

BAY OF PLENTY REGIONAL COUNCIL

DECISION OF HEARINGS PANEL

RM20-0763

IN THE MATTER OF:	The Resource Management Act 1991 and A hearing for an application to remedy flood risk in the Awaiti sub-catchment, Tauranga
APPLICANT:	Tauranga City Council
SITE:	Awaiti sub-catchment within the lower Kaitemako catchment, encompassing Awaiti Place, McFetridge Lane, Poike Road and Harrisfield Drive, Ohauti, Tauranga.
PROPOSAL:	To undertake works to remedy flood risk in the Awaiti sub-catchment, involving resource consents for: <ul style="list-style-type: none">• Earthworks• Temporary stormwater discharge associated with earthworks• Disturbing contaminated soil• Works and structures in the beds of streams• Damming and diverting water• Modifying a wetland
HEARING DETAILS:	<p>The publicly notified application was heard by Independent Commissioners Gina Sweetman (chair) and Julie Shepherd, under authority delegated by the Bay of Plenty Regional Council, on Tuesday 25th October 2022 at The Tauranga on the Waterfront, 1 Second Avenue, Tauranga.</p> <p>The hearing was adjourned on Tuesday 25th October 2022 and closed on Thursday 8th December 2022.</p>

DECISION SUMMARY:	Consent is granted for the reasons given in this decision.
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**HEARING
ATTENDANCE**

The following people attended and presented evidence at the hearing:

For the Applicant, Tauranga City Council (TCC)

- Mr. Matt Allott, Consultant Planner
- Mr. Gareth John, Project Manager

For Bay of Plenty Regional Council (BoPRC):

- Ms. Lucy Holden, Senior Consents Planner
- Ms. Marlene Bosch, Principal Advisor, Consents
- Mr. Rob Donald, Science Manager

Submitter:

- Mr. Des Heke, Ngāti Ranginui Iwi, Ngāti He Hapū, Kaitemako M2 Trust, William Ihaka Kaiawha Tai and Waina Heke Kaiawha

Others in attendance:

Ms. Rachel Musgrave from BoPRC provided hearing support.

Irene Walker (Ngāi Te Ahi Resource Management), Tania Ririnui (Hapū Coordinator), Anthony Ririnui (Ngāti He RMU), Dr Hemopereki Simon, Nessie Kuka, Nathan James, Debbie Kaiawha, Dean Hika, Aroha Ririnui

1 Description of the proposal

- (1) The application is described in Section 4 of the applicant's Assessment of Environmental Effects (AEE) and in Section 2 of the BoPRC's s42A report. For the sake of brevity, we adopt these descriptions. We found the description of the proposal and its evolution in the AEE to be very robust and helpful to understanding the proposal. There were further changes to the proposal through the hearing process.
- (2) As notified, the key reasons for which consent was sought is set out below:
 1. Construct a large dam, within the footprint of and to replace the McFetridge stormwater dam (referred to as the McFetridge stormwater detention dam in Figure 1). The proposed dam will be a 10.5 metre (m) high earth dam upstream of McFetridge Lane, to attenuate stormwater, which includes:
 - a. A service spillway (1200 mm diameter (DIA) pipe) to convey lower flows to the downstream McFetridge tributary culverts and on to the Awaiti inlet.
 - b. An emergency spillway designed to convey >100-year ARI ED flows.
 2. Install a duplicate culvert (1500 mm DIA) under McFetridge Lane to reduce tailwater at the dam discharge.
 3. Upsize Awaiti Pond outlet (scruffy dome) to create enough spillway to convey the 100-year ARI ED flood.
 4. Raise the existing Awaiti stormwater pond embankment by approximately 0.8 m to attenuate flood peaks.
 5. Construct Awaiti storm flow diversion: a pipeline (1800 mm) between Awaiti Pond and Poike Road.
 6. Improve fish passage: dedicated fish passage to replace the current 1050 mm DIA pipeline and to bypass the junction box.
 7. Install energy dissipation and erosion protection structures in streams throughout the sub-catchment.

- (3) The applicant also proposed to enhance a degraded stream at Cheynne Road in a neighbouring catchment to mitigate the long-term effects of permanently modifying approximately 80m of stream habitat. Using a 2:1 offset ratio, a total length of 160m is proposed to be enhanced with riparian planting of between 5 and 10m in width both sides of the stream. We note that there was some confusion about what the extent of stream habitat that was being modified, and whether it was 80m or 220m. By the conclusion of the hearing, it was agreed between the applicant and the Council that it was 220m of habitat being modified, with a 630m offset proposed (greater than the 440m using a 2:1 offset ratio). It was clarified that this offsetting would all occur on land owned by TCC.
- (4) The application was accompanied by a cultural impact assessment (CIA) prepared by Ngāi Te Ahi and Ngāti Hē. The applicant submitted a CIA from Ngāti Ruahine following the close of submissions. The applicant's evidence notes that all recommendations in the CIAs have been accepted. We therefore accept that they form part of the application.
- (5) The changes and clarifications made through the hearing process are set out in the letter from Matt Allott to Rachael Musgrave dated 4 November 2022. This decision is to be read in conjunction with that letter and the plans accompanying it. In summary:
- The inclusion of small fish resting ponds into the site of the proposed fish channel at the left abutment of the McFetridge Dam.
 - Clarification that there would be approximately 643 lineal metres of stream enhancement and riparian planting at the Poike Road North Area.
 - Confirmation that there would be a total of 643 lineal metres in the ecological offset mitigation area at Cheyne Road, in excess of the 440 lineal metres in the recommended conditions of consent appended to the letter. This was later adjusted to 630m.
 - An updated set of recommended conditions, agreed between Mr Allott and Ms Holden
- (6) Our decision is on the proposal as modified through the hearings process.
- (7) TCC has also sought separate resource consent from its regulatory arm for consents required under the Tauranga City Plan. The decision was made that a joint hearing was not required. Therefore, this decision is solely on the consents sought from the BoPRC.

2 The Site and Background

- (8) The site and surrounding area are described in Sections 2 and 3 of the applicant's AEE and in Sections 1 and 7 of the BoPRC's s42A report. For the sake of brevity, we adopt these very helpful and detailed descriptions.
- (9) Of note is that TCC's modelling of the Awaiti sub-catchment in Ohauti, Tauranga has identified a high flood risk and a depth x velocity that exceeds TCC's required level of service for safety to persons¹. This modelling has shown that the Awaiti Pond and McFetridge Dam are both likely to overtop during a 100-year ARI ED² storm event. Flooding would occur in Awaiti Place and the downstream catchment, and properties in

¹ >0.4m²/s (0.4)

² Annual recurrence interval, existing development.

Awaiti Place and Harrisfield Drive could be stranded during storm events. This risk is further described in section 1.3 of the AEE.

3 Procedural Matters

Written approvals, notification and submissions

- (10) The application was not accompanied by any written approvals.
- (11) The applicant requested public notification of the application and it was publicly notified on 17th September 2021 with submissions closing on 15th October 2021.
- (12) The application attracted eight submissions, four in support and four in opposition. The submissions are summarised in Appendix 1 of the s42A report. We adopt that summary but do not repeat it here for the sake of brevity. We were provided with copies of all the original submissions. We also adopt the summary of issues raised in submissions set out in section 5 of the s42A report, which we do set out below:
- Concerns that the streambed would be contaminated, subject to additional sediment and/or the flow reduced.
 - A request to extend the plan to address vegetation growth in the stormwater drain behind submitter's property.
 - A request for ecological and cultural restoration to be provided and concerns that the relevant ecological and cultural issues had not been addressed, such as mahinga kai, ancestral relationships to water and taonga (kōkopu and tuna), waahi tapu (Pukepoto Pā).
 - A request for offline stormwater storage instead of within a streambed.
- (13) Subsequently, following a process of pre-hearing meetings with opposing submitters, issues raised by three of the four opposing submitters were resolved. Two of the three requests to be heard were withdrawn.

Officer's recommendation

- (14) Ms Holden recommended that the applications be granted, subject to conditions. We found Ms Holden's s42A report to be comprehensive and informative.

Hearing, appearances and site visit

- (15) We held the hearing at The Tauranga on the Waterfront, 1 Second Avenue, Tauranga on Tuesday 25th October 2022.
- (16) Evidence from the applicant and Mr Heke was pre-provided in conformance with Minute 1. Copies of the briefs of evidence are held by BOPRC.
- (17) In our Minute 3, we requested further information be provided to us either before or at the hearing to provide us a better understanding of the application and issues raised by Mr Heke in his submission.

- (18) We have not separately summarised the matters covered at the hearing in this section, but we have referred to or quoted from that material as appropriate in the remainder of this decision.
- (19) The hearing focused on the key matter left in contention, which was Mr Heke's proposal that in addition to the stream restoration offset, that a wetland should also be restored as a cultural offset for mahinga kai traditions and educational purposes. Mr Heke had identified a wetland at 572 Welcome Bay Road, Tauranga, owned by the Meretaka Trust as being available. This decision also addresses matters raised by Mr Heke at the hearing.
- (20) We took our own notes of any answers given to verbal questions that we posed to hearing participants.
- (21) We conducted a site visit after hearing from the applicant on the morning of the 25th October. We were accompanied by Mr Richard Conning of TCC, who is not directly involved in this application. We visited the application site, the Meretaka Wetland mentioned in the s42A report, the Pukepoto Pa site and the Cheyne Road offset mitigation area.
- (22) On the evening of 24th October 2022, we received an emailed request from Mr Heke to visit four sites, being:
1. The stormwater treatment ponds at Three Creeks, Adlers Drive.
 2. The Pukepoto Pa site which is accessed through the TCC easement to the TCC water reservoir.
 3. Owens Park/Esméralda Dr Welcome Bay stormwater works.
 4. Tongaparaoa Wetlands at Ila Reserve, Ohauiti.
- (23) This request came well after the date specified in our Minute 3 to advise of any additional sites to visit. We had already determined it appropriate to visit the Pukepoto Pa site given it was directly mentioned in the application material and evidence before us. We asked the parties to address this at the commencement of the hearing. Mr Heke considered these were relevant because of the net cultural loss of mahinga kai to these areas. Mr John and Ms Holden agreed that they were not relevant as they were not mentioned in the application or submission. Mr John also identified that the Adlers Drive offset was as part of water quality treatment, which is not a factor in this application. We preferred the advice of Mr John and Ms Holden and only visited the sites which we considered to be directly relevant to this application and decision.
- (24) Following the adjournment of the hearing, we issued Minute 4 which set out a number of matters that had been identified through the hearing as outstanding and sought a process for the provision of that information and for comments to be received on it. These matters were:
- i. Reviewing the recommended consent conditions
 - ii. Providing a graphic supplement showing additional mitigation measures now proposed in and around McFetridge Dam and Poike Road North
 - iii. Providing further information on the culvert design, pool design, left abutment channel and McFetridge Lane fish ladder in respect on feedback from Mr Donald from the Regional Council
 - iv. Providing further information of the stream enhancement and riparian planting proposed at Poike Road North

- v. Providing more information on the length of stream enhancement and details of that enhancement for ecological offset mitigation at Cheyne Road
- (25) The further information, excluding Mr Donald’s feedback, was received on 4th November 2022. Our Minute 5 asked Mr Heke if the applicant’s suggestion of five working days was adequate in which for him to respond to the further information. Minute 6 set out the timeframes for circulation of information and responses to be received. Mr Donald’s feedback was received on 14th November 2022. Minute 7 set out a revised timeframe, responding to Mr Heke’s request for further time.
- (26) Mr Heke provided feedback on 25th November 2022, which addressed the further information, as well as other matters in the hearing. We note that we had made it clear that any further comment was limited to what was contained in the further information. Accordingly, we have disregarded the additional matters that Mr Heke raised. The matters within scope raised by Mr Heke were:
- The additional ecological fish pools would require hydrological design expertise.
 - The Cheynne Road proposal is an extension of the Otionga Wetland, which was developed with hydrological expertise and involved Ngāi Te Ahi and Ngāti Ruahine, alongside Māori landowners. It is also downstream of SH29A Maleme industrial area.
- (27) Ms Holden responded to Mr Heke’s comments on 28th November 2022. In respect of the first matter, she advised that:
- Recommended condition 5.1 requiring an engineer and freshwater ecologist to certify the final designs of the ponds in the McFetridge dam would meet Mr Heke’s request for hydrological expertise
 - Recommended condition 5.1 should be amended to include a requirement that ponds are designed and planted to provide native fish and eel habitat and resting areas.
 - She considers effects on fish habitat and passage within the McFetridge Dam area to be mitigated
 - The ecological offset at Cheynne Road would be at least 630m, a ratio of more than 7:1.
- (28) We received final comments from the applicant on Monday 5th December 2022 and closed the hearing on Thursday 8th December 2022.

4 Reasons for Consent

- (29) Section 5 of the AEE and section 3 of the s42A report set out the reasons for consent sought under the Regional Natural Resources Plan (RNRP). These are set out below:

Earthworks Under section 9(2)(a) of the RMA and rule LM R4 of the RNRP to undertake a discretionary activity to disturb land and soil during earthworks; the proposed area and volume of earthworks exceed the permitted activity standards.

Temporary stormwater discharge Under s15(1)(b) of the RMA and rule DW R8 of the RNRP to undertake a discretionary activity to temporarily discharge

(associated with earthworks) sediment-contaminated stormwater (associated with earthworks) to land where it may enter water.

The applicant did not initially apply for this consent but agreed³ that consent was required for this activity.

Disturb contaminated soil Under s9(2)(a) and s15(2)(A) of the RMA and rule DW R25 of the RNRP to undertake a restricted discretionary activity to discharge contaminants to land where it may enter water resulting from the disturbance of contaminated soil. The proposal cannot meet permitted activity DW R24 (to remediate contaminated land where the only hazardous substances are motor vehicle or heating fuels or lubricants and the total soil volume is less than 400 m³).

Dam and divert water Under s14(3)(a) of the RMA and rule WQ R21 of the RNRP to undertake a discretionary activity to dam and divert water. The proposed McFetridge Dam will impound more than 5000 m³ and exceeds 2.5 m vertical height so cannot meet the permitted rules for damming water.

Install structures in & disturb the beds of streams Under s13(1)(a) and (b) of the RMA and rule BW R36 of the RNRP to undertake a discretionary activity to install structures, excavate and disturb the beds of streams; the proposal does not meet the permitted rules for bed disturbance.

(30) In section 3 of her s42A report, Ms Holden identifies that the applicant had sought consent for the two following matters, of which she had determined that consent is not required:

- Modifications of wetlands under s9(2)(a) of the RMA and WL R9 of the RNRP. The definition of wetland in the RNRP excludes wetlands in stormwater detention dams. She agreed with the applicant's ecologist's position that the wetlands are also excluded from the definition of natural wetlands under the National Policy Statement for Freshwater Management 2020 and are not subject to the National Environmental Standards on Freshwater 2020.
- Permanent discharge of stormwater to surface water under rule DW R21 of the RNRP. She advises that BORPC consent 66823 already authorizes TCC's comprehensive stormwater discharge.

(31) We accept Ms Holden's advice on this matter.

(32) We accept Mr Allott and Ms Holden's advice that adopting the bundling principle, the proposal is a discretionary activity.

³ Email Matt Allot to Lucy Holden 12 August 2021,

- (33) We also note that the s42A also identifies that the applicant will need a separate building consent for the proposed McFetridge Dam. This does not impact on us deciding on this application.

5 Statutory Framework

- (34) Section 104 of 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) ...⁴
- (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:*
 - (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*

⁴ Not relevant to this application.

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.*
- (35) 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.*
- (36) Section 105 of the RMA sets out matters relevant to certain applications, in this instance being the discharge permits sought from the Regional Council:

- (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.*

- (37) 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.*

6 SECTION 104 ASSESSMENT

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

Existing environment and permitted effects

- (38) The existing environment is well described in the s42A report and the AEE. We adopt those descriptions and refer back to them as necessary. The permitted baseline was not raised as matter of relevance to the application and we agree.

Effects in contention

- (39) After analysis of the application and evidence (including the offered and proposed mitigation measures), undertaking a site visit, reviewing the s42A report, reviewing the submission and concluding the hearing process, we consider that the proposed activity raises the following outstanding effects in contention:
- a) Positive effects
 - b) Ecological effects
 - c) Cultural effects
- (40) We address these effects in turn.
- (41) There were other effects addressed in the AEE and s42A, including:
- Flooding and instream scour
 - Water quality, erosion and sedimentation
 - Contaminated soil effects
 - Dust effects
 - Landscape, visual and natural character
 - Historic heritage.

- (42) We have adopted and accepted Ms Holden's recommendations in those respects, which we found to be comprehensive and thorough, and do not address them further. This decision should therefore be read in conjunction with Ms Holden's s42A report. We note that there are aspects of water quality that are addressed in our evaluation and determination on cultural effects.

Positive effects

- (43) The applicant identifies a number of positive effects in both the AEE and in Mr Allott's evidence⁵; which Ms Holden adopts in 8.1 of her s42A report. We have reviewed these and accept both planner's advice in this regard and find that there will be positive effects on people's health and safety, natural character and landscape arising from the works. We note the findings and recommendations in the CIAs and the advice we received from Ms Rirunui at the hearing supported the proposal in terms of improvements to people's health and safety.
- (44) We have considered the effects on ecology and cultural values below. In both cases, we consider that positive effects will also arise from the works. What we want to emphasise is that there will be positive effects arising, we understand that these do not in any way compensate for the impacts that urban development in this catchment and wider area has had on both ecology and cultural values. However, the baseline of our assessment must be by law limited to the environment as it exists now, rather than how it existed prior to the current environment being created.

Ecological effects

- (45) It was the Council and applicant's agreed position that the habitat that is the subject of this application is of low quality, particularly due to habitat modification with urbanisation and obstructions to fish passage⁶. Together, these had led to low fish diversity.
- (46) By the time the application came to hearing there was little in contention between the applicant and the Council. We had however noted that Mr Suren had outstanding concerns in his advice to Ms Holden, so we sought to address this through the hearing process. His particular concern was that transforming the two ponds back to streams would reduce the overall amount of freshwater habitat in the catchment, as the deep and slow flowing water in the ponds would be lost. Ms Holden had found that the changes from the ponds to meandering streambeds with native vegetation would not be contrary to the NPS-FM. She also considered it would improve the streams' natural function and ecological values and that it was aligned with Objective BW O1 of the RNRP.
- (47) Mr Suren was not available for the hearing, so we asked Mr Donald to consider Mr Suren's concerns. Having liaised with Mr Suren, his advice to us was:

We agree that the re-creation of the original stream channels will reduce the area of habitat for fish compared to the existing ponds, this is based on the smaller 'footprint' of a stream channel versus a pond. It is not possible to quantify what this might mean for the fish communities based on the information provided. We suggest that a series of ponds in the beds

⁵ 6.6 of Mr Allott's statement of evidence.

⁶ 8.6 of Ms Holden's s42A report

*of the dams, connected by stream channels, would be a better solution.
This would provide a greater variety and area of habitat for fish.*

- (48) As outlined at the start of this decision, the applicant made changes to the McFetridge dam so that it would include a series of ponds in the bed, connected by stream channels. Mr Donald's email of 14th November 2022 advises that he thinks "the applicant has done a good job of incorporating the improvements raised at the hearing into the landscape plans".
- (49) Mr Heke sought that there be hydrological input into the design of the ponds. Ms Holden confirmed that recommended condition 5.1 already provided for this. However, she also recommended an addition to that condition to be explicit that the ponds are designed and planted to provide native fish and eel habitat and resting areas. We accept Ms Holden's advice that with these additions, effects on fish habitat and passage within the McFetridge Dam area will be mitigated.
- (50) The applicant also confirmed that through more detailed design, approximately 643 lineal meters of stream enhancement would occur between Poike Road and Harrisfield Road, in addition to the offsetting at Cheynne Road.
- (51) The other matter of contention at the hearing was the actual length of stream habitat that would be modified by the proposal, and the length of offset mitigation required to address that. We addressed this in paragraph 3 of this decision. We accept this advice by the applicant, as confirmed by the Regional Council. As outlined earlier, the applicant provided further information on the details of the enhancement proposed for the Cheynne Road offset mitigation area. We noted Mr Donald's comments at the hearing that while this would result in benefits, there would remain unprotected areas up and downstream, and ideally the whole stream should be protected. Mr Heke also raised this in his response.
- (52) We agree that protection of the whole of the stream would be a very positive outcome. However, we are cognisant that the 630m length of offsetting proposed by the applicant at Cheynne Road is at a 7:1 offset ratio, significantly more than the BoPRC general expectation of 2:1. Further, protecting the whole stream would be a response to wider issues than those arising from the loss of 220m of stream habitat that is the subject of this application, and it would also involve land that is not within Tauranga City Council's ownership. Quite simply, we cannot impose conditions that would affect other people's land without their written agreement. We find that the offset mitigation proposed and the ecological effects overall to be acceptable.

Cultural effects

- (53) As outlined earlier in this decision, the application included supportive CIAs from Ngāi Te Ahi and Ngāti Hē and Ngāti Ruahine, including recommendations that the applicant had adopted. We were told how the applicant and Ngāi Te Ahi and Ngāti Hē and Ngāti Ruahine had been working constructively together on this project, which included an ongoing relationship through implementation. We were also advised that Gina Mohi, a known wai Māori expert, had been instrumental in the process of preparing the Ngāi Te Ahi and Ngāti Hē CIA. Ngāti Ruahine's CIA identified that the project provides the opportunity for genuine ecological and habitat restoration of a degraded catchment, noting that

infrastructure interests are given priority over environmental values, and that it is a response to the flood hazard mitigation.

- (54) Ms Holden addressed the two CIAs in section 8.9 of her s42A report, where she responded to the CIA recommendations. Ms Holden had recommended conditions for all but one of the recommendations. That recommendation related to the Ngāi Te Ahi and Ngāti Hē recommendation that soils sample results be provided to their Resource Management Unit. Ms Holden had not considered it necessary. After questioning this at the hearing, a condition requiring the provision of soil sample results was included in the updated recommended conditions of consent. We find that this addresses the CIA recommendations.
- (55) Mr Heke lodged a submission opposing the application. In the submission, he includes that he is a representative of Ngāti Ranginui Iwi, Ngāti Hē Hapū, Kaitimako M2 Trust, Haukainga Max and Waina Heke Kaiawha. The grounds for the submission are summarised in the s42A report as follows:
- Inappropriate use and development of the waterways.
 - No alternatives designed and planned for National Policy Freshwater management and objectives.
 - No provision for mahinga kai and taonga species as identified in the cultural impact assessment relating to Te Mana o te Wai.
 - TCC failure to undertake and complete 2012 Memorandum of Understanding (MOU) 2012 for Cultural Environment Management Plan and compliance of resource consent 66823.
- (56) Table 4 of the s42A report sets out the outcomes of a pre-hearing meeting held between the Council, Mr Heke and the applicant. The requests made by Mr Heke at the pre-hearing meeting are set out below:
- a) TCC to review its 2012 memorandum of understanding with Ngāti Ranginui TCC Stormwater and Tangata Whenua Plan
 - b) TCC to investigate preserving Pukepoto Pā from inappropriate development and preservation as a reserve.
 - c) Te mana o te wai recognition by providing:
 - Oversight into design and construction.
 - Participation in monitoring and surveying.
 - Ensuring adequate flow and quality (water) for mahinga kai species and activities.
 - d) An advice note acknowledging the cultural impact assessment
 - e) Acknowledgement of ancestral relationship to waahi tapu, sites, waterways and traditions
- (57) We note that the recommended conditions of consent incorporate:
- A condition offered of an Augier basis to address a) and b).
 - Recommended conditions of consent to address c), including providing iwi and hapū the opportunity to input into various management plans, cultural monitoring through earthworks, and measures to minimise sediment discharge.
 - Advice notes to address d) and e).
- (58) Mr Heke addressed water quality at the hearing, wanting to see improvements through the design. In response to questioning, he confirmed that his request for offline storage

was in response to values around mahinga kai and water quality. He also confirmed that he had not considered where offline storage could occur in the area, rather his position was that the applicant should have considered and found a location for offline storage. He advised that other stormwater projects he had been involved with had included treatment.

- (59) Mr John confirmed that this application is not looking at water quality treatment, rather it is focussed on managing the flood risk. Mr John confirmed however that there are likely to be water quality benefits arising. Ms Holden advised that her understanding was that slowing the water flow would improve water quality, and that water quality itself is addressed through the comprehensive stormwater consent that Tauranga City Council's holds from BoPRC. Further she advised that the application is not for any discharges to the streams, and the consent considerations are limited to the water quality effects of the application, rather than the long term water quality effects. In respect to offline storage, the advice we had from the applicant and the Council was not feasible in such a developed area.
- (60) Following the pre-hearing meeting, Mr Heke sought that an additional offset area be provided at a wetland owned by the Meretaka Trust, at 572 Welcome Bay Road, Tauranga. This offset would be a cultural one, for mahinga kai traditions and educational purposes. Mr Heke advised that the landowners are keen to have the wetland restored. Dr Simon, Chair of the Meretaka Trust briefly spoke in closing the hearing. We had nothing in writing from the Meretaka Trust of any details of any restoration or any form of agreement for its restoration to consider.
- (61) We asked Mr Heke how he had determined the area required for cultural offsetting, what the cultural effects were that required offsetting and why the particular area was appropriate. As we understand from what Mr Heke advised us, his underlying concern is the impact that urban development, including the dams and stormwater system have had on mahinga kai and water quality. He was concerned that there are not many mahinga kai spots left and the ones left are diminishing. Mr Heke's mother also spoke, talking about how you used to be able to gather watercress and go eeling in the application area. The impacts are on their people, Māori now with social issues going to the foodbank to get food, instead of being able to rely on natural resources. Ohauti was their swimming pool, with a lot of bird life, pukeko and tuna.
- (62) In terms of the Trust area, he said he had looked at it in terms of value. He called it a highway, a regular area to gather tuna, and talked of its accessibility. In terms of the reasons a cultural offset was required, he further advised that there are two structures currently consented in the stream, and this application would turn it into a stormwater drain, and that's how it would be considered. He told us that the Council will need to improve fish passage by 2024; and he was not sure if the fish passage had been designed for migratory tuna. Overall, Mr Heke wanted recognition of the net loss of the cultural resource. He sought that the Regional Council provides one consolidated consent for all existing stream structures as well as the new ones.
- (63) We asked Mr Donald as to the suitability of Meretaka Trust area for offsetting from an ecological perspective. His advice was that there is a need to focus on the catchment that is affected by the proposed works. While restoring the wetland would be better than nothing, it would not do anything for the immediate catchment.

- (64) We also asked Mr Donald what the impacts of the proposed changes resulting from this application would be on mahinga kai compared to existing, and what the impact would be on the tuna, banded kokopu and other fauna and flora in the area. In respect to improvements in the immediate area, Mr Donald referred us to the applicant's ecological assessment report which concluded that the proposed design would result in a likely positive outcome for fish passage and stream habitat. Mr Donald's opinion on balance was "that this is optimistic and that a neutral level of effect (no better or worse overall than current) on the tuna, banded kokopu and other fauna and flora in the area is more realistic".
- (65) Mr John advised that there are numerous perched culverts through these streams that prevent stream fish passage, and that this project would even the grade to better allow fish passage. In terms of the Trust land, the Applicant advised that the wetland is not owned by the Council. They were concerned about ratepayer money being invested into an upgrade that would not be able to be controlled or accessed by the Council.
- (66) In response to the concerns raised by Mr Heke, Ms Ririnui advised that while the hapū representatives respect and understand Mr Heke's concerns, they had made their decision and wished to move forward. They had sought input from Ms Mohi for the matters that had concerned them. This included planting with natives and using a mauri stone at the start of the dam. The use of a mauri stone would be consistent with tikanga and it would be checked by existing cultural monitors. In terms of impacts on cultural values, Ms Ririnui advised that their whakairo is to look after what is there, but that can't be their only consideration; they also need to look after those who may be directly affected by flooding. Their role as kaitiaki is to maintain things, unless they can be improved.
- (67) As we outlined above, our starting point by law has to be the current situation. We are unable to use this consent process to require the applicant to address effects that have already occurred because of past actions; rather we need to focus on what the changes are proposed by this application on the environment as it exists now. In our view, while this application will not restore mahinga kai to what it was like pre-urbanisation or provide redress for the impact of urbanisation, it will lead to an improvement to the existing situation, through the introduction of native planting, increased stream cover, improved fish passage and slower moving water. While the offsetting would not involve remediation of an entire stream, it would provide ecological benefits over a 630m length. This is in addition and beyond the stream enhancement and riparian planting proposed within the site, including the 643m at Poike Street North. Moreover, as emphasised by Ms Ririnui and Ms Walker, the proposed works would significantly reduce the threat to life for those who now live in this catchment.
- (68) From our site visit, we could see the merits of restoring the Meretaka Trust wetland. However, we did not have the evidence that the cultural effects arising from this application would warrant offsetting of 5ha of wetland in another catchment, on private land. We also had nothing in writing from the Trust itself detailing what works would entail and providing their written agreement. In the absence of this evidence and information, we give this request from Mr Heke little weight.
- (69) Overall, we find that the proposal, with the recommended conditions of consent, appropriately addresses the cultural effects, and that these are acceptable. We note that we have extended the involvement of Ngāi Te Ahi, Ngāti Hē, Ngāti Ruahine and Ngāti

Ranginui to be able to provide input into more management plans than were recommended by the Council and applicant. We consider that this ability to input into the wider proposal is appropriate.

Section 104(1)(a) Effects on the Environment Conclusion

- (70) Overall, we find that, subject to the conditions of consent, the effects arising from the proposal will be acceptable.

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

- (71) The applicant offered ecological offsetting as part of the application. We have addressed this under our s104(1)(a) evaluation.
- (72) The applicant has also offered a condition in response to Mr Heke's submission, requiring that the applicant:
1. *Review the Tauranga City Council 2012 memorandum of understanding (MOU) with Ngāti Ranginui; and*
 2. *Act in good faith with regard to the cultural sensitivity of the area and the project's geographical proximity to Pukepoto Pā, and investigate preserving the Pā as a reserve to protect it from inappropriate development (see Advice Note 1).*
- (73) The applicant would be required to provide the Regional Council with evidence of the review with two years.
- (74) We find that this condition would result in positive effects. We hope that both aspects of this condition will lead to discussions that may address the matters raised through Mr Heke's submission and evidence and by Mr Heke during the hearing that are beyond the scope of which we have delegated authority to decide on.

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

- (75) 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)
 - National Policy Statement on Urban Development 2020 (NPS-UD)
 - Bay of Plenty Regional Policy Statement 2014 (RPS)
 - Bay of Plenty Regional Natural Resources Plan 2008 (RNRP)
 - Tauranga City District Plan (TCDP)
- (76) The applicant provided a robust and detailed evaluation of the relevant planning documents, which Ms Holden adopted in her s42A report⁷. We note that Ms Holden did not consider the TCDP relevant; however, this was addressed in section 7.6 of the AEE. Having reviewed the TCDP evaluation in the AEE, we consider that it does provide relevant direction in respect to natural character, flood risk, contaminated land, stormwater infrastructure, cultural heritage and values. We accept and adopt this evaluation.

⁷ Section 9 of the s42A report.

- (77) We had no evidence from any other party to the hearing about consistency with the planning documents, beyond Mr Heke's submission points that there are no alternatives designed and planned for in relation to the National Policy Statement for Freshwater Management and objectives, and no provision for mahinga kai and taonga species as identified in the CIA relating to Te Mana o te Wai.
- (78) We find that the applicant's active engagement with Ngāi Te Ahi and Ngāti Hē and Ngāti Ruahine through the development of the application is consistent with the NPS-FM and Te Mana o te Wai, as well as relevant direction through the RPS and RNRP. This is reinforced with the conditions of consent which enables their engagement and input through the implementation of the proposed works, alongside Ngāti Ranginui.
- (79) Having reviewed the application and evidence before us, we adopt and accept the applicant and Ms Holden's advice that the proposal is consistent with the relevant planning documents, including the TCDP.

Section 104(1)(b) Relevant Provisions Conclusion

- (80) Overall, we find that the proposal is consistent with the relevant provisions of the relevant policy statements and plans.

Section 104(1)(c) Other Matters

- (81) No parties provided evaluations of any iwi management plans. Ms Holden identified the Stormwater Strategy for the Bay of Plenty Region (2005/2020) as being relevant and concluded that the proposal is consistent with it⁸. Having reviewed her evaluation, we agree that it is relevant, and we accept her advice on the proposal's consistency with it.
- (82) The AEE also addressed the Tauranga Reserves Management Plan (2019), concluding that the proposal is consistent with it. We had no evidence to the contrary and having reviewed section 7.7. of the AEE, we find that the proposal is consistent with it.

Section 105 and 107

- (83) We reviewed the applicant's and Ms Holden's⁹ evaluations under sections 105 and 107 of the RMA.
- (84) There was no evidence presented at the hearing that would lead us to not accept the applicant's¹⁰ and Ms Holden's conclusions that the proposal should be approved under sections 105 and 107 of the RMA.

Subject to Part 2:

- (85) While noting that none of the relevant planning documents are invalid, incomplete or uncertain, the applicant addressed Part 2 in section 7.8 of the AEE, concluding that the proposal is consistent with it. Ms Holden's position was that it was not necessary to consider Part 2, which Mr Allott agreed with in his statement of evidence. We accept Mr Allott and Ms Holden's advice in this regard.

⁸ Section 9.2 of the s42A report.

⁹ Sections 9.2 and 9.3 of the s42A report.

¹⁰ Paragraph 11.2 of Mr Allot's Statement of Evidence.

Section 108 Conditions

- (86) We have carefully reviewed the conditions of consent recommended by the applicant and Council. Subject to the wider inclusion of Ngāi Te Ahi, Ngāti Hē, Ngāti Ruahine and Ngāti Ranginui in inputting into management plans and minor amendments for overall workability and to reflect contemporary practice, we are satisfied that the conditions of consent are appropriate and acceptable.

Duration of consent

- (87) The applicant requested a 35-year term for the streambed structures and a 10-year consent for the physical works. Given that the structures are for stormwater and flood management, we consider the 35-year term to be appropriate. Similarly, a 10-year term to undertake the physical works is considered reasonable, albeit, we would hope that the works could progress sooner, given the health and safety risks to residents in the area.

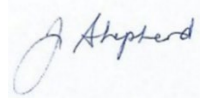
7 Decision

- (88) 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 Tauranga City Council'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:
- Based on the evidence before us, the actual and potential adverse effects of the applications are either no more than minor or can be suitably avoided, remedied or mitigated by readily enforceable consent conditions;
 - The applications will have positive effects; and
 - The applications are consistent with the provisions of the relevant statutory instruments.
- (89) We therefore **grant** the applications lodged by Tauranga City Council for the reasons outlined in Sections 1 of this decision, subject to the conditions set out in Appendix 1. Our reasons for granting consent are set out above and are expanded upon in the body of this Decision.

Commissioner Gina Sweetman



Commissioner Julie Shepherd



Date: 19 December 2022