



**SALLY GEPP**  
BARRISTER

Expert Consenting Panel  
For: Graeme Mathias (chair)

By email to June Cahill

20 May 2022

Dear Sir

**TE RĀHUI HERENGA WAKA WHAKATĀNE LIMITED – WHAKATĀNE  
COMMERCIAL BOAT HARBOUR**

1. Te Rāhui Herenga Waka Whakatāne Ltd has sought authorisations for a commercial boat harbour and associated facilities (“**Boat Harbour**”) using the fast-track consenting process provided for in the COVID-19 Recovery (Fast-track Consenting) Act 2020.
2. The Panel released draft consent conditions for comment on 9 May 2022. The Applicant has provided its response to the Panel’s draft conditions in the form of a track changes version of the conditions with track changes explained in comment boxes. The purpose of this letter is to set out the Applicant’s position on aspects of the conditions that raise legal questions, such that additional explanation for changes proposed is appropriate. This letter addresses conditions relating to:
  - a. Definition of Boat Harbour/Boat Harbours
  - b. 1.1.1 Lapse
  - c. 1.2.10 Wetland Restoration Plan.

**Definition of Boat Harbour/Boat Harbours**

3. The Panel has proposed to define the Boat Harbour and Boat Harbours as the commercial Boat Harbour and recreation Boat Harbour as described in paras 2.3 and 2.4 of the Assessment of Environmental Effects.
4. The Applicant does not support the description of the project as having two Boat Harbours. Schedule 20 of the Covid-19 Recovery (Fast-Track Consenting) Referred Projects Order 2020 provides for one “Boat Harbour” and associated facilities. The Covid-19 Act authorises the Applicant to apply for resource consent for the “referred project”, being the project that was referred by the referral order.<sup>1</sup> Reference to two Boat Harbours may create a risk that the

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<sup>1</sup> Schedule 6, Clause 2 and s 7 Covid-19 Act.

resource consent is perceived as authorising a project that is beyond the scope of the referral order.

5. From a practical perspective, should resource consents be granted, there will be one Boat Harbour.
6. Accordingly, the Applicant proposes that the conditions refer to a singular Boat Harbour, which is defined by reference to the Referred Projects Order:

The commercial boat harbour, associated facilities, and a channel to the Whakatāne River including:

- a. a marina; and
- b. berthing infrastructure; and
- c. an access channel for vessels; and
- d. an upgraded boat ramp for commercial and recreational boats; and
- e. a training centre; and
- f. a commercial maintenance facility; and
- g. a parking area; and
- h. open space and walking areas.

### **1.1.1 Lapse**

7. The Panel has proposed a version of condition 1.1.1 that provides separate lapse periods for resource consents for Stages 1 and 2 (2 years) and Stage 3 (10 years).
8. The Applicant seeks that this condition is worded as proposed in its previous draft conditions:

These resource consents will commence in accordance with Clause 37(9) of Schedule 6 to the COVID-19 Recovery (Fast-track Consenting) Act 2020. These resource consents will lapse if they are not given effect to within two (2) years from the date of commencement in accordance with Clause 37(8)(a) of Schedule 6 to the COVID-19 Recovery (Fast-track Consenting) Act 2020. In this condition, “given effect to” means the commencement of the Stage 1 remediation and enabling works.

9. The Applicant considers that the Panel’s intent is achieved by conditions 3.3 and 3.4 which address the overall term within which Stage 3 could permissibly be constructed (10 years).
10. The inclusion of a 10 year lapse period for Stage 3 is not appropriate because:
  - a. The Panel’s last sentence is inconsistent with the timeframes set out in Clause 37(8), Schedule 6 of the COVID-19 Recovery (Fast-track Consenting) 2020. Reverting back to the previous wording aligns with the 2-year lapse period of the suite of consents provided for in Clause 37(8).
  - b. There are no separate resource consents for Stage 1 and Stage 2 vs Stage 3.

### **Condition 1.2.10 – Wetland Restoration plan**

11. The Applicant’s application for resource consent was accompanied by a Wetland Restoration Plan. The Applicant provided a revised Wetland Restoration Plan in response to comments from interested parties on 19 April 2022, and has provided a final version of that Plan with this

response. The Applicant's proposed conditions refer to the Wetland Restoration Plan, and require compliance with it.

12. Regulation 39 of the Resource Management (National Environmental Standard for Freshwater) Regulations 2020 controls taking, use, damming, diversion, or discharge of water, and earthworks or land disturbance within, or within a 10 m setback from a natural wetland for the purpose of wetland restoration. Where the requirements of the regulation are met, earthworks and land disturbance are a restricted discretionary activity. Regulation 39 specifies the following requirements and conditions:

***Requirement when applying for resource consent***

(5) An application for a resource consent for the restricted discretionary activity must include a restoration plan that includes the information set out in Schedule 2.

***Condition required in resource consent***

(6) A resource consent granted for the restricted discretionary activity must impose a condition that requires compliance with the restoration plan.

13. The Applicant interprets those regulations as requiring that a restoration plan (prepared in accordance with Schedule 2 of the Regulations) is provided with the application for resource consent, and that at the point that any resource consent is granted under Regulation 39 there must be a final restoration plan that must be complied with (rather than providing for a process where a draft restoration plan is provided for subsequent certification by Council). That interpretation is supported by the requirement of Regulation 39(6), that where resource consent is granted, the consent conditions must require compliance with "the restoration plan"; that is, the plan that has been submitted.
14. Accordingly, although it is more common for management plans to be provided in draft and for consent conditions to require certification of draft plans by the consent authority (and that approach has been followed for other management plans forming part of this application), such an approach is not appropriate for the Wetland Restoration Plan.
15. The Panel's draft conditions treat the Wetland Restoration Plan as a draft plan, and provide for it to be reviewed by interested parties and amendments made prior to its certification by Council. That approach does not appear to be consistent with Regulations 39(5) and (6).
16. On that basis, the Applicant submits that its version of the Wetland Restoration Plan conditions, as set out below, should be preferred:

1.2.10 Restoration Plan

1.2.10.1 Vegetation clearance, earthworks, land disturbance and restoration activities (including ongoing maintenance and pest control) undertaken in the wetland restoration area subject to the Regional Council IBDA-A44 mapping must be carried out and completed in accordance with the Restoration Plan dated May 2022 pursuant to Clause 39(5) of the NES FW or any certified updated versions of that plan under condition 1.2.10.3.

1.2.10.2 The consent holder must provide the opportunity for the following parties to be involved in the planning and implementation of restoration works provided for in the Restoration Plan:

- a. Te Rāhui Lands Trust;
- b. Te Rūnanga o Ngāti Awa;
- c. Department of Conservation;
- d. Whakatāne Harbour Care Group; and
- e. Eastern Bay of Plenty Branch of the Royal Forest and Bird Society.

1.2.10.3 Any amendment to the Restoration Plan required under Condition 1.1.1.1 of this Schedule of Common Conditions must be prepared in consultation with the Department of Conservation, the Whakatāne Harbour Care Group and the Eastern Bay of Plenty Branch of the Royal Forest and Bird Society and must be submitted to the Regional Council for certification that it complies with Schedule 2 of the NES FW.

### **Balance of conditions**

17. I consider that the balance of conditions, with the amendments proposed by the Applicant, are lawful and appropriate.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Sally Gepp'.

Sally Gepp  
Barrister