BEFORE THE EXPERT CONSENTING PANEL

CONCERNING THE RANGITANE MARITIME DEVELOPMENT AT RANGITANE, NORTHLAND

IN THE MATTER	of the COVID-19 Recovery (FastTrack Consenting) Act 2020 (the **FTA**) and a jurisdictional decision of the Expert Consenting Panel appointed under Clauses 2, 3, and 4 of Schedule 5 of the COVID-19 Recovery (Fast-Track Consenting) Act 2020 to consider applications for consents to enable the construction and use of reclaimed coastal marine area for a public boat launching facility at Rangitane near Kerikeri in Northland.
Expert Consenting Panel:	Mary Hill (Chair) Juliane Chetham (Member) William (Bill) Smith (Member)
Legal Representation:	Jeremy Brabant for the Applicant
Comments received under Clause 17(2) of Schedule 6 to the FTA:	10 November 2021
Details of any hearing if held under Clause 21 of Schedule 6 of the FTA:	No hearing was held (refer Clause 20, Schedule 6 to the FTA)
Date of Hearing if held:	Nil
Date of Decision:	13 April 2022
Date of Issue:	13 April 2022

RECORD OF JURISDICTIONAL DETERMINATION OF THE EXPERT CONSENTING PANEL UNDER CLAUSE 2(4)(a)(ii) OF SCHEDULE 6, FTA

PART A – EXECUTIVE SUMMARY

1. This determination (Determination) relates to an application for resource consents by Far North Holdings Limited and Far North District Council (the Applicant) in relation to the Rangitane Maritime Development (the Project) lodged on 21 September 2021 (the Application).

2. The Applicant sought a referral from the Minister for the Environment to an expert consenting panel under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (the FTA). The Minister accepted that the purpose of the FTA would be met by the Project[1] and referred it to an expert consenting panel (the Panel) which was appointed to determine the Application on 18 October 2021.

3. Section 18 of the FTA sets out criteria for projects that may be referred. A project is not eligible to be referred to an expert consenting panel unless it meets all the criteria set out in s18. Section 18(3) provides that a project *must not include an activity* that is described as a prohibited activity in the Resource Management Act 1991 (RMA) or regulations made under the RMA including a national environmental standard.

4. Similarly, clause 2(4)(a) of Schedule 6 to the FTA provides that consent applications must not be lodged with the Environmental Protection Authority (EPA) *nor determined by a panel* if they relate to an activity that is classified as a prohibited activity in regulations made under the RMA including any national environmental standard.

5. When the Project was referred to the Panel and lodged with the EPA it was not considered to include an activity that was prohibited. However, since referral to the Panel and prior to the time in which the Panel must determine the Application, a decision of the High Court has caused the activity status of the proposed reclamation earthworks aspects of the Project to be reassessed.

6. The Panel has determined that those aspects of the Proposal are prohibited activities under the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F), which are regulations under the RMA and therefore that the Panel cannot

[1] COVID-19 Recovery (Fast-track Consenting) Referred Projects Amendment Order (No 10) 2021.

reach a final determination on the merits of the Application. This Determination is a jurisdictional one , rather than a determination on the merits of the Application pursuant to clause 37 of Schedule 6 to the FTA. Having made a jurisdictional determination that the Panel cannot go on to consider and finally determine the Application, this determination does not involve an assessment of the Application on the merits.

7. Part B of this Determination sets out the process the Panel has followed. Part C provides the Panel's reasons. Part D contains the findings.

PART B – PROCESS

8. This section sets out the process relating to the Panel's determination that the Application includes or relates to a prohibited activity. Prior to this issue arising, the Panel had been following the process prescribed under the FTA for the consideration of applications referred to a panel. This included obtaining comments on the Application from persons entitled to provide comments, undertaking a site visit, and extending the timeframe for making its final determination until 27 April 2022.

9. For completeness, it is noted that the Applicant sought and was granted a suspension to the processing timeframes to enable it to engage with and respond to matters raised by Te Rūnanga-ā-iwi Ō Ngāpuhi in its comment on the Application. The processing of the Application was suspended from 12 November 2021 to 15 February 2022.

10. When processing of the Application resumed, the Panel issued a Minute[2] noting that, at the time the Application was lodged with the EPA, the effect of an Environment Court declaration[3] meant that the NES-F did not apply to the subject site given it was within the general Coastal Marine Area (CMA) and not within a "*river or connected area*".

11. However, during the period when the Application was suspended, the Environment Court Decision was overturned by the High Court and not

[2] M-5 Minute of the Rangitane Maritime Development Expert Consenting Panel – 22 February 2022.
[3] *Bay of Islands Maritime Park Inc v Northland Regional Council* [2021] NZEnvC 006 dated 10 February 2021 (Environment Court Decision).

appealed further. The High Court found that the NES-F *does* apply to "natural wetlands" within the CMA.[4]

12. Generally speaking (as will be explained further in Part C of this Determination) the potential relevance of this issue to the Application is that the drainage or partial drainage of a wetland is a prohibited activity under the NES-F unless certain exemptions apply.

13. Following resumption of processing, and in light of the High Court decision, the Applicant provided further information to the Panel on 17 February 2022. That information[5] was an expert assessment from the Applicant's ecologist which concluded, in relation to the subject site, that "*the scattered mangroves do not constitute a wetland …*" under the NPS-FM.

14. The Panel appointed a special advisor to provide independent ecological advice on this issue (Special Ecological Advisor / Beca). The Panel's Special Ecological Advisor concluded that "*the mangroves are a feature of a 'natural wetland' ecosystem*."[6]

15. The Panel subsequently gave the Applicant an opportunity to provide a technical response to the report provided by the Panel's Special Ecological Advisor and a legal and / or planning assessment on the implications for the Proposal of a finding that the Proposal would be undertaken within a "natural wetland" under the NES-F. The Panel also appointed a further special advisor to provide a legal opinion on the issues arising (Special Legal Advisor / Ms Shaw).[7]

16. The Applicant provided a further ecological report maintaining its conclusion that the proposed site is not a natural wetland.[8] The Applicant

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[4] *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated* [2021] NZHC 3113 dated 18 November 2021 (High Court Decision).

[5] Rangitane Loop Road Boat Ramp – Coastal Wetland Considerations, 4Sight Consulting Limited (20 December 2021) (epa.govt.nz) (**4Sight Coastal Wetland Assessment**).

[6] Ecological Technical Review of Rangitane Maritime Development, Beca Limited, 4 March 2022 (**Beca Technical Review**), p 5.

[7] M-7 Minute of the Rangitane Maritime Development Expert Consenting Panel – 14 March 2022.

[8] Re: Ecology Response to Minute 7 of the Rangitane Maritime Development Expert Consenting Panel, 4Sight Consulting Ltd, dated 21 March 2022 (**4Sight Minute 7 Response**).

also provided planning evidence[9] and legal submissions.[10] Both the planning and legal assessments support the view that the Proposal is for "*regionally significant infrastructure*" (RSI) and therefore, even if the subject site forms part of a natural wetland, the exemption for RSI under the NES-F applies and therefore the Proposal does not involve a prohibited activity.

17. To properly inform its decision making, the Panel sought a supplementary report from its Special Ecological Advisor providing any further information of a site specific nature observed during the site visit that is considered relevant to the conclusion that "*the individual mangroves proposed to be removed form part of the coastal wetland mosaic at this location*."[11] That report was provided, and maintained the original conclusion.[12]

18. On 1 April 2022 the Panel received a response to the supplementary ecological report from the Applicant's ecologist.[13] That report disagreed with various conclusions in the supplementary report from the Panel's Special Ecological Advisor.

19. On 2 April 2022 the Panel received advice from its Special Legal Advisor that, if the site is part of a "natural wetland", the earthworks (including reclamation) activities would be a prohibited activity for which the Panel cannot grant consent.[14]

20. On 6 April 2022 the Panel received a response from the Applicant's legal counsel in relation to the advice from the Panel's Special Legal Advisor.[15]

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[9] Statement of Evidence of Deanne Marie Rogers on behalf of Far North Holdings Limited and Far North District Council in Response to Minute 7 of the Rangitane Maritime Development Expert Consenting Panel, dated 21 March 2022 (**Rogers' Evidence**).

[10] Legal Submissions on behalf of Far North Holdings Limited and Far North District Council in Response to Minute 7 of the Rangitane Maritime Development Expert Consenting Panel, dated 21 March 2022 (**Brabant Minute 7 Response**).

[11] M-8 Minute of the Rangitane Maritime Development Expert Consenting Panel – 25 March 2022.

[12] Supplementary Report - Constituents of a Coastal Wetland Ecosystem, Beca Limited, 30 March 2022 (**Beca Supplementary Report**).

[13] Re: Ecology Response to Minute 8 of the Rangitane Maritime Development Expert Consenting Panel, 4Sight Consulting Limited, dated 1 April 2022 (**4Sight Minute 8 Response**).

[14] Legal opinion from Sarah Shaw, Barrister, on the Rangitane Maritime Development, dated 2 April 2022.

[15] Response to Ms Shaw's Legal Advice to the Rangitane Maritime Development Expert Consenting Panel on the Rangitane Maritime Development under the Covid-19 Recovery (Fast-Track Consenting) Act 2020, from Jeremy Brabant, Barrister, dated 6 April 2022.

Although this response had not been sought by the Panel (as acknowledged in the response) the Panel resolved to receive it and that response has been considered by the Panel.

PART C- REASONS

21. There are four key issues requiring consideration by the Panel in order to determine whether the Proposal includes or relates to a prohibited activity and if so whether the Application can be determined by the Panel. They are:

    (a) Whether the subject site forms part of a "natural wetland" as defined under the NES-F;

    (b) If so, whether any activities forming part of the Proposal would (but for the application of an exemption) trigger a Prohibited Activity status under the NES-F;

    (c) If so, whether any of the exemptions to the Prohibited Activity status under the NES-F apply such that the activity would have a different status; and

    (d) What are the implications for the Application if the Proposal is found to include or relate to a Prohibited Activity.

Does the site form part of a "natural wetland"?

22. "Natural wetland" is defined in the NPS-FM as follows:

> **natural wetland** means a wetland (as defined in the Act) that is not:
>
> (a) a wetland constructed by artificial means (unless it was constructed to offset impacts on, or restore, an existing or former natural wetland); or
>
> (b) a geothermal wetland; or
>
> (c) any area of improved pasture that, at the commencement date, is dominated by (that is more than 50% of) exotic pasture species and is subject to temporary rain-derived water pooling

23. We agree with Mr Brabant that "the Act" refers to the RMA and that none of the exemptions in (a)-(c) apply. Accordingly, the interpretation exercise must default to the definition of "wetland" provided for in the RMA.

24. Section 2 of the RMA defines "Wetland" as follows:

> **wetland** includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions.

25. We agree with Mr Brabant that the RMA definition is broad, non-exclusive, and relies on (in addition to hydrological features) the presence of a natural ecosystem of plants and animals that are adapted to wet conditions.

26. We also agree that there is High Court authority that the NES-F applies to the coastal marine area[16] and that whether a particular site constitutes a "natural wetland" by reference to the NES-F requires an evidential assessment.

27. We have reviewed all of the expert ecological evidence provided to the Panel, referred to in Part B of this Determination. Following careful consideration, we have concluded, based on that evidence, that the site does form part of a natural wetland as defined under the NES-F. In summary, our key observations and findings on this issue are:

    27.1 Both ecologists acknowledge the definition of "natural wetland" is very broad. Both confirm there are plants (mangroves) and animals present.[17] Therefore, at face value, the site would meet the definition (being an intermittently wet area that supports a natural ecosystem of plants and animals adapted to wet conditions).

    27.2 Both agree that the wetland delineation protocol (**Protocol**)[18] is not particularly useful for identifying coastal wetlands.[19]

    27.3 Despite that reservation, the 4Sight analysis focuses on the vegetation coverage aspects of the Protocol and argues that the scarcity of mangroves present on the site suggests "opportunistic" establishment therefore the site is not a natural wetland.[20]

    27.4 Given the reservation about the usefulness of the Protocol as a tool for identifying coastal wetlands, Beca looks to alternative

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[16] *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated* [2021] NZHC 3113 dated 18 November 2021.
[17] Beca Supplementary Report, p 2 and 4Sight Coastal Wetland Assessment, p 2.
[18] *Wetland Delineation Protocols* (Ministry for the Environment, ME 1515, August 2020).
[19] Beca Supplementary Report, p 2 and 4Sight Coastal Wetland Assessment, p 2.
[20] 4Sight Coastal Wetland Assessment p3.

literature and refers to definitions which are specific to coastal wetlands, which include mudflats (i.e. an area not dominated by vegetation) and "*mangroves interspersed with mudflats*"[21] such as the subject site.

27.5 In response to 4Sight's focus on the site alone, rather than the broader context, and its conclusion that the mangroves which have established on the site are "opportunistic," Beca explains the need to look at the wider ecological context and "ecosystem trajectory" (i.e. what has formed it). Beca observes that 4Sight's opportunistic conclusion does not align well with 4Sight's earlier report (provided with the AEE), which noted the low energy depositional environment at the site and the expanding saltmarsh and mangrove scrub within the broader inlet. Beca observes that mangroves are unlikely to be abundant at the site because it is less sheltered but observes evidence of seedlings establishing at the site.[22]

27.6 Beca's contextual assessment concludes that the site is part of a coastal wetland mosaic which the mangroves are a feature of.[23]

27.7 In our view a holistic and contextual approach to the ecological assessment of the site is the correct approach, and is consistent with our understanding of ecosystems and with the definition of "natural wetland".

27.8 We observe that the 4Sight response to the Beca assessments does not suggest the Beca approach is unsound but rather that it is "too conservative". 4Sight is critical of two aspects, neither of which we consider are determinative of Beca's ultimate conclusion, specifically Beca's reference to:

(a) The wider Kerikeri Inlet as relevant context; and

(b) The "future state" of the environment.

27.9 Beca's supplementary report addresses the context issue, clarifying that Beca is not saying that the Inlet is the appropriate

[21] Beca Technical Review p 3.
[22] Beca Technical Review p 5.
[23] Beca Technical Review p 5.

scale at which to assess whether the site is a wetland. Rather it is relevant context together with the "*associated mosaic of wetland habitats*" within the wider inlet.

27.10 In relation to Beca's commentary on the "future state" of the environment, we consider that the 4Sight report misinterprets Beca on this issue. In our assessment Beca is not relying on what the site might become in the future in support of the conclusion that the site forms part of a natural wetland. Rather, Beca was explaining that a good understanding of coastal processes is useful in assessing whether there might be a more representative state in the future.

27.11 Ultimately Beca's conclusion that the site forms part of a natural wetland is based on two key observations:

(a) The site exhibits mudflat habitat with mangroves present, being a habitat type forming part of a coastal wetland as defined by the literature; and

(b) The site forms part of a "matrix" or "mosaic" of associated coastal wetland habitat.

27.12 4Sight did not provide a substantive response to these findings which would cause us to consider them unreliable. Rather, it opines that the Beca assessment is overly "conservative" and observes that a distance of 42 metres exists between the site and the "*nearest vegetation meeting the dominance test*". Given both ecologists agree that the Protocol is not useful for coastal wetland identification, we do not consider this observation useful.

27.13 Beca has not suggested that the separate parts of the mosaic need to be directly contiguous (otherwise they would presumably be a single wetland rather than a mosaic). We agree.

27.14 Overall, we agree with the assessment of the Panel's Special Ecological Advisor that the site forms part of a natural wetland as defined under the NPS-FM.

27.15 For completeness we record that we have not relied upon Auckland Council's "*Practice and Guidance note: Managing*

Natural Wetlands under the National Environmental Standards for Freshwater Regulations 2020" referred to us by Ms Shaw.

Does the Proposal include any Prohibited Activities?

28. It is accepted by the Applicant that, to enable construction, the Applicant must reclaim a section of the coastal marine area. Relevant to this interpretive exercise, the Proposal requires:

    (a) The removal of 7 mangroves; and

    (b) Reclamation of approximately 7,400m^2 of coastal marine area.[24]

29. Mr Brabant acknowledges that the proposed reclamation, if undertaken in a "natural wetland", would trigger a prohibited activity status by reference to regulation 53 of the NES-F.[25]

> **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.

30. We agree with that conclusion, and the reasoning provided by Mr Brabant and generally endorsed by the Panel's Special Legal Advisor Ms Shaw.

31. It is therefore necessary to consider whether, pursuant to Regulation 53(1)(b), the earthworks have another activity status under any of regulations 38-51.

32. We agree with Mr Brabant that the only potentially relevant exemptions are found in:

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[24] Brabant Minute 7 Response at [29].
[25] Brabant Minute 7 Response at [10].

(a) Regulation 42 – Construction of wetland utility structures; and / or

(b) Regulation 45 – Construction of specified infrastructure.

33. We start with Regulation 45(2), which requires an assessment of whether the earthworks to create the reclamation (which we have prima facie found to be a Prohibited Activity) are for the purpose of constructing "*specified infrastructure*".[26]

> **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.

34. "*Specified Infrastructure*" is (relevantly) defined to mean "*regionally significant infrastructure* ***identified as such*** *in a regional policy statement or regional plan*".[27] [our emphasis]

35. This requires an assessment as to what Regionally Significant Infrastructure (RSI) is identified as being RSI within the Regional Policy Statement for Northland (RPS) or the Proposed Northland Regional Plan (PNRP). Given the PNRP repeats the RPS definition of RSI we focus on the RPS.

36. "*Regionally significant infrastructure*" is defined in the RPS glossary by cross-referencing Appendix 3 of the RPS for "*a list of identified regionally significant infrastructur*e."

37. On its face therefore the matters listed in Appendix 3 are the "identified list" of RSI and are therefore the "*Specified Infrastructure*" for the purpose of Regulation 45(2).

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[26] For completeness we have also referenced regulation 45(1) relating to vegetation clearance, although we do not need to assess this further given vegetation clearance does not amount to a prohibited activity (it is not provided for in regulation 53).

[27] By reference to the National Policy Statement for Freshwater Management (NPS-FM) at clause 3.21(1)(b).

38. The Rangitane Maritime Development (the subject Proposal) is not listed in Appendix 3. Mr Brabant also accepts that the listed activities "*do not provide for any significant recreational marine facility*."[28] Therefore, on a plain interpretation, the Proposal does not amount to Specified Infrastructure and the exemption from Prohibited Activity status in regulation 45(2) (by virtue of regulation 53(2)(b)) is not engaged.

39. However, we acknowledge Mr Brabant's argument (accepted by Ms Shaw) that the list in Appendix 3 is non-exhaustive due to the use of the word "includes". We must therefore consider whether the non-exhaustive approach allows for inclusion of other infrastructure (existing or proposed) which are neither specifically identified by name in the Appendix 3 list, nor included within any class of infrastructure listed in Appendix 3.

40. Mr Brabant submits that, if a non-listed proposal is assessed on the evidence to be of regional significance, when viewed in the context of the relevant regional policies, then there is an opportunity for it to be included in the definition of RSI under the RPS and PNRP. He relies on the planning evidence of Ms Rogers on behalf of the Applicant to conclude that the Proposal has "*significant regional benefits to Northland*" and should therefore be included in the non-exclusive list of RSI "identified" in the RPS.[29]

41. We have two significant reservations about this submission:

    (a) Ms Rogers relies on "*a network of … boat launching facilities around the Bay of Islands*." While in her view the proposed facility at Rangitane would make a "*significant contribution*" to the existing boat ramp network, she accepts that only when viewed "collectively" with the existing network would the proposal meet the regional significance test; [30]

    (b) Despite there being an "identified" (listed) category for "*significant social and community facilities*" in Appendix 3 of the RPS, with a list of particular facilities or facility types

[28] Brabant Minute 7 Response at [110 c] and [110e].
[29] Brabant Minute 7 Response at [111 h].
[30] Rogers' Evidence at [70] to [75].

falling within that category, there is no reference to the network of boat launching facilities within that category.

42. Ultimately, we agree with Ms Shaw that, in order to be "identified" in the RPS or PNRP for the purposes of being "*specified infrastructure*", and particularly given the RPS definition itself refers to a list of "identified" activities, then the relevant class of infrastructure (in this case the network of boat launching facilities) must be expressly included within the listed categories.

43. Putting to one side whether the evidence establishes that the Proposal has significance to the Region, in our view as a matter of interpretation it cannot be correct that any proposal involving infrastructure occurring in any part of the Region, despite not being either expressly referred to by name or by class in the RPS or PNRP, would (by definition) be "identified" in the RPS / PRCEP as being RSI.

44. Although not binding on us, we agree with Ms Shaw that the decision relating to the Kopū Marine Precinct[31] is distinguishable because in that case neither the RPS definition, nor any supporting policies, refer to a list of "identified" infrastructure nor require recognition of activities "identified" in such a list.[32]

45. Given our finding that Regulation 45 is not engaged and therefore the activity status of the proposed reclamation is Prohibited (because Regulation 53(2)(b) doesn't apply), and given Mr Brabant's acknowledgement that the Proposal is being progressed as a package,[33] it is not necessary to consider whether we agree with Mr Brabant that Regulation 42 (relating to "*wetland facility structures*") is partially engaged in relation to the Proposal.

Implications

46. We agree with Mr Brabant's assessment that "*the implication of regulation 53 is that as a matter of law the Applicant would be prevented from*

[31] Record of Decision of the Expert Consenting Panel on the Kopū Marine Precinct dated 9 March 2022.
[32] In this case Policy 5.3.1 provides that "*The regional and district councils shall recognise the activities identified in Appendix 3 of this document as being regionally significant infrastructure."*
[33] Brabant Minute 7 Response at [92].

lodging, and the Panel prevented from determining, an application for resource consent under the NES-F to undertake the required reclamation works."[34]

47. Like Ms Shaw, we acknowledge the severity of this finding for the Proposal and acknowledge the significant efforts of the Applicant and its advisors in pursuing the Application to this point. However, we must apply the law as we find it.

48. Given we have found that the proposed reclamation would involve earthworks resulting in drainage of a natural wetland, and given we have not found that the proposal is "specified infrastructure" under the NES-F (being regulations under the RMA), we find that the Panel is precluded pursuant to clause 2(4) of Schedule 6 of the FTA from reaching a final determination on the merits of the Application pursuant to clause 37 of Schedule 6.

49. We observe that clause 2(4) provides that consent applications must not be lodged with the EPA nor determined by a panel if they relate to an activity that:

> (a) is classified as a prohibited activity … in regulations made under the Resource Management Act 1991 (including any national environmental standard); **and** [our emphasis]
>
> (b) is to occur within a customary marine title area, unless agreed in writing with the appropriate customary marine title group.

50. We have concluded that the reference to "and" is a drafting error, and should be interpreted as "or". If the provisions in (a) and (b) were intended to be read conjunctively, a panel could still determine an application which contained a prohibited activity where it didn't also occur within a CMT area, as in this case.

51. Such an interpretation would be contrary to s18(3)(a) of the FTA, which provides that a project is ineligible to be referred to an expert consenting

[34] Brabant Minute 7 Response at [10(a)(ii)].

panel if it includes "*an activity that is described as a prohibited activity in the Resource Management Act 1991, regulations made under that Act (including a national environmental standard), or a plan or proposed plan*".

52. It would also be inconsistent with the scheme of the FTA, and particularly s12, which contemplates that, while the process for determining consent applications will be that prescribed under the FTA, any consent which is granted is effectively a "deemed consent" under the RMA. Given the RMA precludes the grant of consent for a prohibited activity (s87A(6)), we consider this supports our conclusion (which Mr Brabant accepts) that we cannot determine the Proposal if it contains a prohibited activity. This is also recognised in clause 31(7) of Schedule 6 to the FTA, which only provides for a panel to grant consent on the basis that the activity concerned is a controlled, restricted discretionary, discretionary, or non complying activity, regardless of what type of activity the application was expressed to be for, but does not provide for the granting of a prohibited activity.

53. Even if we are wrong in this conclusion, we observe that, had we proceeded to determine the Application on its merits pursuant to clause 37 of Schedule 6, we could not grant consent to the prohibited reclamation activity.

PART D – DETERMINATION

54. We find that the proposed reclamation would involve earthworks resulting in drainage of a "natural wetland" as defined under the NES-F;

55. We find that the proposed earthworks are not for the purpose of constructing "*specified infrastructure*" pursuant to regulation 45 of the NES-F;

56. We therefore find that the proposed earthworks are a Prohibited Activity under Regulation 53(1)(a) of the NES-F;

57. Accordingly, we find that the Panel is precluded, pursuant to clause 2(4) of Schedule 6 to the FTA, from reaching a final determination on the merits of the Application;

58. This is a jurisdictional determination and is not a determination on the merits of the Application pursuant to clause 37 of Schedule 6 to the FTA.

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Mary Hill (Chair)

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Juliane Chetham (Member)

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William (Bill) Smith (Member)