

Memorandum

To: Phil Wardale and Sally Gepp

From: Luke Faithfull

Date: 8 December 2020

Re: Whakatane Boat Harbour – Response to matters raised in BOPRC Fast-Track Referral Application Commentary

INTRODUCTION

In their response to the Ministry for the Environment (MfE), Bay of Plenty Regional Council (BOPRC) stated their support for the referral of the Whakatāne Boat Harbour (WBH) to the fast track consenting process under the COVID-19 Recovery (Fast-track Consenting) Act 2020.

This memorandum provides a planning response to two key matters identified in BOPRC's commentary to MfE on application for referral. The two matters are:

1. Whether the project meets the definition of *Regionally Significant Infrastructure* (RSI) under the Bay of Plenty Regional Policy Statement (RPS) and the Regional Coastal Environment Plan (RCEP)¹; and
2. Confirmation of the project activity status under the Resource Management (National Environmental Standards For Freshwater) Regulations 2020 (NESFW).

REGIONALLY SIGNIFICANT INFRASTRUCTURE

Understanding whether the WBH meets the definition of RSI under the RPS is imperative as it dictates the activity status for the project under both the RCEP and the NESFW, particularly in respect to works within the natural wetland area (land on the eastern side of the stopbank) and within the Indigenous Biological Diversity Area – A.

The RPS defines RSI as follows [**emphasis added**]:

Is infrastructure of regional and/or national significance and includes:

> ...

> **Commercial port areas including Tauranga Harbour and its channels necessary for the operation of ports and adjoining land and storage tanks for bulk liquids. ...**

¹ The definition of Regional Significant Infrastructure in the RCEP is a duplicate of the definition in the Bay of Plenty Regional Policy Statement.

The identification of 'commercial port areas' as RSI provides sufficient specificity that the WBH, in particular the Stage 1 development which focuses on the provision of commercial marine / port related activities², meets the definition of RSI.

This is further supported by *Policy CE 15B* of the RPS, which recognises the significance of a port area in Whakatāne and states [**emphasis added**]:

*Recognising secondary ports - **Recognise the local and regional significance of ports at Whakatāne and Ōpōtiki** and take into account their social and economic benefits, including the need to maintain navigation channels.*

Explanation - The region's secondary ports contribute to the wellbeing of their communities.

Policy CE 15B requires recognition of their existing and potential benefits in decision-making. Ōpōtiki and Whakatāne Ports are located in river estuaries and require ongoing dredging in order to maintain safe vessel access.

Overall, given the WBH will be located in Whakatāne (Policy CE 15B), and that Stage 1 provides for development of a boat harbour and supporting infrastructure focusing on commercial marine / port related activities (commercial berthing for aquaculture and tourism, loading and unloading facilities, land-based marine industry activities, etc), we consider that a strong case can be presented demonstrating that the WBH is consistent with the definition of RSI under the RPS.

ACTIVITY STATUS UNDER THE NESFW

Specified infrastructure

The BOPRC response stated:

If the proposal does not meet the definition of specified infrastructure then disturbance to a natural wetland will be a non-complying or prohibited activity under the NESF.

² RCEP Definition for Port Related Activities - Industrial and commercial activities that for operational purposes require a location near the Port, including:

- Commercial fishing facilities;
- Marine berthing and storage, construction, repair, servicing and maintenance facilities – including the Tauranga Bridge Marina;
- Bulk fuel supply infrastructure including terminals, wharflines and pipelines;
- Handling, storage, processing and transportation of cargo; and
- Navigational aids and equipment.

As the WBH is consistent with the definition of RSI, it would also meet the *specified infrastructure*³ definition under the National Policy Statement for Freshwater Management 2020, and in turn, the definition under the NESFW⁴.

The project elements to which the NESFW regulations apply are the construction, operation and maintenance of the access channel within the natural wetland area (land to the east of the stopbank). These fall for consideration under *Part 3, Sub-part 1 – Natural Wetlands* of the NESFW.

Regulation 45 provides for vegetation, earthworks and land disturbance associated with the construction of specified infrastructure as follows:

45 Discretionary activities

- 1) *Vegetation clearance within, or within a 10 m setback from, a natural wetland is a discretionary activity if it is for the purpose of constructing specified infrastructure.*
- 2) *Earthworks or land disturbance within, or within a 10 m setback from, a natural wetland is a discretionary activity if it is for the purpose of constructing specified infrastructure.*
- 3) *Earthworks or land disturbance outside a 10 m, but within a 100 m, setback from a natural wetland is a discretionary activity if it—*
 - a. is for the purpose of constructing specified infrastructure; and*
 - b. results, or is likely to result, in the complete or partial drainage of all or part of the natural wetland.*
- 4) *The taking, use, damming, diversion, or discharge of water within, or within a 100 m setback from, a natural wetland is a discretionary activity if it is for the purpose of constructing specified infrastructure.*

Vegetation clearance, earthworks and land disturbance associated with construction of the access channel will fall under provisions 1 – 4 of Regulation 45 and therefore, be a **discretionary activity** under the NESFW.

We note that this approach is consistent with that which was recently applied by the Expert Consenting Panel in the Matawii Water Storage Reservoir decision under the Fast-Track Act.

³ NPS FM definition - Specified infrastructure means any of the following:

- (a) infrastructure that delivers a service operated by a lifeline utility (as defined in the Civil Defence Emergency Management Act 2002)
- (b) **regionally significant infrastructure identified as such in a regional policy statement or regional plan [emphasis added]**
- (c) any public flood control, flood protection, or drainage works carried out:
 - (i) by or on behalf of a local authority, including works carried out for the purposes set out in section 133 of the Soil Conservation and Rivers Control Act 1941; or
 - (ii) for the purpose of drainage by drainage districts under the Land Drainage Act 1908

⁴ NESFW definition - Specified infrastructure has the meaning given by the National Policy Statement for Freshwater Management

Vegetation clearance and earthworks within a wetland associated with construction of the Matawii Water Storage Scheme was treated as a discretionary activity under Regulation 45 because the Scheme qualified as regionally significant infrastructure under the relevant RPS.

Wetland drainage

Advice from Wildlands is that construction works (excavation within, and disturbance of, the wetland), and the completed access channel, will not result in the 'the complete or partial drainage of all or part of' the wetland area. On that basis, Regulations 45(3)(b), 52 and 53 do not apply.

However, in the event the construction works did result in any degree of wetland drainage the following would be relevant:

- Regulation 45(3)(b) – where the activities were beyond a 10 m setback, and out to 100m, from a natural wetland the works would be a discretionary activity;
- Regulation 52(1) – where earthworks occur outside, but within a 100 m setback from, a natural wetland resulting in partial or complete wetland drainage, which do not have another status under regulations 38 to 51, they would be a non-complying activity; and Regulation 53(1) – where earthworks occur within a natural wetland resulting in partial or complete wetland drainage, which do not have another status under regulations 38 to 51, they would be a prohibited activity. However, in both cases, the earthworks have status (discretionary under Regulation 45 as specified infrastructure) therefore, neither the non-complying nor the prohibitive status apply.

Activity Status

Earthworks, vegetation clearance and land disturbance associated with construction of the access channel will fall under provisions 1 – 4 of Regulation 45 and are therefore a **discretionary activity** under the NESFW.

Regulation 46 provides for the operation and maintenance of specified infrastructure as either a permitted activity or a restricted discretionary activity subject to meeting various conditions which, based on current understanding, should be able to be met with appropriate management / maintenance plans.

CONCLUSION

In summary, we consider that:

1. The WBH is consistent with the definition of RSI under both the RPS and the RCEP; and
2. The activity status under the NESFW for the project works within a natural wetland is discretionary.