

Forest & Bird’s Comment on the Kōpū Marine Precinct

All sections of this form with an asterisk (*) are mandatory.

1. Contact Details

Please ensure that you have authority to comment on the application on behalf of those named on this form.

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2. *We will email you draft conditions of consent for your comment

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3. Please provide your comments on this application

If you need more space, please attach additional pages. Please include your name, page numbers and the project name on the additional pages

INTRODUCTION

1. Forest & Bird is New Zealand’s largest and longest-serving independent conservation organisation, with many members and supporters. Its mission is to be a voice for nature, on land, in fresh water, and at sea, on behalf of its members and supporters. Volunteers in 50 branches carry out community conservation projects around New Zealand.
2. In support of the Society’s objectives, it has been involved in resource management processes around New Zealand for many years, at the national, regional, and district level. It routinely submits on regional and district plan provisions, and advocates in the Environment Court in relation to plan provisions relating to biodiversity, landscape and natural character and on some resource consents. It is particularly interested to ensure that the environmental bottom lines established in national policy

statements in order to give substance to the “protective” element of Part 2 of the RMA are given effect to in regional and district plans and achieved through decisions on resource consents.

3. Forest & Bird provided a submission on the COVID19 Bill and is recognised as a party that must be consulted with for listed and referred projects.
4. Forest & Bird has concerns regarding the potential adverse environmental impacts of this proposal. Particularly on banded rail, including the loss of wetland and river/estuarine habitat. Banded rail is identified as an At Risk-Declining species. As such protection of them is incredibly important. This means that the avoiding adverse effects on banded rail is necessary and is required by Policy 11 of the NZCPS is relevant. The proposal will have adverse effects as the result of habitat loss and disturbance during construction and has potential ongoing adverse effects from the presence of more people, vehicles, from noise, light, dogs and pest as a result of use and operational activities.

IMPACT ON BIRD HABITAT

5. Banded rail have disappeared from most of NZ since the 1970s and now have the conservation status of At Risk–declining. Banded rail are rarely seen as they are well camouflaged and spend 75% of their time feeding under mangrove cover. They seldom venture into the open, and then mainly at dawn and dusk. A most significant fact is that breeding pairs are territorial and stay on their territories all year-round.
6. Forest & Bird considers that the loss of habitat and adverse effects on habitat for banded rail as a result of this proposal is not given the level of recognition required for an At-Risk species within the ecological assessments.
7. The finding that “habitat available at the site is not considered to be unique or of particular importance to any of the avifauna identified during the surveys”¹ and that “the ecological value of the intertidal borrow pit is considered very low.”² do not adequately assess the potential for adverse effects on banded rail from the proposal or reflect their own finding that “the ecological value of banded rail at the site is considered high.”³ The conclusion that it “is likely **only** foraging behaviour will be impacted⁴ (emphasis added) down plays the value of foraging habitat, particularly during breeding periods, and other impacts of the proposal.
8. The report includes inconsistent and potentially misleading statements, for example with retrospect to potential roosting and nesting habitat of the banded rail affected by the proposal being “likely inundated during storm events”⁵ to being a definitive “are inundated during storm events”⁶. We agree that regular flooding would make it unsuitable for nesting but there is no evidence provided of regular flooding during the breeding season or that the pair nest elsewhere. Also, that “localised disturbance to avifauna is unlikely to have a significant effect on the wellbeing of those individuals, as they will be able to readily

¹ Page 15, Appendix T ecological assessment Option 2

² Page 12, Appendix T ecological assessment Option 2

³ Page 15, Appendix T ecological assessment Option 2

⁴ Page 19, Appendix T ecological assessment Option 2

⁵ Page 18, Appendix T ecological assessment Option 2

⁶ Page 19, Appendix T ecological assessment Option 2

move into nearby habitat” does not accord with the statement that banded rail are “not typically considered to be mobile or wide ranging”⁷.

9. We are concerned that the low value accorded to the habitat of banded rail affected by the proposal does not reflect the actual situation and will result in a failure to protect these At-Risk birds. Both Options 1 and 2 are of concern in this respect.
10. While it is recognised in the report that banded rail are not typically considered to be mobile or wide ranging⁸, the referral to like-for-like habitat to the north of the site and suggestions similar of better habitat is available within the vicinity is potentially misleading with respect to banded rail. Te Ara government website⁹ provides specific information on banded rail which is more relevant than the WRC technical report referred to in the ecological assessment. This information includes that breeding pairs of banded rail stay on their territory year round.
11. While the ecological values of the habitat that would be lost as a result of the proposal may be low generally and comparatively to adjacent area, it is within this area that banded rail have been identified as present, this makes it habitat of a significant species. Further the territory, or home range extent of 4h is equivalent to the area of the proposal footprint¹⁰ and while the territory may not overlie the whole footprint it is evident that there is an overlap. However the applicant has not provided information on the potential impacts of this. For example, it is not clear to what extent the territory of the observed pair overlaps with the footprint of the proposal. The underlying assumption appears to be that any loss of habitat to the banded rail can just be made up by them just moving along a bit. However, this fails to account for the behaviour of banded rail, whether the availability of habitat to the north of the proposal is subject to the territory of other breeding pairs. The impacts of losing this habitat could be significant during the breeding season even if the nest itself is not within the footprint and could have long term impacts if the pair are unable to re-establish adequate territory for foraging.
12. We are particularly concerned with the proposed in the draft management plan, that the birds could just be ushered along, this does not accord with the territorial nature of banded rail. The presence of other breeding pairs and corresponding territory could mean that establishing a new territory is not a simple matter. Nor do impacts of disturbance such as breeding success, appear to be considered. The extent of adverse effects from “ushering”, loss of habitat and construction noise has not been considered in the ecological report, nor is it clear whether such effects could be avoided by either option of the proposal, as required by policy 11(a) of the NZCPS.
13. Further the disturbance of indigenous species is prevented under the Wildlife Act. It is natural for the banded rail parents to evict young them from their territory after 2 months¹¹. Just because chicks may move freely before then does not make it acceptable for works to continue or for any “ushering” to occur. This would constitute disturbance and would potentially have adverse effects which are to be avoided.
14. Forest & Bird considers that Option 2 is not acceptable given the adverse effects on banded rail. Option 1 would be preferable to Option 2. However, there will still be some loss (approximately 92m²) of

⁷ Page 15, Appendix T ecological assessment Option 2

⁸ Page 15, Appendix T ecological assessment Option 2

⁹ <https://teara.govt.nz/en/wetland-birds/page-9>

¹⁰ Paragraph 14, Appendix U Ecology Peer Review

¹¹ <https://teara.govt.nz/en/wetland-birds/page-9>

habitat and the impact of this on year-round banded rail territory has not been determined in the AEE and could still have significant adverse effects that need to be avoided. It is not clear why the revetment hardfill area in Option 1 still extends north beyond the point from which the wharf extends. If that were reduced, the borrow pit habitat could be retained and adverse effects further reduced and potentially avoided in terms of habitat loss.

15. Forest & Bird seeks clear and measurable conditions for the avoidance and mitigation of adverse effects on banded rail and where appropriate enhancement of their habitat. This is particularly necessary where there is potential for adverse effects which would be inconsistent with the avoidance directives in Policy 11 of the New Zealand Coastal Policy Statement (NZCPS).
16. The marine precinct and its construction area will also result in a loss of habitat to a variety of coastal seabirds. While this may not result in a loss of significant habitat it is a loss nonetheless which has implications for available habitat in the local area. Any loss of habitat of indigenous species also has implications in terms of the maintenance of indigenous biodiversity.
17. The regional coastal plan also has directive policy requirements with respect to habitat and threatened and important species, to avoid, or avoid or remedy adverse effects – Policy 3.2.1 (a).
18. While the applicant has proposed some wetland enhancement planting and pest control, it is not entirely clear what of that is to remedy, mitigate or other wise offset or compensate for. The AEE states that adverse effects associated with the removal of this wetland [Option 2] can be appropriately managed to ensure there are no significant adverse effects on banded rail and will be offset through pest control and enhancement planting. However, offsetting is not an appropriate response in respect to adverse effects that are to be avoided under Policy 11(a) of the NZCPS. Forest & Bird considers that these offsetting measure can appropriately be applies to other adverse effects of the proposal that do not require avoidance under the NZCPS.
19. In particular conditions for enhancement planting to offset vegetation and habitat loss should follow offsetting best practice and be in place as soon as possible to ensure there is no gap between the effects occurring and the benefits being achieved and should last for as long as the adverse effects. This will likely mean in perpetuity given the intended permanence of the infrastructure. Likewise for pest control measures.

EFFECTS MANAGEMENT HIERARCHY

20. The applicant argues that the application is for “specified infrastructure” under the NES for Freshwater and as defined in the NPSFM. In our view this determination is not as clear cut as the applicant argues, and the panel should make their own determination on this.
21. In particular the recreational aspects of the proposal as they affect natural wetland are unlikely to meet the definition of “specified infrastructure” in our view. It would seem more appropriate for recreational interests to continue at the south end of the proposal where mangrove/wetland habitat is not present and banded rail where not observed. Potential at the site currently identified for bulk storage which would appear to enable a similar level of access for boats as the current situation (i.e. at high tide).
22. If, however the proposal is be determined as significant infrastructure, then adverse effects on the natural wetland must be considered by demonstrate how the effects management hierarchy of the NPSFM has been applied. This should include identifying which adverse effects are avoided, remedied, mitigated or offset. If the requirements of the hierarchy (a) to (e) cannot be met then the activity must

itself be avoided¹². However there does not appear to be any assessment of the proposal effects on wetlands under this hierarchy.

23. Given the potential adverse effects on banded rail it is not certain that these requirements can be met for the mangrove wetland to be lost under Option 2.
24. The ecological statement makes no clear conclusion that the borrow bits are not natural wetland, just that they were excluded on the basis of their use for maintaining stop banks.
25. Given the recognition of mangroves as wetlands further consideration of the effects on the borrow pits as relates to the proposal and the provisions of the NES for Freshwater is required. The application of the effects management hierarchy is only applicable where the loss of extent and values of a natural inland wetland does not have to be avoided. The proposal advises that the borrow pits are above mean high-water springs meaning that the “natural inland wetland” definition is applicable, if that are a natural wetland.
26. However, this hierarchy cannot be used to override requirements of the NZCPS. This means that where the NZCPS is directive for the avoidance, avoidance of significant, remediation or mitigation of adverse effects a lower effect management option in the NPSFM hierarchy cannot be applied. Such effects are considered with the respect to Policy 11 of the NZCPS below.

NZCPS

27. The assessment of environmental effect considers that overall adverse effects on banded rail are avoided as required by Policy 11 and that the proposal is consistent with the NZCPS. Any “overall” or “broad judgement” approach is not appropriate under the NZCPS, nor is this consistent with the approach of the Supreme Court in King Salmon and the Court of Appeal in RJ Davidson Family Trust. This is because a fair appraisal of the NZCPS’s policies when read as a whole are clear and that adverse effects on banded rail must be avoided. No recourse to Part 2 is required to clarify the NZCPS’s clear policy direction because it will not add anything to the evaluative exercise.
28. The requirement to “avoid” cannot be negated by other actions/measures. In this case there will be a loss of habitat that can be directly attributed to a pair of banded rail identified within the proposed footprint under both Option 1 and Option 2. The issue of whether the loss of habitat under the different options will have an adverse effect on the banded rail has not been adequately addressed in our view for the reasons set out above (habitat). The other issue which is not adequately addressed is whether disturbance from construction and later from operational use will have adverse effects on banded rail, particularly those identified within the footprint given territorial nature of the birds and introduction of pest and possible presence of dogs.
29. Any adverse effects on banded rail which cannot be avoided means that Policy 11 is not met and the proposal cannot be considered as consistent with the NZCPS.
30. The ecological mitigation¹³ is considered on the basis that there is no loss of biodiversity or significant habitat for terrestrial fauna. This conclusion fails to adequately consider adverse effects as required under Policy 11 of the NZCPS. This includes adverse effects on indigenous taxa. As explained in respect of banded rail habitat above, it is difficult to see how the removal/loss of habitat within the birds

¹² 3.21 Definitions relating to wetlands and rivers, NPSFM 2020

¹³ 5.1 Mitigation, Appendix T ecological assessment Option 2

territory would not have an adverse effect. Such an adverse effect is not limited to significant. In our view the banded rail management measures are not appropriate and would not ensure the avoidance of adverse effects.

31. However, we do agree that pest control may be able to ensure that adverse effects associated with the operation of the infrastructure can be avoided.

PESTS

32. While the applicant has recognised the impact of pests on avifauna as a particular concern, they have not identified adverse effects of the proposal in this regard. That is the potential increase in pests as a direct result of the proposal. Pest plants can be introduced through construction machinery while pest animals such as rats and wild cats may increase once the proposal is operational. Operational adverse effects may also include the presence of dogs, particularly under Option 2 with increased recreational use. Food scraps attract rats and cats and detritus provides them places to hide and breed.
33. Pest management as mitigation for adverse habitat effects needs to start at least at the time adverse effects start, preferably earlier and be ongoing.
34. Given the habitat values to At Risk and other species adjacent to the proposal, we consider that dogs should be banned from infrastructure/facility. This may be a significant issue if the recreational boat access is provided as Banded rail feed at dawn and dusk and are most likely to range beyond mangrove cover at these times. This is also when boats, particularly for fishing, are also most likely being launched and retrieved.
35. We support the proposed pest control which includes trapping from the beginning at the Waihou Bridge to the south of the project site and extending along the Hauraki Rail Trail to a point approximately 550m north of the project site.
36. To address direct effects of the proposal we consider that measures to ensure the site is maintained free of food scraps and other detritus are also required. That provision for monitoring of pests around the facility and targeted control, including for feral cats, is included in the conditions of consent.

LIGHTING

37. Forest & Bird is concerned about the potential adverse effects of lighting on banded rail. There does not appear to be any consideration of such effects in the ecological assessments.

OFFSITE AND ASSOCIATED EFFECTS

38. While Forest & Bird does not have any information to suggest that increased number vessels would have adverse impacts on marine mammals in the area, this is an aspect which we consider should be assessed as part of the application. The facility will increase vessel movements in the area. Increase recreational use in particular has been shown to have adverse effects on marine mammals in the bay of islands for example.
39. It is unclear whether dredging is anticipated as a result of the proposal. It would appear that this may reasonably be anticipated to ensure the operation of the wharf and potentially the boat ramps. In our view the effects associated with dredging should be considered as part of this proposal. It is uncertain whether this could result in changes to benthic species and impact of the food sources for birds.

CONSENT CONDITIONS

40. Many conditions are uncertain, relying on information or development of management plans which will only be available after grant of consent.
41. It is unclear why the Land Use Consent (s.45) NES-FW for Works within a wetland for the purposes of specified infrastructure seeks an unlimited timeframe. Given that the construction works will destroy the wetland the consent should only be required for the period of construction. If it is intended for ongoing work within any wetland this is not evident in the conditions of consent. The timeframe for this consent should be limited to the duration of construction.
42. Certification of management plans.
 - a. The general requirements regarding experience for certification is inadequate to ensure the expertise necessary for the banded rail management plan. Ecological expertise required would include certifying changes to meet plan objectives as well as expertise which may be different to that of certifying whether the plan complies with conditions.
 - b. There is no process where agreement cannot be reached on certification. A dispute resolution should be included.
43. Condition A8 – the terminology “adequately gives effect to the relevant condition(s)”, is uncertain and subjective.
44. Conditions A12-A14 for amendments to management plans is not appropriate with respect to Banded Rail. This could result in adverse effects not being addressed as intended by decision makers. Different interpretations could be taken to the objectives of the management plan and conditions alone do not ensure avoidance of adverse effects would occur. In fact current measures proposed within the management plan do not avoid adverse effects in our view. It should not be possible to deem a change to this management plan certified and not within only 5 working days. More flexibility is required given resourcing implications of covid including staff being on sick leave.
45. Condition A17 – we question the timing of implementation for wetland enhancement. Leaving this until after construction has started means that there any offset value in the way of habitat is not provided at the time which adverse effects occur and would not have any value until the enhancement is mature enough to provide benefits.
46. Condition A18 – Pest control to address adverse effects of the activity must be for the duration of effect, ie in perpetuity. Leaving the period to the management plan to determine is inappropriate as changes can be made to management plans.
47. Condition B1, table 5 should include a plan for vegetation and habitat, showing what is to be removed, retained and what is to be established at and immediately adjacent site (within the project footprint).
48. Adaptive management can be effective tool, but only where adequate baseline information is available before grant of consent. It is not appropriate where there is a directive requirement for avoidance is required, for example, under the NZCPS or NPSFM.
49. Condition A19 – we have not been able to find information on the “adaptive management plan” and whether this relates to ecological effects.

50. Condition F11 - The limitation that the management plan to only apply during construction fails to recognise that adverse effects may occur once the proposal is operative. This could be particularly so if the pair of banded rail identified stay in the area, as they may consider the site part of their territory. At the very least the management plan should require surveying for nesting each breeding season and measures for protections of nests and birds from users of the facility as appropriate.
51. Condition F16 and F17 with respect to banded rail
- a. Forest & Bird agrees that no vegetation should be removed around any nests and considers that the 30m radius set out in the draft management plan is appropriate. The 30m distance should be stated in the condition for certainty that adverse effects will be avoided. The condition requirement for an ecologist to be on site during vegetation clearance should be extended to occur even if a nest is not identified.
 - b. These conditions make no requirement for the avoidance of adverse effects respect to insitu banded rail.
52. Banded rail management plan. It is not appropriate to leave the determination of effects and management responses to the management plan. It is the decision makers responsibility to assess adverse effects and set conditions. The conditions must be clear to ensure that disturbance of birds is not provided for and that adverse effects are avoided.
- c. Forest & Bird has significant concerns with the management plan approach to discourage/disturb birds from their breeding habitat. It is our understanding that such disturbance would be in breach of the Wildlife Act and that a permit from DOC would need to be obtained. However we also understand that wildlife permits can only authorise 'capture' and 'kill' and not disturbance.
 - d. Forest & Bird is also concerned with the approach set out in the draft management plan allowing the applicant to determine if it is appropriate to usher the birds along. If the birds are breeding the only option in Forest & Bird's view is to establish appropriate measures to work around them for remainder of the breeding/nesting period. Adverse effects on them from disturbance, whether a permit can be obtained by DOC or not, would be inconsistent with Policy 11 (a) of the NZCPS.
 - e. The ecological assessment states that "that there is no disruption to any nests or in-situ banded rail (10.1.1 pg 64)" but this is not born out by the conditions of consent. While the draft management plan suggests a 30 set back from a nest, there is no condition to specifically require this distance of setback. There are no conditions or management plan requirements to ensure there is no disruption with respect to in-situ banded rail. In fact the management plan specifically considers "ushering" them out of the way. Overall, there is very little certainty or enforceability with respect to measures to avoid adverse effect on the identified banded rail or other banded rail.
53. Condition F18, neither option 1 or 2 suggest that 4000m2 of mangroves will be removed. This limit far exceeds what has been considered in the ecological assessment.
54. Condition G9 – The purpose of the wetland enhancement management plan does not seem relevant given that it will not avoid or remedy adverse effects and with the implementation set after wetland clearance has already occurred would be unlikely to mitigate. Enhancement is generally a term used with offsetting and it is offsetting which the assessment of effects refers. This purpose should be aligned with the principles of best practise offsetting

55. A decision to grant the proposal on the basis of current proposed conditions could result in adverse effects that are inconsistent with the directive provisions of the NZCPS and/or the NPSFM.

CONCLUSION

56. While Forest & Bird has a number of concerns with both options as explained throughout this submission, our preferred option if the proposal goes ahead is Option 1 – commercial only. As stated above we consider that Option 1 should be scaled down further to avoid adverse effects on banded rail habitat within the borrow pits.
57. As shown on the plans provided for option 1 the development would largely retain the coastal wetland area identified by ecologists and the inferred wetland area. Retention of these areas is critical to ensure that banded rail territory and habitat is retained.
58. Forest & Bird would support the grant of this proposal on the basis of a reduced Option 1 and improved conditions as set out below,

Thank you for receiving these comments on the proposal.

Lissy Fehnker-Heather
Regional Manager - Auckland & Coromandel
Royal Forest & Bird Protection Society