

9 June 2021

Te Tai Tokerau Water Trust
c/o Robert Kaiwai, General Manager

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Dear Robert,

Otago Water Storage Reservoir

- 1 This advice considers whether the proposed Otago Water Storage Reservoir (**Reservoir Proposal**) will trigger any prohibited activity rules under the Resource Management National Environmental Standards for Freshwater Regulations 2020 (**NES-F**).
- 2 It is understood that this advice may be included in further correspondence between the Te Tai Tokerau Water Trust (**Trust**) and the Ministry for the Environment (**MfE**) in the context of the Reservoir Proposal being advanced for referral to an expert consenting panel under the Covid-19 Fast Track Recovery (Fast-track Consenting) Act 2020 (**Covid Fast Track Act**).

Key Assumptions and Executive Summary

- 3 The Reservoir Proposal will include infrastructure (reservoir, pipes and hydrants) to supply water for firefighting and emergency water supply (untreated) for Ōhaeawai township and the surrounding area of Ōhaeawai-Waimate North (population 1,140¹), as well as infrastructure to supply water for irrigation to a wider area.
- 4 The Trust is aware of the statutory duties of lifeline utilities under the Civil Defence Emergency Act 2002 (**CDEM Act**), (reference paragraph 13 below), and on commissioning of the Reservoir Proposal will have measures in place to illustrate compliance with its CDEM duties.
- 5 This advice is on the assumption that the Reservoir Proposal will include consent conditions requiring completion and operation of the supply of water for the Ōhaeawai township.
- 6 The provision of emergency and firefighting water to Ōhaeawai as part of the Reservoir Proposal would constitute a service provided by a 'Lifeline Utility' as per Part B (item 3) of Schedule 1 CEDM Act. The infrastructure which stores, supplies and distributes the water falls within the 'specified infrastructure' definition of the National Policy Statement for Freshwater Management 2020 (**NPS-FM**). Therefore works within any wetland are provided for as a discretionary activity under clause 45 of the NES-F, and not a prohibited activity under clause 53.

Prohibited activities and the Covid Fast Track Act

- 7 Relevant provisions from the NPS-FM and NES-F are attached as **appendix 1**.

¹ 2018 Census

- 8 A project is not eligible to be referred to an expert consenting panel under the Covid Fast Track Act if the project includes any prohibited activities (as per regulations, plans, or proposed plans, under the RMA).²
- 9 Given the Reservoir Proposal will result in damming, diversion and discharge of water within a natural wetland³, clause 53 of the NES-F applies as a prohibited rule unless any of the clauses 38 – 51 apply. Clause 45 provides for the same works within a wetland as a discretionary activity if it is for the purpose of constructing of 'specified infrastructure':
- 10 Clause 45 is not restricted to activities which have a 'sole purpose' of construction of specified infrastructure. The omission of such a term means that, on plain reading of the clause, any activity which (whether in part or in full) constructs 'specified infrastructure' falls within this definition.
- 11 Specified Infrastructure is defined under the NES-F by reference to the definition in the NPS-F, which includes infrastructure that delivers a service operated by a lifeline utility.

Lifeline Utility

- 12 Lifeline Utility is defined in the Civil Defence Emergency Act 2002 (**CDEM Act**) as follows:

Lifeline utility means an entity named or described in [Part A](#) of Schedule 1, or that **carries on a business described in [Part B](#) of Schedule 1**⁴

Part B

Entities carrying on certain businesses

...

3 An entity that supplies or distributes water to the inhabitants of a city, district, or other place.

- 13 Section 60 of the CDEM Act sets out the duties for Lifeline Utilities. Every lifeline utility must:
- (a) ensure that it is able to function to the fullest possible extent, even though this may be at a reduced level, during and after an emergency:
 - (b) make available to the Director in writing, on request, its plan for functioning during and after an emergency:
 - (c) participate in the development of the national civil defence emergency management strategy and civil defence emergency management plans:
 - (d) provide, free of charge, any technical advice to any Civil Defence Emergency Management Group or the Director that may be reasonably required by that Group or the Director:
 - (e) ensure that any information that is disclosed to the lifeline utility is used by the lifeline utility, or disclosed to another person, only for the purposes of this Act.

² Section 18, Covid Fast Track Act

³ Note that the anticipated footprint of the Reservoir Proposal includes 'natural wetland' as defined in the National Policy Statement for Freshwater Management 2020 (NPS-FM), 3.2.1 (definitions). This therefore is in line with section 3 (interpretation) of the NES-F).

⁴ Section 4 CDEM

Is the Reservoir Proposal a lifeline utility?

- 14 Part of the Reservoir Proposal involves piping water to the township of Ōhaeawai and installing hydrant(s) for the purposes of firefighting and emergency water supply. We consider that such a proposal would fall within the definition of Part B (item 3) of Schedule 1 of the CDEM Act listed above, given it is clearly a supply of water to the inhabitants of a place. We do not consider that 'place' requires a population or geographical threshold to satisfy this definition, particularly when considering context and purpose Schedule 1 and the CDEM Act.
- 15 Relevant provisions from the CDEM are attached as **appendix 2**.
- 16 When looking at Part B (item 3) in its immediate context and in light of the purpose of the CDEM:
- (a) A lifeline utility is an organisation that provides an essential service and is defined in Schedule 1 of the CDEM Act. Lifeline utilities cover a broad range of services and include telecommunications, water, wastewater, ports, airports, roads, rail, electricity, gas, petroleum, and broadcast media organisations.
 - (b) The provision of water for firefighting and emergency supply both generally and in the event of a Civil Defence Emergency is provision of a service that is consistent with the purpose of the CDEM, including 'planning and preparation for emergencies and for **response and recovery** in the event of an emergency'⁵.
 - (c) The purpose of the legislation also specifically seeks to:
 - (b) encourage and enable communities to achieve acceptable levels of risk (as that term is defined in this Act), including, without limitation,—
 - (i) identifying, assessing, and managing risks; and
 - (ii) consulting and communicating about risks; and
 - (iii) identifying and implementing cost-effective risk reduction; and
 - (iv) monitoring and reviewing the process; and⁶
 - (d) This purpose is broad. The Reservoir Proposal is consistent with this purpose as it will help reduce the risk of disruption to water supply arising from any hazard causing an emergency.
 - (e) There is also no indication in the Act that the provision of such a service must be to a minimum or maximum populous or a geographical definition to fall within a Schedule 1 definition.
 - (a) When looking at Part B (item 3) Schedule 1 in light of any 'other permissible guides as to meaning' there is helpful guidance in the publication: *The Lifeline Utilities and CDEM: Director's Guide for Lifeline Utilities and Civil Defence Emergency Management Groups* document⁷, which provides that:

A resilient lifeline utility is well placed to minimise the consequences of an emergency, and to benefit from any opportunities that adversity may present in their operating environment.

⁵ Section 3 (c), CDEM.

⁶ Section 3 (b) CDEM

⁷ Published by Ministry of Civil Defence and Emergency Management, June 2014.

Resilience is a constantly evolving state based on the performance characteristics of a lifeline utility's assets, personnel, and business functions. From the perspective of CDEM organisations, lifeline utility resilience contributes strongly to community resilience.⁸

- (b) Reference to lifeline utilities acting within their 'operating environment' and to provide 'community resilience' further supports an interpretation that the intention of Schedule 1, Part B (item 3) is that any 'other place' includes provision of water to communities which would not otherwise fit within the definition of 'city' or 'district'.
- 17 We therefore consider that the Reservoir Proposal falls within the Schedule 1 Part B (item 3) definition, in that it:
- (a) Is a service by an 'entity' (i.e. the Trust)
- (b) Which will 'supply or distribute water' (there being no requirement for this to be potable or treated);
- (c) To '... any other place' (being the community of Ōhaeawai, in the absence of any legislated restrictions as to population or geography, for such a place).
- 18 The infrastructure which delivers this specified service will be the reservoir, pipes and hydrants providing and distributing water from the Reservoir Proposal to the Ōhaeawai community. This therefore falls within the 'specified infrastructure' definition and clause 45 of the NES-F.
- 19 The above interpretation gives effect to the purpose and intention of the CEDM Act in that it will ensure the community of Ōhaeawai is more resilient in the instance of a civil defence emergency, potentially requiring the provision of firefighting and emergency water supply.

Yours faithfully
Anderson Lloyd



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⁸ Page 1

Appendix 1 – Extracts from NPS-FM and NES-F

Resource Management National Environmental Standards for Freshwater Regulations 2020

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.

Clause 53 Prohibited activities

- (1) Earthworks within a natural wetland is a prohibited activity if it—
 - (a) results, or is likely to result, in the complete or partial drainage of all or part of a natural wetland; and
 - (b) does not have another status under any of [regulations 38 to 51](#).
- (2) The taking, use, damming, diversion, or discharge of water within a natural wetland is a prohibited activity if it—
 - (a) results, or is likely to result, in the complete or partial drainage of all or part of a natural wetland; and
 - (b) does not have another status under any of [regulations 38 to 51](#).

National Policy Statement for Freshwater Management 2020

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
- (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

(emphasis added)

Appendix 2. Extracts from Civil Defence Emergency Management Act 2002

Section 3 Purpose

The purpose of this Act, which repeals and replaces the Civil Defence Act 1983, is to—

- (a) improve and promote the sustainable management of hazards (as that term is defined in this Act) in a way that contributes to the social, economic, cultural, and environmental well-being and safety of the public and also to the protection of property; and
- (b) encourage and enable communities to achieve acceptable levels of risk (as that term is defined in this Act), including, without limitation,—
 - (i) identifying, assessing, and managing risks; and
 - (ii) consulting and communicating about risks; and
 - (iii) identifying and implementing cost-effective risk reduction; and
 - (iv) monitoring and reviewing the process; and
- (c) provide for planning and preparation for emergencies and for response and recovery in the event of an emergency; and
- (d) require local authorities to co-ordinate, through regional groups, planning, programmes, and activities related to civil defence emergency management across the areas of reduction, readiness, response, and recovery, and encourage co-operation and joint action within those regional groups; and
- (e) provide a basis for the integration of national and local civil defence emergency management planning and activity through the alignment of local planning with a national strategy and national plan; and
- (f) encourage the co-ordination of emergency management, planning, and activities related to civil defence emergency management across the wide range of agencies and organisations preventing or managing emergencies under this Act and the Acts listed in section 17(3)

Section 4 Definitions

hazard means something that may cause, or contribute substantially to the cause of, an emergency

risk means the likelihood and consequences of a hazard

Section 60 Duties of lifeline utilities

Every lifeline utility must—

- (a) ensure that it is able to function to the fullest possible extent, even though this may be at a reduced level, during and after an emergency:

- (b) make available to the Director in writing, on request, its plan for functioning during and after an emergency:
- (c) participate in the development of the national civil defence emergency management strategy and civil defence emergency management plans:
- (d) provide, free of charge, any technical advice to any Civil Defence Emergency Management Group or the Director that may be reasonably required by that Group or the Director:
- (e) ensure that any information that is disclosed to the lifeline utility is used by the lifeline utility, or disclosed to another person, only for the purposes of this Act.

Part B of Schedule 2. Entities carrying on certain businesses

1. An entity that produces, supplies, or distributes manufactured gas or natural gas (whether it is supplied or distributed through a network or in bottles of more than 20 kg of gas).
2. An entity that generates electricity for distribution through a network or distributes electricity through a network.
3. An entity that supplies or distributes water to the inhabitants of a city, district, or other place.
4. An entity that provides a waste water or sewerage network or that disposes of sewage or storm water.
5. An entity that provides a telecommunications network (within the meaning of the Telecommunications Act 1987).
6. An entity that provides a road network (including State highways).
7. An entity that produces, processes, or distributes to retail outlets and bulk customers any petroleum products used as an energy source or an essential lubricant or additive for motors for machinery.
8. An entity that provides a rail network or service.