evaluation against Part 2 in paragraphs 256 to 277 of his s42A report.

139. We concur with Ms. Golsby and Ms. Holden that there are no areas of uncertainty, invalidity or incomplete coverage within any of the planning documents that would necessitate an evaluation under Part 2. However, we also found Mr. Hudson's evaluation useful. We accept Mr. Hudson's advice that:

- Natural character will be preserved
- The significant ecological feature will be protected
- Safe public access to the Omanawa River will be enhanced
- The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga has been recognised through the application and will have positive cultural benefits
- The Omanawa Falls Power Station will be protected
- The ability of Ngāti Hangarau to exercise kaitiakitanga will not be prevented or impacted. We find that it will be enhanced
- The quality of the environment, amenity values, intrinsic values of ecosystems and the efficient use of resources are all appropriately provided for, and suitable conditions imposed in that regard
- The Treaty of Waitangi principles of partnership, protection and participation have been actively taken into account, and are in fact in our view, a fundamental part of the proposal
- The proposal as a whole achieves sustainable management.

140. We find that the proposal achieves Part 2 of the RMA.

### **Section 123 and 125 duration and lapsing of consent**

141. Ms. Golsby addressed the requested duration of consent for the regional consents in section 9.2 of the AEE, of 35 years for the river structure and five years for the earthworks and vegetation clearance. Ms. Holden considers that these terms are appropriate and has recommended these terms accordingly in the conditions of consent. Not having any evidence to the contrary, we find these durations of consent are appropriate.

142. Ms. Golsby addresses the lapse period of consent sought for the district council consent in section 9.3 of the AEE. Mr. Hudson supports this term in paragraph 252 of his s42A report. We agree with both planners and find that a 10-year lapse period is acceptable and appropriate in these circumstances.

### **Section 108 Conditions**

143. We have carefully reviewed the recommended conditions of consent applying to both the BOPRC and WBOPC consents. Subject to some minor amendments to provide greater clarity in respect to the WBOPC consent, we are satisfied that the conditions agreed between the applicant and the two Councils are adequate and appropriate to address the concerns expressed by the submitters and potential adverse effects arising from the activities on the site.

## **8 Overall Conclusion and Reasons**

144. While acknowledging the understandable concerns raised by submitters, we consider that the proposal overall will result in positive effects; primarily by making what is currently an unsafe and unsatisfactory situation into one that is safe, managed and controlled. The current risk to public safety by people accessing the Omanawa Falls is significant and we heard of the disruption that trespassing and uncontrolled parking on the road was causing. The proposal also brings benefits of providing safe public access through to the Falls which and its surrounding area, while ensuring that the values these areas hold are appropriately protected. Further, the proposal will further enable Ngāti Hangarau to express their cultural associations with the site and exercise kaitiakitanga and manaakitanga and enable those visiting the site to gain greater appreciation of its value.

145. We are satisfied that appropriate conditions of consent can be imposed to mitigate the potential adverse effects that may arise both on the site and on the surrounding area, and that any effects overall will be acceptable. Turning to the discharges resulting from the application, we are also satisfied that these are acceptable and are not of a nature that would warrant refusal of consent.

146. We are also satisfied that the proposal is consistent with the relevant objectives, policies and assessment criteria contained in the relevant planning documents, and that overall, the proposal achieves and sits comfortably with Part 2 of the RMA.

147. For this reason, we find that consent can be granted.

148. Finally, we would like to thank the hearing participants with the constructive and collaborative approach to resolving areas of disagreement that they took prior to the hearing, and their willingness to continue this through the hearing process.

## 9 Grant of Consent

Pursuant to the authority delegated to us by the Bay of Plenty Regional Council and Western Bay of Plenty District Council and pursuant to sections 104 and 104B of the RMA, we **grant consent** to the application by Tauranga City Council and Ngāti Hangarau.



**Commissioner Gina Sweetman**



**Commissioner Russell De Luca**

**Date: 4 May 2022**