

6 April 2022

Rangitane Maritime Development Expert Consenting Panel

C/- Environmental Protection Authority

Attention: Alex Erceg
by email

Dear Alex

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

1. I act for Far North Holdings Limited and Far North District Council (**Applicant**) in relation to its application for resource consent for the Rangitane Maritime Development (**Application**) under the Covid-19 Recovery (Fast-Track Consenting) Act 2020 (**FTA**).
2. I refer to the Rangitane Maritime Development Expert Consenting Panel's (**Panel**) Minute 7 dated 14 March 2022 appointing Ms Shaw as a Special Advisor to provide independent legal advice to the Panel relating to the interpretation of a "natural wetland". The scope of Ms Shaw's brief is set out in the Panel's Minute 8 dated 25 March 2022.¹
3. The Applicant received a copy of Ms Shaw's advice on 4 April 2022. While it is acknowledged that the Panel has not directed the Applicant to provide a response to Ms Shaw's advice, the Applicant respectfully offers some brief observations to matters arising from Ms Shaw's advice, namely:

¹ At paragraphs 10 – 12.

- (a) Auckland Council’s Practice and Guidance Note for managing natural wetland under the National Environmental Standards for Freshwater Regulations 2020 (**Wetlands Guidance Document**)²;
 - (b) The definition of “regionally significant infrastructure”; and
 - (c) Northland Regional Council Planning Maps.
4. Accordingly, the following brief observations are made to assist the Panel in undertaking its interpretative exercise.

Wetlands Guidance Document

5. Ms Shaw has advised the Panel of the Auckland Council’s recent ‘Wetlands Guidance Document’.³ While it is understood that Ms Shaw does not rely on the Wetlands Guidance Document to support her position, I note that the Wetlands Guidance Document:
- (a) Contains a disclaimer that users be advised that the information within it does not alter the “Resource Management Act 1991 or other laws of New Zealand and other official guidelines and requirements.”⁴
 - (b) Is an internal, non-binding, non-statutory document intended for internal council use.
 - (c) Is not incorporated into the NPS-F by reference under cl 1.8 of the NPS-F.
 - (d) Is not directly applicable in a Northland Regional context.
6. Accordingly, the document is not an official guidance document representing the Ministry’s (or central government’s) position in relation to wetland identification or the identification and interpretation of coastal wetlands.
7. The Auckland Council Wetlands Guidance Document takes the position that until the status of natural coastal wetlands is resolved,⁵ all applications for resource consent should apply the provisions of the NES-F on the following basis: “In the interim any vegetation, salt marsh,

² Dated March 2022.

³ Paragraph 23 of Ms Shaw’s advice.

⁴ Disclaimer at page 1.

⁵ By reference to regulatory amendments.

mudflats or estuarine environment within the CMA should be treated as a natural wetland for the purpose of applying the NES-F.”⁶ That position is clearly incorrect in law.

8. The NPS-F and NES-F anticipate that there is a need for a factual and evidential assessment in each case by reference to relevant definitions and provisions.
9. For completeness I note that nothing in the Wetlands Guidance Documents alters or detracts from Applicant’s position that the subject site is not a “natural wetland”.

Regulation 45 – Construction of “Specified Infrastructure”

10. I note there is broad agreement between the Applicant and Ms Shaw in relation to the relevant provisions related to the interpretation of “regionally significant infrastructure”.⁷ The key area of disagreement relates to the effect of the words “identified as such” within the definition of “specified infrastructure”.
11. Ms Shaw’s interpretation takes a narrow approach whereby all infrastructure considered by Northland Regional Council to be of regional significance must be “identified as such” in the relevant planning instrument. The corollary of this approach is that if infrastructure is not expressly recorded⁸ in a plan at the time a plan becomes operative, it cannot be considered regionally significant.
12. In my opinion, an interpretation that constrains the express, non-exhaustive nature of the term “includes” runs contrary to the RPS / PNRP definitions as:
 - (a) At paragraph 66 Ms Shaw notes that “whether or not the regional council *could* give effect to the RPS by including additional identified RSI in the PNRP, it has not done so.” [original emphasis]. However, the PNRP’s use of the word “includes” (which must be assumed to be deliberate) indicates that the following list of “identified” infrastructure is non-exclusive. If Northland Regional Council had intended in its most recent plan change process to limit regionally significant infrastructure expressly to that infrastructure listed, it would have simply removed the word “includes” from Appendix 1. It did not.

⁶ Section 2.5, page 8.

⁷ Defined as “specified infrastructure” for the purposes of the NPS-FM.

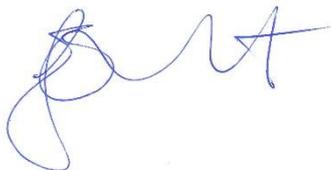
⁸ By description, address, or by map.

- (b) The Northland Regional Plan definition (and RPS) continue to use the term “includes”. The Applicant and Ms Shaw agree that “includes” is non-exhaustive.
 - (c) Such an interpretation would not provide for the inclusion of any subsequent or future regionally significant infrastructure in the absence of a plan change. By way of example the new Northland Regional Plan definition of “regionally significant infrastructure” in Appendix 1 has been rolled over from the older Coastal Policy Statement’s Appendix 3 dating to May 2016. On Ms Shaw’s interpretation no infrastructure constructed in the last 6 years could be regionally significant.
13. To round out the above, the Applicant maintains its position that a constrained interpretation of “includes” runs contrary to the non-exhaustive purpose of that term.

Northland Regional Plan Maps

14. Beca’s supplementary report at Figure 1 includes a (zoomed out) snapshot of the Northland Regional Council’s “Biodiversity Wetlands” geospatial layer. According to the geospatial layer’s legend, the area identified as green on the planning map denotes a “mangrove riparian complex”. I make two brief observations:
- (a) Notwithstanding the name of the geospatial layer, the overlay does not purport to identify “wetlands” as defined by the NES-F.
 - (b) Zooming in online⁹ illustrates that the overlay reflects the factual real-world position identified by 4Sight in their response dated 21 March 2022 – namely that there is a clear separation (distance of approximately 42m) between individual mangroves on the site and distinct large Aroha Island mangrove complex.

Yours faithfully



Jeremy Brabant

⁹ NRC Local Map Tool, accessible through the NRC website.