

Decision Report
Kopeopeo Canal Remediation Project

Bay of Plenty Regional Council
Resource Consent Application to Bay of Plenty Regional Council

5 September 2016

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1 Introduction

[001] Bay of Plenty Regional Council (the applicant) has applied to the Bay of Plenty Regional Council (BOPRC) and the Whakatane District Council (WDC) to change the conditions of existing consents for the Kopeopeo Canal Remediation Project (existing consents RC 67173 and WDC LL-2012-808).

2 Appointment

[002] The BOPRC and WDC, acting under section 34A of the Resource Management Act 1991 (RMA), have each appointed independent hearing commissioner Rob van Voorthuysen¹ to hear and decide the application to change conditions of consent.

3 Description of the Proposal and Consents Required

3.1 Description

[003] The application to change conditions of consent relates to a proposed new method for removing dioxin contaminated sediment from the Kopeopeo Canal, transporting that sediment to three containment sites, dewatering the sediment and discharging stormwater and filtrate from the containment sites back into the canal. The new method utilises a suction dredge to remove the sediment from the canal and pipe it as slurry to three containment sites (instead of using trucks as originally proposed). To enable the dredge to function effectively the water level in the canal may be maintained at the normal high tide level. At the containment sites the slurry will be dosed with a flocculent (and possibly a coagulant) and lime and thereafter pumped into geotextile tubes for dewatering. Water and filtrate draining from the sealed containment sites will be collected and discharged back into the canal (or re-applied to the containment sites). The sediment remaining in the geotextile tubes will be bio-remediated through the addition of fungal and bacteria cultures and the planting of trees (phytoremediation).

[004] The new methodology has been trialled on a small scale within the canal. Water quality monitoring showed that turbidity levels decrease relatively quickly following dredging, usually within a matter of hours. The community and other interested parties and experts were invited to attend and observe the trial and its results have been published.

[005] Under the existing consents, dioxin contaminated sediment was to be removed from the dewatered canal using excavators and loaded onto trucks for transport to the containment sites. The truck movements were identified as a significant potential source of dust emissions to air, and there were also concerns about the potential for releases of dioxins as a result of spillages of contaminated material and dust generated at the containment sites, especially during sediment handling and mixing.

[006] Under section 42A of the RMA a comprehensive recommendation report has helpfully been prepared by an independent consultant to the BOPRC and WDC (Paula Golsby).²

¹ Commissioner van Voorthuysen is an experienced independent commissioner, having sat on over 245 hearings throughout New Zealand since 1998. He has qualifications in natural resources engineering and public policy and was a full member of the New Zealand Planning Institute (NZPI) from 1998 to 2016.

² Kopeopeo Canal Remediation Project - Variation Applications to Bay of Plenty Regional Council & Whakatane District Council, Planner's Report, Paula Golsby, 31 August 2016 [section 42A report].

[007] I do not summarise the application or the background to it in any more detail than is provided in paragraphs [003] to [005] above as Ms Golsby's section 42A report does that adequately and so there is no need for me to repeat that information here.³

[008] I record that in the weeks prior to receiving Ms Golsby's section 42A report I independently read a large volume of material associated with the application to change conditions of consent. That included the application document and its appendices⁴, the BOPRC's section 92 request for further information, the applicant's section 92 response and its appendices⁵, and a range of technical review reports commissioned by Ms Golsby. The documents that I read were listed in Annexure 2 to my section 95 Notification/Non-Notification Decision report.⁶

3.2 Consents required

[009] The application is made under section 127(1) of the RMA. Under section 127(3)(a) the application is to be treated as if it were an application for a resource consent for a discretionary activity and sections 88 to 121 of the RMA, with all necessary modifications, apply to it.

4 Notification and Written Approvals

[010] Acting under delegated authority from the BOPRC and the WDC I previously made a decision that the application to vary the consent conditions for the Kopeopeo Canal Remediation Project did not need to be the subject of public notification under section 95A of the RMA; it did not need to be the subject of limited notification to affected persons under section 95B of the RMA; and it should accordingly be processed on a non-notified basis.

[011] No written approvals were provided as part of the application documentation.⁷

5 Process Issues

5.1 Consultation

[012] Under section 36A of the RMA there was no obligation on the Applicant to undertake consultation. Nevertheless, the application document helpfully summarised the consultation that had been undertaken.⁸

5.2 Officer's recommendation

[013] Ms Golsby recommended that the application be granted and as part of her section 42A report she included a suite of recommended changes to the existing conditions of consents RC67173 and WDC LL-2012-808.⁹

5.3 Timeframes

[014] Ms Golsby advised that due to the complex nature of the application and the technical matters that needed to be reviewed and assessed, the Applicant agreed to extend the application processing timeframes in accordance with section 37 of the RMA. The WDC's timeframes were extended under staff delegation. However, any decision to extend the BOPRC's timeframes is delegated to me.

³ Ibid, Section 1, page 1 (including by way of cross-reference to other documents).

⁴ Kopeopeo Canal Remediation Project: Application to Change Resource Consent Conditions. Document prepared by Harrison Grierson Consultants on behalf of the Bay of Plenty Regional Council, Whakatane, April 2016 [Application document].

⁵ 'Kopeopeo Canal Remediation Project – Application to Vary the Conditions of Resource Consents RC67173 and LL-2012-8085 – Bay of Plenty Regional Council' dated 28 June 2016

⁶ Notification/Non-Notification Decision (Sections 95A to 95F Resource Management Act 1991), 22 August 2016.

⁷ Application document, Appendices 1-1 and 1-2.

⁸ Ibid, Section 8, page 53.

⁹ Ibid, Attachment 1 (BOPRC conditions) and Attachment 2 (WDC conditions).

[015] Ms Golsby assessed the relevant section 37A matters in her section 42A report. She recommended that the BOPRC consent processing timeframes be extended under sections 37(1)(a) and 37A(5) of the RMA for a period exceeding twice those specified in section 115(3).¹⁰ I agree with and adopt her assessment, noting in particular that the applicant has agreed to the timeframe extension.

[016] By way of authority delegated to me by the BOPRC under section 34A of the RMA I hereby extend the BOPRC consent processing timeframes under sections 37(1)(a) and 37A(5) of the RMA for a period exceeding twice those specified in section 115(3).

5.4 Hearing and site visit

[017] As the application was not notified there was no hearing. The application document, its supporting appendices and Ms Golsby's section 42A report were clear on their face and I had no questions in relation to them.

[018] I did not undertake a site visit as I am familiar with the Kopeopeo Canal and its surrounding environment as a result of numerous other commissions I have undertaken for both the BOPRC and the WDC.

5.5 Section 113 of the RMA

[019] Section 113(3) of the RMA provides that:

- (3) A decision prepared under subsection (1) may,—
 - (a) instead of repeating material, cross-refer to all or a part of—
 - (i) the assessment of environmental effects provided by the applicant concerned;
 - (ii) any report prepared under section 41C, 42A, or 92; or
 - (b) adopt all or a part of the assessment or report, and cross-refer to the material accordingly.

[020] In this case the application is non-notified. As alluded to above, I previously authored a Notification/Non-Notification Decision report¹¹ in which I addressed the potential adverse effects of the application. That decision report was in turn based on a very comprehensive section 95 recommendation report authored by Ms Golsby. As already mentioned, Ms Golsby has now also authored a section 42A report in which she cross-refers to her section 95 recommendation report.

[021] The consequence of all of that is that in the spirit of section 113(3) of the RMA and in order to avoid repetition I intend to cross-refer to the application document, my previous Notification/Non-Notification Decision report and to Ms Golsby's section 42A report.

6 Section 104 and 104D matters

[022] I now address the relevant aspects of the application in terms of section 104.

6.1 Actual and potential effects on the environment

[023] In my previous Notification/Non-Notification Decision report I considered the potential adverse effects of the application on ecological and water quality matters, groundwater matters, air quality matters, flooding matters, geotechnical matters, noise matters, traffic matters, visual amenity matters, productive soil matters and

¹⁰ Section 42A report, section 2, page 2.

¹¹ Notification/Non-Notification Decision (Sections 95A to 95F Resource Management Act 1991), 22 August 2016.

human health matters in quite some detail.¹² That consideration was informed by my reading of the documents referred to in paragraph [008] of this report.

[024] I concluded that:

- the proposed new methodology will not increase by more than a minor degree the scale or intensity of adverse effects that were anticipated to arise from the existing consented methodology. In fact, with regard to most if not all of categories of potential adverse effect listed in paragraph [023] above, the scale or intensity of adverse effects will be reduced by the proposed new methodology; and
- where the proposed new methodology might give rise to more than minor adverse effects that would not have arisen using the existing consented methodology, those potential adverse effects are able to be avoided, remedied or mitigated to a level where they are no more than minor by the imposition of consent conditions.

[025] I adopt my section 95 effects assessment and conclusions for the purposes of this report. I do not repeat that assessment here for the sake of brevity.

[026] In her section 42A report Ms Golsby advised that she has undertaken an analysis of the effects of allowing the proposed changes to consent conditions compared with the effects of the canal remediation project as currently consented and that her assessment was detailed in section 5 of her Notification Assessment report. After summarising that detailed analysis Ms Golsby concluded that having regard to the proposed conditions, the information provided with the application and the advice of her technical advisers, she was satisfied that there would be no unacceptable adverse effects as a result of the proposed changes to consent conditions and that any additional adverse effects can be appropriately avoided, remedied or mitigated.¹³

[027] I agree with and also adopt the analysis of actual and potential effects on the environment of allowing the activity (namely granting the change of conditions sought) contained in Ms Golsby's section 42A report.

[028] Accordingly, I find that the actual and potential effects of the application are no more than minor and that weighs strongly in favour of granting the application.

6.2 National environment standards

[029] The National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health ('NES for Soils') is relevant. As part of the original consenting process, it was determined that consent was required to disturb soil within and adjacent to the canal in accordance with Regulation 10 of the NES for Soils as a Detailed Site Investigation ('DSI') had been undertaken. Similarly, it was determined that consent was required under Regulation 11 for Containment Site 3 (CS3) as it had previously been used for the disposal of wood waste, but a DSI had not been undertaken for it.¹⁴

[030] The application document stated that the proposed new dredging methodology, and the transport and containment of the dredged material, would not raise any new matters requiring further consideration against the NES for Soils. It concluded that the application was entirely consistent with the purpose of the NES.¹⁵

¹² Ibid, section 5, pages 4 to 7.

¹³ Section 42A report, section 4.1, pages 3 and 4.

¹⁴ Ibid, section 4.2.1, page 4.

¹⁵ Application document, section 7.2.2, page 40.

- [031] In her section 42A report Ms Golsby advised that application had been reviewed by Andrew Kohlrusch¹⁶ and he considered that proposed new dredging methodology was a practical alternative method to the existing consented method. He also considered that with appropriate planning and execution the proposed new methodology would allay community concerns regarding dust generation and contamination of other areas, avoid hundreds of truck movements carting contaminated sediments, maintain the water flow in the canal during remediation, and allow the sediments to be placed in a controlled and safe manner that can be accessed for the bioremediation phase.¹⁷
- [032] Ms Golsby stated that on the basis of the information provided by the Applicant and the advice provided by Mr Kohlrusch, she was satisfied that the proposed changes to the consent conditions were appropriate in terms of managing contaminants to protect human health in accordance with the NES for Soils.¹⁸
- [033] Having considered the relevant provisions of the NES for Soils myself I agree with and adopt the conclusions reached in both the application document and in Ms Golsby's section 42A report.

6.3 Other regulations

- [034] There are no other relevant regulations.
- [035] In saying that I note that Ms Golsby advised that as part of the original consenting process, it was concluded that the remediation project did not require resource consent under the NES for Air Quality. She further advised that having regard to the changes to consent conditions sought, which reduce the potential for dust generation, her original assessment on the NES for Air Quality remained unchanged.¹⁹ I accept that advice.

6.4 National policy statement

- [036] The NPSFM 2014 is relevant to the application. This was addressed very briefly in the application document, referring to limits for water quality and quantity set in the Regional Water and Land Plan.²⁰
- [037] The NPSFM was addressed in a more comprehensive and helpful manner in Ms Golsby's section 42A report where she advised (abridged by me):²¹

"In my view the variation application [sic] remains consistent with the outcomes sought by Objectives A1 and A2 of the NPS for Freshwater given the intent of the project is to improve the water quality of the canal and protect the health of the community. The amended proposal also includes a range of management measures and conditions of consent aimed at protecting water quality and the values of the wetland area. My assessment of ... objectives [B1 to B4] remains unchanged and I consider the variation applications [sic] to be consistent with the outcomes sought by Objectives B1 to B4 of the NPS Part D of the NPSFM relates to the roles and interests of Tangata Whenua. The original application and proposed variations [sic] have been developed in consultation with Tangata Whenua and the proposed methods of remediation reflect Tangata Whenua values and interests, particularly in

¹⁶ A contaminated land specialist, accredited site auditor, and also the Independent Monitor appointed in accordance with condition 6.1 to 6.3 of the original Regional Council consent.

¹⁷ Section 42A report, section 4.2.1, page 5.

¹⁸ Ibid.

¹⁹ Ibid, section 4.2.2, page 5.

²⁰ Application document, section 7.2.3, page 39.

²¹ Section 42A report, section 4.4, page 6.

relation to using bioremediation methods, and by containing and keeping the contaminated sediment within the local area.

Overall, it is considered that the revised proposal remains consistent with the outcomes sought by the NPS for Freshwater.”

- [038] Having considered the relevant provisions of the NPSFM myself I agree with and adopt the conclusions reached in the application document and in Ms Golsby’s section 42A report.

6.5 New Zealand Coastal Policy Statement

- [039] A discrete area of the Kopeopeo Canal east of the Keepa Road bridge is within the coastal environment, but no part of the proposed remediation works fall within the coastal marine area.²² The application document advised that the new proposed methodology will have similar or reduced effects on natural character during the excavation phase and the overall ecological outcome will be improved. It was suggested that the application “... is strongly supported by Policy 14 of the NZCPS in terms of restoring the natural character of the canal through the removal of contaminated sediments.”²³

- [040] The application document concluded that the proposed changes to the conditions were consistent with the objectives and policies of the NZCPS.²⁴

- [041] In her section 42A report Ms Golsby advised that she had assessed the application to change conditions of consent against the NZCPS and she considered that the proposed new methodology remained consistent with the outcomes promoted by the relevant NZCPS objectives and policies.²⁵

- [042] Having considered the relevant provisions²⁶ of the NZCPS myself I agree with and adopt the conclusions reached in the application document and in Ms Golsby’s section 42A report.

6.6 Regional Policy Statement

- [043] The Bay of Plenty Regional Policy Statement (RPS) was addressed in the application document.²⁷ Relevant objectives and policies were identified and commented on.²⁸ The application document concluded that the application was consistent with the objectives and policies of the RPS.

- [044] In her section 42A report Ms Golsby advised that the RPS objectives and policies of most relevance to the application were associated with air quality, the coastal environment, infrastructure, integrated resource management, iwi resource management, matters of national importance, water quality and land use, water quantity and natural hazards.²⁹ Ms Golsby assessed the application against those provisions and concluded that it was consistent with them. She provided detailed reasons in relation to each of the topic areas listed above.³⁰

²² Application document, section 7.2.4, page 39.

²³ Ibid.

²⁴ Ibid.

²⁵ Section 42A report, section 4.5, pages 7 and 8.

²⁶ Including Objectives 1 and 2 and Policies 2, 4, 5, 11, 13, 17, 21, 22, and 23.

²⁷ Application document, section 7.3.3, pages 40 to 42.

²⁸ Including Objectives 1, 12, 17, 27 and 30 and Policies AQ2A, IW2B and IW5B.

²⁹ Section 42A report, section 4.6, page 8.

³⁰ Ibid, pages 8 and 9.

[045] Having regard to Ms Golsby's detailed reasons I note that while the application will result in short-term adverse effects on the natural character values of the lower sections of the canal and adjoining Whakatane estuary saltmarsh, those effects are able to be appropriately remedied and mitigated such that there will be no long-term adverse effects.

[046] Additionally, the proposed new methodology:

- is not expected to result in adverse effects on the natural character values of the eastern end of the Piripai Dunes and Spit, which is identified as an area of 'high natural character' within the coastal environment;
- will result in some short-term adverse effects on aquatic species, however, once the canal is remediated, there will be benefits for eels, fish, and other species. In addition, the revised proposal is expected to result in less effect on the Whakatane estuary salt marsh area than the currently consented method;
- has been developed in consultation with tangata whenua and potential adverse effects on wahi tapu sites continue to be managed through existing conditions of consent (including the appointment of a Cultural Monitor and accidental discovery protocols);
- seeks to improve the quality of water in the long-term and, in the shorter term, discharges to the canal associated with the works and discharges from the containment sites are managed through conditions and limits to ensure human health and environmental values are protected; and
- removes the risk of contamination occurring within the groundwater.

[047] Having considered the relevant provisions of the RPS myself I agree with and adopt the conclusions reached in the application document and in Ms Golsby's section 42A report.

6.7 Regional and district plans

[048] Relevant regional plans are:

- Bay of Plenty Regional Water and Land Plan (RWLP)
- Operative and Proposed Bay of Plenty Regional Coastal Environment Plans (RCEP)
- Bay of Plenty Regional Air Plan (RAP)
- Bay of Plenty Regional Gravel Management Plan (RGMP)
- Operative and Proposed Whakatane District Plans

[049] The regional plans were addressed in the application document.³¹

[050] In terms of water quality, the application document advised that the Kopeopeo Canal remediation project was of particular importance to tangata whenua and that the Community Liaison Group and Cultural Monitor had provided input to the new dredging methodology. That new methodology had been specifically developed to reduce potential adverse effects on ground and surface water quality, aquatic and terrestrial ecology and soil; and to reduce environmental risks associated with the existing consented methodology. It was noted that water quality monitoring would be undertaken and thresholds (water quality discharge standards) would be developed to avoid adverse effects from the discharges. The new methodology had been

³¹ Application document, sections 7.3.4 to 7.3.8, pages 42 to 48.

trialled and the remediation target (based on guidelines for environmental and human health) would be met.

- [051] In terms of the coastal environment, while there would be some short-term effects on the saltmarsh east of Keepa Road, the ecological outcomes were expected to be better than those associated with the existing consented methodology and saltmarsh restoration will occur if required.
- [052] In terms of air discharges, the application document advised that the proposed new methodology was designed to reduce potential dioxin laden discharges to air.
- [053] In terms of the risk of canal bank erosion and flooding, the application document advised that the effects of the proposed new methodology were similar or less than the current consented method.
- [054] Having considered the relevant objectives and policies of the regional plans³² the application document concluded that the application was consistent with those plans in overall terms.
- [055] The application document also addressed the Operative and Proposed Whakatane District Plans.³³ In terms of matters not covered in response to the regional plans, it advised that the Community Liaison Group and Cultural Monitor had provided input to the new dredging methodology; that there would be no increased effects on the life supporting capacity of the soil; the proposed sealing of the containment sites would reduce effects associated with the existing consented methodology; there would be less nuisance effects (particularly dust and vibration); traffic effects would be substantially reduced; visual effects would not significantly change; and potential adverse effects on human health would be reduced.
- [056] Having considered the relevant objectives and policies of the district plans³⁴ the application document concluded that the application was consistent with the objectives and policies of those plans.
- [057] In her section 42A report Ms Golsby advised that she had assessed the application to change conditions of consent against the provisions of the relevant operative and proposed regional and district plans, and she considered the proposed changes to consent conditions did not change her original conclusions that the canal remediation project was consistent with the objectives and policies of those planning instruments.³⁵
- [058] Ms Golsby discussed each of the plans, referring back to her assessment of the original application and to Mr McGhie's assessment of district plan matters.³⁶ I do not repeat her discussion here, but I agree with it and note that it was consistent with the applicant's assessment. The points I listed in paragraph [046] above are relevant

³² RWLP Objectives 4, 6 9, 10, 20 and 38 and Policies 5, 9, 11, 14, 21, 43A, 58 and 59; Operative RCEP 4, 6, 7 and 8; Proposed RCEP Objectives 2A and 12 and Policies NH4, NH4A, NH5, NH8, NH11, IW1, IW2; RAP Objective 2 and Policies 1(a), 1(b), 3 and 12; RGMP Policies 5, 7 13 and 15.

³³ Application document, sections 7.4.3 and 7.4.4, pages 48 to 52.

³⁴ Operative DP Objective LRS2 and Policies 1, 2 and 3, Objective LRS3 and Policy 1, Objective BE2 and Policies 1 and 3, Objective BE6 and Policy 1, Objective BE8 and policy 1, Objective NHaz1 and Policies 3, 4, 5 and 6, Objective NHaz2 and Policies 2 and 14, and Objective LS 2and Policies 5 and 6; Proposed DP Strategic Objective 7 and Policies 3 and 5, Objective IB1 and Policy 1, Objective IB2 and Policy 1, Objective HS2 and Policy 2, 3 and 4.

³⁵ Section 42A report, section 4.7, page 10.

³⁶ Ibid, sections 4.7.1 to 4.7.7, pages 10 to 12.

to that finding as is my conclusion on the section 104(1)(a) matters addressed in section 6.1 of this report.

[059] Having considered the relevant provisions of the regional and district plans myself I agree with and adopt the conclusions reached in the application document and in Ms Golsby's section 42A report.

6.8 Other matters

[060] There are no other matters that I consider relevant to the application. I note that there are no relevant planning documents prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Takutai Moana) Act 2011.³⁷ Nor are trade competition or the effects of trade competition relevant.³⁸

6.9 Permitted baseline

[061] When forming an opinion for the purposes of subsection 104(1)(a) of the RMA, I may disregard an adverse effect of the activity on the environment if a national environmental standard or a plan permits an activity with that effect.³⁹ I have not disregarded any such effects.

[062] However, in this case, my consideration of adverse effects on the environment is limited to the effects of the proposed change to the original conditions of consent.⁴⁰ Consequently I have only considered the potential adverse effects of the proposed new methodology against a background environment that entails the existing consented methodology.

[063] In other words, I have considered whether the proposed new methodology gives rise to adverse effects (over and above those that are anticipated from the existing consented methodology) that are unable to be avoided, remedied or mitigated. I have concluded that it does not, subject to the imposition of appropriate changed conditions of consent.

7 Section 105 matters

[064] As the application relates to changes to discharge permits I have had regard to the requirements of section 105 of the RMA. In particular I have had regard to:

- a) the nature of the discharge and the sensitivity of the receiving environment to adverse effects;
- b) the applicant's reasons for the proposed choice; and
- c) any possible alternative methods of discharge, including discharge into any other receiving environment.

[065] The application document addressed the section 105 matters.⁴¹ It stated that the discharges comprised filtrate and stormwater from the containment sites to the Kopeopeo Canal. The canal was not thought to be a sensitive receiving environment as it had low ecological value. Alternative options for managing the filtrate and stormwater within the containment sites had been considered, but it was decided to treat it and discharge it back to the canal as the large volume of water involved meant there was no practical alternative.

³⁷ Section 104(2B) of the RMA.

³⁸ Section 104(3)(a) of the RMA.

³⁹ Section 104(2) of the RMA.

⁴⁰ Section 127(3) of the RMA.

⁴¹ Application document, section 7.8, pages 53 and 54.

[066] I agree with the applicant's assessment and find that this gives adequate regard to the section 105 matters.

[067] In her section 42A report Ms Golsby advised that having regard to the nature of the receiving environment, the proposed new methodology that seeks to reduce the risk of contamination, the proposed changed conditions of consent, and the fact that the discharge of filtrate and stormwater from the contained sites is able to be stopped (if necessary to prevent a breach of the water quality limits), she was satisfied that sufficient regard has been given to the matters set out in section 105.⁴² That is consistent with my own finding.

8 Section 107 matters

[068] Under section 107 I cannot grant the changes to the discharge permits if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the effects listed in section 107(1)(c) to (g) of the RMA unless section 107(2) applies.

[069] The application document stated that it was considered that the discharges would not give rise to any of those effects.⁴³

[070] In her section 42A report Ms Golsby advised:⁴⁴

"In relation to the new discharge of water from the containment sites to the Kopeopeo Canal, careful consideration has been given to applying water quality limits to protect the visual clarity and quality of the water within the canal so that the discharges do not result in the effects identified in s107. In addition, the proposed conditions require water quality monitoring and management responses providing for early detection and correction of possible non-compliances with water quality limits.

Having regard to the advice provided by Mr Hamill (addressed in more detail within my Notification Assessment report dated 16 August 2016) and subject to compliance with the proposed conditions of consent, I am satisfied that the new discharges will not contravene s107(1) of the RMA."

[071] Having considered the information contained in the numerous technical reports referred to in paragraph [008] of this report, I agree with and adopt the conclusions reached in the application document and in Ms Golsby's section 42A report.

[072] Even if I am wrong about the discharges not being likely to give rise to the section 107(1)(c) to (g) effects, I consider that any such effects would be temporary as they will only occur for the duration of the remediation works and the subsequent dewatering of the geotextile bags into which the contaminated sediment will be placed within the sealed containment sites. In that case I am satisfied that the discharges would qualify for the exemption provided in section 107(2)(b) of the RMA.

9 Part 2 matters

9.1 Positive effects

[073] The application to change conditions of consent is required to accommodate a proposed new dredging and contaminated sediment storage and bioremediation

⁴² Section 42A report, section 4.9, page 13.

⁴³ Application document, section 7.9, page 53.

⁴⁴ Section 42A report, section 4.10, page 14.

methodology that has been designed to significantly reduce potential adverse effects that were of concern to submitters on the original application. This is a substantial positive effect that weighs strongly in favour of granting the section 127 application.

9.2 Part 2

[074] Part 2 of the RMA sets out the purpose and principles of general application in giving effect to the Act. I understand that the RMA has a single purpose, which calls for an overall broad judgement of potentially conflicting considerations, the scale or degree of them, in terms of their relative significance or proportion in promoting the sustainable management of natural and physical resources.⁴⁵ The enabling elements of section 5 are not absolute or necessarily predominant and they must be able to co-exist with the purposes in paragraphs (a) to (c) of section 5.⁴⁶

[075] Based on the evidence, I find that the application will enable people and communities to provide for their social and cultural well-being and their health and safety (section 5(2)). Potentially significant adverse effects on human health are avoided or otherwise appropriately mitigated (section 5(2)(c)).

[076] Section 6 of the RMA identifies matters of national importance that I am required to recognise and provide for. I find that the application will assist with preserving the natural character of the Kopeopeo Canal and the Whakatane Estuary to which that canal discharges (section 6(a)). It will assist with protecting that environment from inappropriate use, namely the ongoing presence of dioxin contaminated sediment (sections 6(b) and (c)). It will not impact on public access to or along the coastal marine area (section 6(d)) other than for a temporary period of time. I understand that the remediation of the canal, and a means of doing so that results in reduced adverse effects, accords with Maori culture and tradition (section 6(e)).

[077] Section 7 directs that in achieving the purpose of the RMA I must have particular regard to some eleven listed matters. The applicable matters in this case include sections 7(a), 7(b), 7(c), 7(d), 7(f) and 7(f). I find that the application is consistent with each of those sections as the adverse effects of the proposed new methodology (which has occasioned the section 127 application) are less than the effects arising from the existing consented methodology.

[078] Section 8 directs me to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). I have done so to the extent that those principles are consistent with the scheme of the RMA. I note that the Treaty of Waitangi is a partnership between the Crown and Maori, however in my view the Applicant has been respectful of the Treaty principles and has sought to reflect these principles in their pre-application consultation.

[079] In overall terms I find that the application is consistent with Part 2 of the Act.

10 Changed Conditions

[080] As part of the application document the applicant submitted a detailed suite of changed conditions (using a conventional strikeout and underlining format).⁴⁷ Further amendments to the changed BOPRC suite of conditions were submitted by the applicant as part of their response to the section 92 request for further information.⁴⁸

⁴⁵ *Green & McCahill Properties v Auckland Regional Council* [1997] NZRMA 519 (HC).

⁴⁶ *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 [5-215] (not questioned on appeal: *Horticulture NZ v Manawatu RC* [2013] NZHC 2492)

⁴⁷ Appendix 2-1 for the changed BOPRC conditions and Appendix 2-2 for the changed WDC conditions.

⁴⁸ Appendix 1 to the section 92 response letter from Harrison Grierson dated 28 June 2016.

[081] As part of the section 42A reporting process Ms Golsby reviewed the applicant's proposed suite of changed conditions and she was assisted in that task by a number of independent technical reviewers and council technical staff. I understand that discussions between Ms Golsby and the applicant resulted in further amendments.

[082] I have reviewed the suite of changed conditions ultimately recommended to me by Ms Golsby. I am satisfied that the changes she recommends are appropriate in terms of providing certainty that the potential adverse effects of the proposed new methodologies for canal dredging, contaminated sediment storage and bioremediation will be appropriately avoided, remedied or mitigated.

11 Determination

[083] Pursuant to the powers delegated to me by the Bay of Plenty Regional Council and the Whakatane District Council under section 34A of the Resource Management Act 1991, I record that having read the application document and its appendices, a range of technical reports associated with the previous decision that I made under section 95 of the RMA, Ms Golsby's section 42A report, and having considered the various requirements of the RMA, I find that:

- a) The actual and potential adverse effects of the application (the proposed change of consent conditions) are able to be satisfactorily avoided, remedied or mitigated by the imposition of changed conditions of consent;
- b) The application has significant positive effects;
- c) The application is consistent with the provisions of the relevant statutory instruments;
- d) The application to change BOPRC consent conditions (CH16-0147) is not contrary to the requirements of section 107 of the RMA; and
- e) The application is consistent with Part 2 of the RMA and so the purpose of the RMA would be best achieved by granting the application.

[084] I therefore **grant** the Bay of Plenty Regional Council's application to vary the consent conditions for the Kopeopeo Canal Remediation Project (existing consents RC67173 and WDC LL-2012-808 and change of consent condition applications CH16-0147 and LV-2016-8085-01) for the reasons listed in paragraph [083] above and as further set out in the body of this decision report.

[085] The changed conditions of consent are set out in Appendices 1 and 2. The changes are shown in red font in 'tracked format' (additions underlined and deletions in strikeout). I only made minor grammatical and formatting amendments to the recommended conditions. I noted a large and (in my opinion) possibly unnecessary degree of overlap between the BOPRC and WDC conditions⁴⁹, however I considered it went beyond the scope of my commission to attempt to rectify that.

Signed by the commissioner:



⁴⁹ A number of the WDC conditions appeared to fall outside the WDC's functions under section 31 of the RMA, or at least fell more appropriately within the BOPRC's functions under section 30 of the RMA., and vice versa.

Rob van Voorthuysen

Dated: 5 September 2016

Appendix 1 BOPRC Changed Conditions of Consent

Appendix 2 WDC Changed Conditions of Consent