

## Decision Report

Bay of Plenty Regional Council - Integrated Catchments

Application CH21-02259 (65979)  
to  
Bay of Plenty Regional Council

6 October 2022

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## 1 Introduction

[001] The Bay of Plenty Regional Council - Integrated Catchments (applicant) has applied to change conditions 1 and 2 and add new conditions to resource consent 65979 to allow a one-off reduction in the water level of Lake Rotoiti for the purpose of enabling an inspection of the lakebed to address matters raised in the Cultural Management Plan<sup>1</sup> prepared on behalf of the Ohau ki Rotoiti Kaitiaki Group and the Ngāti Pikiao Environmental Society (NPES) in October 2016.

[002] While the Bay of Plenty Regional Council - Integrated Catchments is the applicant, we understand from the applicant's evidence that it is 'partnering' with NPES.<sup>2</sup>

**The application is granted in part for the reasons herein.**

## 2 Appointments

[003] The BOPRC, acting under s34A of the Resource Management Act 1991, appointed Independent Hearing Commissioners Rob van Voorthuysen<sup>3</sup> and Poto Davies<sup>4</sup> to hear and decide the application.

## 3 Description of the Proposal

[004] The proposal is described in the Applicants AEE<sup>5</sup> and the BOPRC Section 42A Report.<sup>6</sup> By way of brief summary it entails:

- The applicant holds resource consent 65979 in relation to the operation of the Okere Control Gates (Okere Gates). The Okere gates control the level of Lake Rotoiti. The conditions of consent 65979 establish a minimum Lake Rotoiti water level of RL 279.00m and maximum level of RL 279.40m. Lake water levels are, 'where practicable', to be maintained between RL 279.10m and RL 279.20 and only in extreme weather conditions (droughts or other emergency situations) can lake levels fall below RL 279.00m;<sup>7</sup>
- The applicant has sought to change the conditions of resource consent 65979 to enable a one-off 'trial' where the Lake level will be drawn down to RL 278.85m and held there for seven days. For the applicant Graeme O'Rourke advised that it may take 5 to 10 days to reach RL 278.85m. Thereafter the Lake will be allowed to return to its normal operating range in response to rainfall which could take between 47 to 95 days to occur<sup>8</sup> depending on climatic conditions. On Mr Woodhouse's evidence the length of the 'trial' therefore actually ranges between 59<sup>9</sup> and 112<sup>10</sup> days;
- In answer<sup>11</sup> to our questions we posed in our Minute 3, Andy Bruere advised<sup>12</sup> that Mr Woodhouse's figures were based on a "worst case range" for filling based on rainfall rather than actual Lake level rates of rise as a result of rainfall. Mr Bruere suggested that after the Easter public holiday Rotorua is certain to receive regular heavy rainfall events. He said that annual graphs showing Lake levels

<sup>1</sup> Cultural Management Plan for Okere Gates and Ohau Weir, Atkins Holms Majurey, 7 October 2016 ["the CMP"]

<sup>2</sup> EIC Andy Woolhouse, paragraph 12.

<sup>3</sup> Commissioner van Voorthuysen is an experienced Independent Commissioner, having sat on over 360 Hearings throughout New Zealand since 1998. He has qualifications in natural resources engineering and public policy. In 2020 he was appointed as a Freshwater Commissioner by the Minister for the Environment.

<sup>4</sup> Commissioner Davies is an Independent Commissioner (since 2013): grounded in Mātauranga Māori and currently working with elected members of local body government.

<sup>5</sup> "Lake

Rotoiti Resource Consent Variation: Assessment of Environmental Effects: Proposed Variation to Resource Consents 65979. Lake Level Control Trial, dated 17 May 2022 ["the AEE"].

<sup>6</sup> Bay of Plenty Regional Council, Officer's Report for limited notified resource consent application, Section 42A Resource Management Act 1991 (RMA), Phil Brown, consultant planner, 11 May 2022.

<sup>7</sup> Consent 65979 also sets flow rates through the Okere Gates into the Kaituna River, but the applicant is not proposing to alter those conditions

<sup>8</sup> EIC Andy Woolhouse, paragraph 21.

<sup>9</sup> 5 + 7 + 47 days.

<sup>10</sup> 10 + 7 + 95 days

<sup>11</sup> Memorandum on Behalf of Applicant in Response to Minute 3, 19 July 2022, paragraph 3.8.

<sup>12</sup> Mr Woolhouse was not available for the hearing.

indicate the time to refill the Lake is likely to be less than 30 days. On that basis he suggested that using a realistic assessment of a maximum of 30 days for the refilling period, allowing a maximum of 7 days to lower the lake and a maximum of 7 days for the observation period, the more realistic total maximum period for the proposal was 44 days;<sup>13</sup>

- The 'trial' can only occur during the period commencing from the first Tuesday after the Easter public holiday and ending on 30 June during the years 2023 to 2027 inclusive (a period of four years and five months). However, if the existing Lake level is lower than RL 278.850m +/- 5mm as a result of climatic conditions, then the 'trial' can commence on the first weekday after Waitangi Day;
- The refilling of the lake could extend past 30 June depending on when the trial is undertaken.<sup>14</sup> The applicant's ecological experts have confirmed that a potential refilling time out to mid-August does not present any ecological concerns;<sup>15</sup>
- Only one 'trial' attempt can be undertaken each calendar year (climatic conditions may not enable the Lake to be reduced to the intended low level);
- The intended Lake level during the 'trial' of RL 278.85m is 24mm above the pre-Okere Gates extreme minimum level of RL 278.826m, that being the lowest level reached in the 103 years preceding 1981;<sup>16</sup> and
- The purpose of the 'trial' is said to facilitate the inspection of beaches and sites of cultural significance located around the Lake that are located below the current operational Lake level range.

## 4 Process Issues

### 4.1 Written approvals, notification and submissions

[005] No section 92 requests for further information were issued. No written approvals were obtained. The application was limited notified on 6 September 2021 and 15 November 2021 to owners and occupiers of Lake shore properties and the owners of jetties, boat ramps and private boat sheds. There were 98 submissions received of which eight were in support, 87 were in opposition and three were neutral.

[006] The submissions are summarised in the Section 42A Report.<sup>17</sup> We adopt that summary but do not repeat it here for the sake of brevity. We were provided with copies of all of the original submissions.

### 4.2 Applicant's Late Evidence

[007] The applicant provided written opening legal submissions<sup>18</sup> on the afternoon before the hearing. Attached to those submissions was a 'Supplementary Report' authored by Mr Bruere that provided information on water depths at jetties and boat ramps at the Rotoiti Hot Pools, Otaramarae Bay and Okawa Bay. Ms Hill agreed that the 'Supplementary Report' comprised evidence for the applicant and that it had not been provided ten working days prior to the hearing as required by RMA section 103B(3). In response to our questions Ms Hill sought a waiver for the late service of that evidence under section 37(1)(b) of the RMA.

[008] The hearings administrator confirmed that the legal submissions and the 'Supplementary Report' had been provided to all submitters who had expressed a wish to be heard.

[009] When we raised the matter of our obligations under section 37A(1) of the RMA, Ms Hill suggested that we should not adjourn the hearing (such an adjournment would give submitters time to consider and respond to the 'Supplementary Report'), but instead we should provide further time to any submitter who requested such to enable them to respond to the 'Supplementary Report'. While the very late provision of the 'Supplementary Report' is less than ideal we grant a timeframe waiver for it under section 37 of the RMA.

<sup>13</sup> Memorandum on Behalf of Applicant in Response to Minute 3, 19 July 2022, paragraph 3.10.

<sup>14</sup> Reply submissions, paragraphs 2 and 3.

<sup>15</sup> Reply submissions, paragraph 4.

<sup>16</sup> AEE, Figure 9.

<sup>17</sup> Section 5, Notification; Table 1: Key Points Raised by Submitters; and Appendix 2.

<sup>18</sup> Mary Hill, Cooney Lees Morgan.

- [010] In the event at the hearing no submitter sought additional time to respond to the 'Supplementary Report', although many expressed their dissatisfaction with its very late provision.
- [011] After the hearing Mr Murray Dawson submitted an 'Addendum to previous submission' document which responded to matters raised in the 'Supplementary Report', but also to matters raised in the applicant's Reply submissions. We have read and had regard matters raised by Mr Dawson regarding potential effects on his own jetty but have not had regard to matters relating to the applicants Reply submissions.
- [012] As part of the opening submissions, we also received (later on the afternoon before the hearing) a Memorandum from Alastair Suren, a BOPRC Freshwater Ecologist, addressing the matter of algae blooms in the Lake. We were familiar with Mr Suren in his usual capacity as an advisor to the Council's Section 42A Reporting officers and so we asked Ms Hill what the status of his Memorandum was. She advised it also formed evidence for the applicant and so a waiver was also sought for its late submission. As with Mr Bruere's 'Supplementary Report', we grant a timeframe waiver for Mr Suren's evidence under section 37 of the RMA.
- [013] We then asked the BOPRC Section Report author, consultant planner Phil Brown, if the BOPRC intended to obtain a 'peer review' of Mr Suren's evidence (as that would normally be the case where an applicant presented ecological evidence). In response Mr Brown advised that Mr Suren's evidence appeared to be consistent with that of Mr Hamill. We asked Mr Brown to provide Mr Suren's evidence to Mr Hamill and for Mr Hamill to advise if he disagreed with any aspect of it. As part of his end of hearing report to us Mr Brown advised that Mr Hamill took no issue with Mr Suren's conclusions.
- [014] As part of the opening legal submissions Ms Hill appended emails from Andi Uhl (CFO Okere Falls Voluntary Rural Fire Force (VRFF)), Jon Jon Peters (BOP Harbourmaster/Manager) and Rob Pitkethley (Rotorua Lakes District Council Sport, Recreation and Environment Manager). In answer to our questions Ms Hill advised that those gentlemen should also be considered as witnesses for the applicant. We asked Ms Hill to make Mr Pitkethley available at the hearing as we had several questions for him.

#### **4.3 Officer's recommendation**

- [015] Mr Brown recommended that the application be granted.

#### **4.4 Hearing, appearances and site visit**

- [016] We held a Hearing in the Millennium Hotel in Rotorua on Tuesday 6 and Wednesday 7 September 2022.
- [017] Evidence<sup>19</sup> from the applicant and evidence from a witness for a submitter<sup>20</sup> was pre-circulated in conformance with a procedural Minute that we issued. We posed written questions to the applicant's witnesses which were helpfully answered in writing prior to the Hearing. Further written evidence from submitters was tabled<sup>21</sup> at the hearing and other submitters<sup>22</sup> spoke to their submissions. Copies of those documents are held by BOPRC. We do not separately summarise the matters covered here, but we refer to or quote from that material as appropriate in the remainder of this Decision. We took our own notes of any answers given to verbal questions that we posed to Hearing participants.
- [018] The Applicant's written Reply submissions were dated 29 September 2022 and were provided to us on that date. We closed the Hearing on 5 October 2022, having concluded that we required no further information from any of the parties.<sup>23</sup>

<sup>19</sup> Andrew Bruere (Lake Operations Manager), Andrew Woolhouse (self-employed environmental contractor), Graeme O'Rourke (Survey Team Leader – Engineering), Joseph Tahana (Ngāti Pikiao).

<sup>20</sup> Lake Rotoiti Community Association Inc (Jim Stanton and Reina Englen) called by Ron Duffy.

<sup>21</sup> Donald Atkinson (representing himself and the Lake Water Quality Society), Brad Scott representing the BOP Trailer Yacht Squadron, Roy Duffy, Jim Stanton (representing the Lake Rotoiti Community Association Inc) and Murray Gascoyne-Bishop.

<sup>22</sup> Tim Manning representing Lake Rotoiti Hot Springs Limited; Kate Barry-Piceno (representing the Okere Road Reserve Jetty Association and Kelvin Fraser and Kathryn Lellman), Richard Amery and Michael Marston (representing the lake Rotoiti Classic and Wooden Boat Association Inc).

<sup>23</sup> The Panel Chair was on leave prior to that date.

- [019] We did not conduct a site visit as we were familiar with both Lake Rotoiti and its margins and the Okere Gates.

#### 4.5 Consent category

- [020] Under section 127(3) of the RMA the application is treated as if it is an application for a discretionary activity.
- [021] Mr Brown advised<sup>24</sup> that some submitters had questioned whether the application was within the scope of the original consent. Mr Brown stated that case law made it clear that section 127 is not appropriate if a proposal relates to a fundamentally different activity, or one having materially different adverse effects, or one that seeks to expand or extend the original activity. No party opposed the use of section 127 by the applicant.
- [022] Prior to the hearing we asked Mr Brown if consent was required under either Regulation 41(3) or Regulation 52(2) of the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-FM) given the advice of the BOPRC's technical reviewer Keith Hamill that as a result of the s127 application "There may be some short-term effects on water levels in adjacent wetlands."
- [023] In response counsel for BOPRC as applicant advised that a variation to a consent pursuant to s127 of the RMA does not trigger an obligation to incorporate the NES-FM standards into the conditions of the consent. That only occurs if the consent authority decides to review the consent under s128(1)(ba) as such a review would result in the NES-FM regulations prevailing over the conditions of consent.<sup>25</sup> Counsel<sup>26</sup> for the BOPRC (as regulator) agreed stating:

*"In summary, we agree with the Memorandum that resource consent is not required under the Standards, on the basis that the application is for a variation to the Consent. If the proposed drawdown were more appropriately dealt with as a new activity requiring a new consent, then the Standards would apply. We have not interrogated that question in detail, but on the face of it agree that the Variation is a variation to the Consent given that the activity includes "artificially control the water levels in Lake Rotoiti" and the temporary drawdown falls within that."*

- [024] We received no legal advice to the contrary and so we accept the above submissions from counsel.

#### 4.6 Permitted baseline

- [025] When forming an opinion for the purposes of subsection 104(1)(a) of the RMA we 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.<sup>27</sup> We have not disregarded any such effects associated with the section 127 application.

#### 4.7 Existing environment

- [026] The Applicant suggested that the consent conditions that were cancelled in August 2021 enabling Lake levels between RL 279.00m and RL 279.10m to facilitate flushing of sediment from the Ohau Channel (which was required to be undertaken between 1 May and 30 September) should be considered 'mitigation' of the now proposed low Lake level trial. We questioned how that could be the case since the applicant's position in the August 2021 s127 application process was that following ten years of operations, monitoring and survey results of the 'flush' proved it to be ineffective and that the cancellation of conditions (previously conditions 13.1 to 13.5 and 7.4(b)(i)(a)) enabling it would have no environmental effects.
- [027] We failed to understand how an action that would have no environmental effects could be considered mitigation for an unrelated Lake level lowering trial, particularly given that the Ohau Channel flushing Lake

<sup>24</sup> Section 42A Report, section 7.

<sup>25</sup> Memorandum on Behalf of Applicant in Response to Minute 3, 19 July 2022, paragraph 8.11.

<sup>26</sup> Memorandum, Holland Beckett law (Vanessa Hamm), 23 August 2022, paragraph 3.

<sup>27</sup> Section 104(2) of the RMA.

lowering regime is no longer part of the existing environment. In the written answers<sup>28</sup> to our Minute 3 questions Mr Bruere simply stated that *“In my opinion a reasonable approach would be to consider the flushing removal as part of the mitigation proposed for the one-off trial”*. We found that to be unconvincing.

[028] As part of that written response counsel for the applicant submitted<sup>29</sup> that *“Removal of the annual flushing would reduce the cumulative effects of the proposed lake level reduction trial on lake users, by limiting the number of times that the lake level would be reduced below the normal operating parameters in any given year.”* That may be so, but it does nothing to address the effects on Lake users during the trial.

[029] When we asked Ms Hill about this matter at the hearing, she advised that the applicant was not relying on the absence of the Ohau Channel flushing regime being part of the existing environment. She submitted that the conservative approach was to assume that the ‘existing environment’ (against which we must compare the effects of the Lake level trail) was the existing Lake Rotoiti operating range, namely a Lake level between RL 279.10m and RL 279.20m.

[030] We agree, noting that the trail will result in a decrease of Lake level that ranges from 250mm to 350mm compared to that ‘existing environment’.

## 5 Section 104 and 104B matters

[031] We now address the relevant aspects of the application in terms of sections 104 and 104B of the RMA.

### 5.1 Actual and potential effects on the environment

[032] Having reviewed the documentation we find that we should address the following matters:<sup>30</sup>

- Positive effects;
- Navigation and safety;
- Recreational uses;
- Economic impacts;
- Water quality and ecology; and
- Māori interests and values.

#### 5.1.1 Positive effects

[033] It is routine to record our understanding of the positive effects of an application.

[034] For the applicant Joseph Tahana, a Ngāti Pikiao representative, having explained how the loss of “natural fluctuations of Lake Rotoiti” have had a range of impacts on tāngata whenua, stated:<sup>31</sup>

*“Ngāti Pikiao supports the Bay of Plenty Regional Council proposed consent application to observe the lake at an historically low level and make observations of various aspects of the lake and lake shore.*

*Ngāti Pikiao considers that this proposal will allow it the opportunity to see, touch, feel and document if there are positive impacts such as whether the beaches will re-establish, or if weed problems and fish habit improve.”*

[035] We initially had difficulty understanding how an extra 15cm of water depth would preclude those beaches and sites being inspected now, given that the minimum Lake operating level is RL 279.00m and the ‘trial’

<sup>28</sup> Memorandum on Behalf of Applicant in Response to Minute 3, 19 July 2022, paragraph 3.2.

<sup>29</sup> Ibid, paragraph 7.2.

<sup>30</sup> We note that some submitters raised issues not relevant here, including the requirement for an annual flush of the Ohau Channel; allowing people to dredge in order to provide continuous access to boat shed and jetties during the ‘trial’; and setting a post-drawdown sheds and ramps Lake level range of RL 279.20m - RL 279.30m.

<sup>31</sup> EIC Tahana, paragraphs 31 and 32.

will only reduce that level by 15cm to 185.50m RL. We asked Mr Tahana about that by way of our Minute 3. His response<sup>32</sup> was:

*“From a western perspective, a 15cm difference in water level may not sound like much. However, the drawdown must be viewed through a cultural lens. It is about viewing the beaches and experiencing the features in the same way our grandparents did, pre the installation of the Okere Gates in 1982 and before the lake level was artificially controlled. ... The lake level drawdown will enable Ngāti Pikiao kaumatua to experience the lake as they remember it, but also enable them to share that experience and history with the next generation of Ngāti Pikiao.”*

[036] In regard to the intent of the ‘trial’ and its associated positive effects, Andy Bruere stated:<sup>33</sup>

*“In my observation, from reading the CMP and my work with Ngāti Pikiao, I understand they have a long-standing desire to observe lower lake levels because they are concerned that managing Lake Rotoiti within such a narrow range has led to the loss of mana, loss of specific taonga around lake locations, and the loss of historic beaches that were important to their communities.”*

[037] As also noted by Mr Bruere, the applicant has prepared a Lake Level Control Observation Monitoring Plan (LLCOMP) dated May 2022 in consultation with the Lake Rotoiti Community Association. The LLMCOMP states that during the ‘trial’ the BOPRC will undertake a one-day long boat inspection<sup>34</sup> of its regular monitoring sites and additional sites which in total would comprise:

- All public jetties and boat launching ramps to assess any impacts on boat launching and retrieval;
- Key beaches including Ruato Bay and Hinehopu.
- The Hinehopu / Tamatea Street Wetland, Gisborne Point, Okawa Bay Marina and Resort, the Ohau Weir and upstream beach on Lake Rotorua, the Okere Gates;
- Key cultural sites as specified by Ngāti Pikiao people accompanying BOPRC staff, which in addition to the above areas would include Te Weta Bay and the western cliffs between Hinehopu and Honeymoon Bay; and
- Areas of the lake generally known to have limited draught for boating including near the entrance of the Okere Arm and Okawa Bay, and Gisborne Point particular.

[038] Having considered the above matters we are satisfied that the proposal will have positive effects for Ngāti Pikiao and possibly some positive benefits for the BOPRC (regarding a documentation of adverse effects on jetties, boat ramps and navigational safety) should, at any stage in the future, the Council decide to seek a Lake level operating range that is reminiscent of “*natural lake levels*”.

### 5.1.2 Navigation and safety

[039] Unsurprisingly, numerous submitters expressed concerns regarding risks to navigation and safety. Issues raised included increased obstacles (rocks and other obstructions), the potential for boats getting stuck on the lakebed, and the difficulty for emergency services to access the Lake. Mr Brown advised that the application had been provided to the BOPRC harbourmaster (Jon Jon Peters). Mr Peters advice was:

*“A natural consequence of the lowering of the water level in the lake would be a reduction in the depth in some areas of the Lake. The resultant reduction in the navigable areas of the Lake would be marginal and, in any case, does not take away the responsibility of the skipper of any water craft to keep a safe look out for navigational hazards including shallows.”*

<sup>32</sup> Memorandum on Behalf of Applicant in Response to Minute 3, 19 July 2022, paragraphs 6.2 and 6.8.

<sup>33</sup> EIC Bruere, paragraph 32.

<sup>34</sup> The boat trip would include Ngāti Pikiao representatives and invitations to attend would be made to the Chairpersons of the Rotorua Te Arawa Lakes Operational Liaison Group, the Lake Rotoiti Community Association and the Lake Rotoiti Classic and Wooden Boats Association; and the Commodore of the Trailer Boat Squadron and the Rotorua Lakes District Council Parks and Reserves Manager.



[040] Andy Bruere stated:<sup>35</sup>

*“While I acknowledge taking the Lake lower for a short period will increase the risk of boats coming into contact with submerged or partially submerged objects, these types of obstructions are most likely to be within the 5 knot area within 200m of the lake shore, which is an area where boaties are naturally on alert to these types of issues.”*

[041] Mr Brown advised that the proposed public notification<sup>36</sup> of the ‘trial’ date (should a trial be attempted) and the placing of warning signs at public boat ramps would enable individuals and organisations to plan accordingly and undertake any necessary navigation precautions.

[042] He also considered that the intention to limit the time of the ‘trial’ to between the “*first Tuesday after Easter*” and 30 June would coincide with a period of reduced Lake usage. In that regard we note that many submitters sought that the ‘trial’ be restricted to “*winter*”, “*the months of July, August or September*”, “*after Easter and before September*”, from “*May to October*” and that the period between Waitangi Day (6 February) and the end of Easter should be avoided. The applicant’s proposed ‘trial’ window generally addresses some but not all of those submitter requests.

[043] At the hearing submitters expanded on their concerns about effects on navigation and safety to Lake users.

[044] Donald Atkinson advised “*In the middle of the Okere Arm is a lower section which boats will strand at the proposed [trial] levels. There are many rocky ledges which will be a danger to navigation ...*”. Michael Martson, a representative of the Lake Rotoiti Classic and Wooden Boat Association Inc, stressed that a lake level of RL 279.10m was the minimum safe navigable Lake level. He considered that any lake level lower than that presented a danger to navigation.

[045] The only ‘mitigation’ offered by the applicant is to publicly notify the trial commencement date and to place warning signs at public boat ramps. That will rely on boat users reading or hearing the notification or seeing and reading the warning signs. Even if that occurs, there is a real possibility of boats running aground or colliding with underwater obstacles during the trial, particularly for people who do not have a sound ‘local knowledge’ of existing hazardous areas. That adverse effect has not been mitigated.

[046] On the evidence we find that the ‘trial’ will increase navigation and safety risks for up to 112 days. It will also result in some jetties and boat ramps being unusable for that period of time, which poses different safety risks in terms of increased crowding at remaining usable facilities or the inability to retrieve boats from the water. We were unable to reach a conclusion on the precise magnitude of those adverse effects, but we accept the view of submitters that they will be more than minor.

[047] In light of concerns raised by submitters regarding effects on rescue services, after the hearing the applicant contacted Andi Uhl from the Okere Falls Voluntary Rural Fire Force and Jeremy Doorman from Coastguard Rotorua Lakes. Counsel for the applicant submitted that both organisations provided further written confirmation (by way of emails) that they had no concerns about their ability to carry out their operations during the proposal.

[048] The actual response from the VRFF was not as unequivocal as that. Andi Uhl’s email actually said “*... we are pretty certain that we can find a way to launch our rescue boat during the proposed low-water-level trial ... If there is a problem we can look at temporary mitigation to ensure continued access during this trial*”. We are unclear as to what that ‘temporary mitigation’ might entail.

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<sup>35</sup> EIC Bruere, paragraph 28.

<sup>36</sup> Including communication to the Lake Rotoiti Community Association that can be published on their website, publish details on the BOPRC website and other social media forums, and notification to local news media.

- [049] However, the applicant has offered a condition requiring it to consult with both rescue service organisations prior to the first early drawdown period (i.e. prior to Waitangi Weekend 2023) to enable an assessment to be undertaken of accessibility of their vessels to boat ramps at low Lake levels. The applicant would be required to obtain written approval from both organisations that they could conduct their operations effectively during the Lake level trial.<sup>37</sup>

### 5.1.3 Recreational uses

- [050] Numerous submitters expressed concern that the low Lake level during the 'trial' would make it difficult to use and access jetties, private boat ramps and boat sheds.

- [051] Mr Woolhouse advised that at the maximum proposed drawdown level of RL 278.85m, 40 jetties (14.7% of total) would have a water depth of less than 400mm and this may cause some access restrictions. However, 230 jetties (85.3%) would not suffer any material access restrictions during the maximum drawdown period.<sup>38</sup> Mr Woolhouse also advised<sup>39</sup> that regarding public boat ramps, those at Hinehopu and Okawa Bay would remain accessible at the low level while accessibility at other ramps would depend on the size of the boat.

- [052] Mr Brown concluded:<sup>40</sup>

*"Overall, when having regard to the temporary and short-term nature of the drawdown, together with the measures proposed, I consider that although short-term adverse recreation effects may result from the drawdown, these are not unacceptable in nature."*

- [053] At the hearing a number of submitters expanded on their concerns with regard to the potential impact of the trial on recreational use of boat ramps and jetties.

- [054] Donald Atkinson has a jetty in Okawa Bay where he moors a 'classic wooden boat'. He said that during low Lake levels (such as occurred in late 2020) his boat nestles on the Lake bed. He was of the view that at the Lake level proposed for the trial his jetty would be unusable, as would his sisters.

- [055] Brad Scott (BOP Traylor Yacht Squadron) advised that:

- the Squadron has a membership of 130 yachts representing around 260 people;
- the Squadron holds resource consent for the Okawa Bay Ramp and three jetties;
- at low Lake levels above the proposed trial level of RL 278.85m there are significant impediments to members safely accessing the Lake. For example, two members ended up with trailers been driven off the ramp in an attempt to launch or recover their yachts in the summer of 2020 when Lake levels were as low as ≈RL 278.926m. External resources were required to recover the trailers and that blocked the ramp for other users;
- a water depth of 0.77m at the end of the ramp<sup>41</sup> would not be deep enough for most trailer yachts. A depth of around 2m was required at the end of the ramp for trailer yachts; and
- a sustained low Lake level would mean some boats could not be launched or recovered using the Okawa Bay ramp.

- [056] We find that the trial will have a more than minor adverse effect on the members of the BOP Traylor Yacht Squadron.

<sup>37</sup> Reply submissions, paragraphs 5 to 8.

<sup>38</sup> EIC Woolhouse, paragraph 17.

<sup>39</sup> EIC Woolhouse, paragraph 19. Based on advice he received from Mr Rob Pitkethley (Rotorua Lakes Council Sport & Recreation & Environment Manager).

<sup>40</sup> Section 42A Report, section 8.2.

<sup>41</sup> Mr Bruere's estimate in his Supplementary Report.

- [057] Roy Duffy described how at a Lake level of RL 278.850m he would not be able to launch his boat on his concrete ramp. Jim Stanton advised that many of the Lake Rotoiti Community Association (LRCA) members and other owners of the 1100 residential properties around the Lake are known to experience difficulty in launching and berthing at their jetties or slipways when the Lake falls below the minimum operating range level of RL 279.10m. Kate Barry-Piceno described how the eleven members of the Okere Road Reserve Jetty Association shared a jetty and how at low lake levels part of the jetty is unusable. She also noted that many people from outside the immediate catchment used the public boat ramps at Lake Rotoiti. That was echoed by Michael Martson (whom we referred to earlier).
- [058] Mr Marston also advised that a depth of 700mm at the end of a boat ramp was insufficient as provision needed to be made for both the draft of the boat and the height of the trailer. Murray Gascoyne-Bishop told us that at a Lake level of RL 278.850m his launch would be marooned in his Okere Arm boatshed, as would his neighbour's boat.
- [059] Murray Dawson advised<sup>42</sup> that at his jetty in Otaramarae Bay (which accommodates four boat owners), during average Lake water levels his 5.5 metre inboard power boat had only 100mm clearance under the keel and he had to dig out a hole each summer for the fully raised inboard to sit in. He considered that removing 200 to 350mm of water level during a Lake level trial would make his jetty "totally unusable".
- [060] The evidence of the submitters is consistent and persuasive. We find that the proposal is likely to result in more than minor adverse effects on the recreational use of the Lake and lakeshore structures (jetties and boat ramps) by the boating community.
- [061] Confirming our finding in that regard was:
- the verbal evidence of Rob Pitkethley, the Rotorua Lakes District Council (RLDC) Sport, Recreation and Environment Manager, that of the six public boat ramps on Lake Rotoiti administered by RLDC, he could only be certain that the Hinehopu boat ramp would be serviceable during the draw down trial; and
  - the applicant's written Reply submissions<sup>43</sup> which stated "*Ultimately it is acknowledged that the proposal will cause some access limitations for private jetty owners for a relatively limited period during late autumn / early winter, and outside of the peak holiday season.*"

#### 5.1.4 Commercial and economic impacts

- [062] As with recreational uses, the potential adverse effects of the 'trial' on businesses using the Lake largely depends on the effects on navigation and safety and the useability of jetties and boat ramps. Mr Brown advised<sup>44</sup> that some submitters had highlighted that tourism and recreational services that use the Ohau Channel, such as jetboating and that boat charters, may not be operable during the drawdown, leading to lost revenue. Lakeland Princess Charters, who operate in Lake Rotoiti, noted that their business would need to be placed on hold to avoid risk of their commercial charter vessel becoming grounded.
- [063] At the hearing submitters presented their views on this matter.
- [064] For Lake Rotoiti Hot Pools Limited (LRHPL) Mr Manning advised:
- There is no road access to LRHPL and visitors and staff must arrive by boat;
  - Modern 'wake boarding' boats require a water depth of up to 1m to berth. Those boats have fixed propellers and rudders and cannot park on the Lake shore;
  - LRHPL has five jetties which can cater for 27 moored boats;
  - April and May are busy months for LRHPL and during that period the five jetties are often full;
  - The proposed Lake level trial will result in ten boats being unable to use the jetties; and

<sup>42</sup> See section 4.2 of this Decision.

<sup>43</sup> Paragraph 28.

<sup>44</sup> Section 42A Report, section 8.5.

- The reduction of the visitors (often five people per boat) associated with those ten boats will result in a 13% reduction in revenue during the trial period. That equates to the entire profit for LRHPL during that time.

[065] We find that the trial will have a significant adverse effect on LRHPL.

[066] Mr Manning called Stephen Newland as a witness. Mr Newland represents Volcanic Air Safaris (VAS). Mr Newland suggested that a lower Lake Rotoiti level would result in a lower Lake Rotorua lake level which could affect the ability of to operate their float plans which take off and land on Lake Rotorua. In her written Reply submissions counsel for the applicant submitted<sup>45</sup> that Peter Blackwood (BOPRC Principal Technical Engineer) had advised *"The Ohau Channel weir operates as an "undrowned" weir when Lake Rotoiti levels are low. That means that the upstream levels (in Lake Rotorua) are affected by the weir geometry, not the downstream levels (in Lake Rotoiti). ... lowering Lake Rotoiti Levels as proposed under the temporary drawdown are not anticipated to have any flow on effect on Lake Rotorua levels and certainly not to a degree which would affect use of the submitter's floatplane"*. We accept Mr Blackwood's view and it coincides with our own understanding of the operation of the Ohau weir.

[067] We do not consider that the trial will have an adverse effect on VAS's Lake Rotorua operations.

[068] Tom Mayne of Lakeland Princess Charters did not appear at the hearing. His submission expressed concern that the lowering of Lake Rotoiti would make navigating the Ohau Channel difficult. He was also concerned that lowering Lake Rotoiti would also cause the level of Lake Rotorua to drop, affecting his business. For the same reason as for set out above in relation to VAS, we do not consider that the trial will have an adverse effect on Lakeland Princess Charters' operations on lake Rotorua.

[069] Consistent with our finding of potential adverse effects on navigation and safety and recreational uses, we find that the proposal is likely to result in more than minor adverse effects on business activities that rely on access to Lake Rotoiti and navigation around it.

### 5.1.5 Water quality and ecology

[070] Some submitters<sup>46</sup> were concerned about potential adverse effects on water quality and Lake ecology (primarily fish and Dabchicks). For the applicant potential adverse effects on native fish were assessed by Dr Dave Rowe and potential adverse effects on birds was assessed by William Shaw. The applicant did not call those authors as witnesses but we have read their reports and agree with the summary of their conclusions as presented in the evidence of Mr Woolhouse:

- Dr Rowe initially concluded that *"... there are no effects on the proposed drop in water level that could be considered to be more than minor on any of the species habitats or movements. Hence the abundance and growth of these fish in Lake Rotoiti will be unaffected"*;
- Following a consideration of concerns expressed by the Lakes Water Quality Society he advised *"...some impacts to the shallow margin of the littoral zone in lake Rotoiti could well occur following a prolonged period of low lake level (to around 278.85m). Although the marginal vegetation (i.e. emergent plants and turf – forming species) would be damaged in the relatively few places where they occur in this lake, the overall effects in invertebrates, water quality and sediment in the lake are expected to be less than minor."*
- Regarding effects on bird nesting (the only potential concern in terms of avifauna) Mr Shaw *"Bird nesting is unlikely to be affected as the trial will occur after the main breeding season", "Adverse effects on bird feeding habitat are very unlikely" and "Shoreline erosion effects (and related sedimentation effects on the littoral zone) are extremely unlikely, and any effects on the turf zone and on the vegetated littoral zone will recover quickly. Adverse effects on bird breeding and feeding habitats are very unlikely."*

<sup>45</sup> Paragraph 14.

<sup>46</sup> Including the Lake Water Quality Society represented by Donald Atkinson.

[071] The potential water quality and ecological effects were also addressed by Keith Hamill as part of the Section 42A Report. He advised:<sup>47</sup>

- *Drawdown of Lake Rotoiti to 150mm below the minimum consented range is very unlikely to cause an adverse effect in overall lake water quality. It is possible that there are localized effects on water quality (e.g. temperature) in very shallow areas with poor mixing, but these will be primarily an extension of natural spatial variability. Overall effects of this will, in my view, be low or negligible;*
- *The risk of adverse effects on dabchick nests is low because the drawdown is programmed to occur after the main breeding season and the magnitude of drawdown is relatively low;*
- *Increased fluctuations in lake water level tends to result in wider beaches and less aquatic weed in shallow area, but the effects will be low because the proposed draw down is relatively small;*
- *There may be some short-term effects on water levels in adjacent wetlands however most wetland plants are adapted to fluctuating water levels and for the magnitude of drawdown, duration and timing, the overall effects are expected to be low*
- *Kakahi and koura were not explicitly addressed in the [Rowe and Shaw] reports. However, any reduction in habitat for these species will be small, considering that these species have a wide depth range, and recognizing the short-term reduction in water level being considered and the small rate of draw-down (<5cm per day);*
- *A June drawdown could potentially affect trout migration to spawning habitat in the Te Toroa Stream if it has not had time to cut down to a new level. Given the small water level reduction the risk is low, but it could be further reduced by making the draw down period from 1 March to 1 June, (instead of 1 March to 30 June);*
- *If [a manual] inspection shows that the Te Toroa Stream is not flowing across the beach to the lake as surface water, then its path across the beach should be manually deepened to using hand tools<sup>48</sup>; and*
- *Overall, effects on trout spawning are expected to be low because the draw-down in outside of the spawning period, in addition, direct effects on the spawning areas is expected to be low;*

[072] As we noted earlier, Mr Suren also provided ecological evidence for the applicant. Regarding the possibility of the trial he advised:<sup>49</sup>

*"I can see no ecological mechanisms why a slight reduction in lake water level for a relatively short period of time (up to 47 days) would trigger an algal bloom. Algal blooms occur in response to a mixture of high nutrients, high temperatures, and periods of settled weather where algal cells can remain floating on the surface. ... this lake lowering trial will occur during cooler months of the year when growth rates of phytoplankton are naturally lower."*

[073] On the evidence we find that potential adverse effects on water quality and ecology have been comprehensively assessed and will be no more than minor.

#### 5.1.6 Māori cultural values and interests

[074] Given the intent of the 'trial' is to enable Ngāti Pikiao to inspect beaches and sites of cultural significance around the Lake that are located below the current operational lake level, we find that there are no adverse effects on Māori cultural values and interests associated with granting the application. We discussed the positive effects that would accrue to Ngāti Pikiao in section 5.1.1 of this Decision.

#### 5.1.7 Overall conclusion on effects

[075] We have found that the proposal will have positive effects for Ngāti Pikiao and perhaps for the BOPRC. It will have less than minor adverse effects on Lake water quality and ecology.

<sup>47</sup> Section 42A report, Table 1 and emails from Keith Hamill dated 24 March 2022 and 9 May 2022 appended to the Section 42A Report (Technical Inputs). Email from Keith Hamill to Phillip Brown dated 3 August 2022 provided in response to our Minute 2..

<sup>48</sup> Mr Brown advised (email dated 31 August 2022) that would require a discretionary activity consent under RNRP Rule BW R36. Consequently, we cannot impose a condition to that effect.

<sup>49</sup> Memorandum dated 5 September 2022, section 4.

- [076] We accept that amendments that the applicant has made to the original proposal, such as moving the Lake draw down trial to the autumn and winter months, have mitigated the potential adverse effects of the original proposal.
- [077] However, the issue we need to address is, what if any mitigation the applicant is proposing with respect to any adverse effects of a 250mm to 350mm lower Lake level during the possible 44 days (if we accept Mr Bruere's evidence on that matter in preference to Mr Woodhouse's evidence) or up to 112 days (if we accept Mr Woodhouse's evidence on that matter in preference to Mr Bruere's evidence) that the Lake level will be deliberately lowered.
- [078] During the 12 April to 30 June period (and possibly beyond that taking into account Lake refilling) when the Lake is drawn down below the current minimum consented level of RL 279.00m, the evidence from submitters is that the proposal is likely to have more than minor adverse effects on navigation and safety, private boat ramp and jetty owners and users, recreational users of public boat ramps, and business activities that rely on access to the Lake and navigation around it. During that period those effects will not be mitigated.
- [079] For example, the applicant has not offered to provide alternative temporary boat launching and retrieval facilities that would be unaffected by a lower-than-normal Lake level.
- [080] **We therefore find that the 12 April to 30 June trial period aspect of the proposal should be declined.**
- [081] However, we note that in answer to our questions at the hearing Joe Tahana (President of the Ngāti Pikiao Environmental Society and a witness for the applicant) advised that the intent of the trial was to enable younger members (those under 40) of Ngāti Pikiao to view the exposed Lake shore areas so that they could determine for themselves if they wished to carry on 'the challenge' at the end of the current consent term, which we assume to be the seeking of a new lower Lake level regime at the expiry of the existing consent.
- [082] The current consent does not expire until 4 April 2047 and so it seems to us that there is no great urgency to enable the realisation of the 'intent' of the Lake level drawdown trial as enunciated to us by Mr Tahana.
- [083] We therefore turned our minds to the part of the proposal that would enable the trial to occur (subject to conditions of consent) on the first weekday after Waitangi Day. That part of the proposal would essentially 'build on' natural low Lake levels and involve drawing the Lake level down from RL 278.945m to RL 278.85m, which amounts to an additional drop in Lake level of 95mm. We note that many of the submitters who spoke at the hearing told us that they had adapted to, and were able to cope with, low Lake levels that naturally occurred from time as a result of extended periods of low rainfall (such as during a drought). It was the 'artificial' nature of the 12 April to 30 June trial period that caused concern.
- [084] In her written Reply submissions<sup>50</sup> counsel for the applicant stated "*...the Lake has the potential to fall to levels close to the drawdown target quite aside from the Proposal, such as the drought in the summer of 2020.*"
- [085] We were also mindful of Mr Bruere's advice to us, which was that during the period since January 2019 the Lake had dropped below the minimum level of RL 279.000m on at least four separate occasions. On 22 March 2020 the Lake was as low as RL278.929m which is within 79 mm of the proposed trial drawdown level of RL 278.850m. It appears that there are times when natural climatic conditions would almost enable an inspection of the Lake and its margins at the low Lake level sought by Ngāti Pikiao.
- [086] **We therefore find that the "Waitangi Day" trial aspect of the application should be approved.** However, we see no reason why it should be limited to a particular time of year. If climatic conditions are such that

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<sup>50</sup> Paragraph 33(b).

the Lake is already well below its minimum operating level of RL 279.00m, then we assume that navigation and safety would already be adversely affected and private boat ramp and jetty owners and users, recreational users of public boat ramps, and business activities that rely on access to the Lake and navigation around it, will already have had their normal activities compromised. On that basis we assume that an additional 95mm drop in Lake levels is unlikely to result in significant additional constraints on those already compromised activities.

[087] In making that assumption, we are conscious that several submitters informed us that the 'safe' Lake level for navigation and access to boat ramps and jetties was the well-established and widely accepted operating range of RL 279.10m to RL 279.40m. On that basis of that evidence, it seems likely that normal activities will begin to be compromised at a Lake level of RL 279.10m.

[088] Having said that, we see no need to allow the Lake to be held at a low level for 7 days. As the Lake would have been dropping in level naturally for some time the consent holder will have ample forewarning that a trial can be attempted. We therefore find that a 5 day 'holding' period is sufficient.

[089] We therefore conclude that, subject to our assessment of its consistency with the statutory instruments, the section 127 application can be granted in part as outlined above.

## 5.2 National environment standards and other regulations

[090] We have discussed the NES-FM in section 4.4 of this Decision and no other relevant national environmental standards or regulations were brought to our attention and we are not aware of any.

## 5.3 National policy statements

[091] The NPS for Freshwater Management 2020 (NPSFM) is applicable. The NPSFM 2020 was assessed by Mr Brown<sup>51</sup> and based on his assessment of the RPS and RNRP in relation to water quantity, water quality, kaitiakitanga and tangata whenua values, and integrated management he concluded that the proposal was "generally consistent" with the outcomes sought by the NPSFM.

[092] No other party, including the applicant, presented any planning evidence.

[093] We note that the sole Objective 2.1(1) of the NPSFM 2020 is:

The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:

- (a) first, the health and well-being of water bodies and freshwater ecosystems
- (b) second, the health needs of people (such as drinking water)
- (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future

[094] On the evidence we are satisfied that the proposal does not offend Objectives 2.1(1)(a) and 2.1(1)(b).

[095] The application is primarily directed at achieving Objective 2.1(1)(c) for Ngāti Pikiao. However Objective 2.1(1)(c) is also relevant to the social and economic well-being of the lake users. There is no weighting to be applied to the three well-beings. On that basis we find that granting the section 127 application in part would not be inconsistent with Objective 2.1

[096] We consider that most relevant NPSFM policies are Policy 1, 2, 9, 10 and 13.<sup>52</sup>

[097] Policy 1 relates to Te Mana o te Wai which the NPSFM (section 1.3) states" ... is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the

<sup>51</sup> Section 42A Report, section 9.4.

<sup>52</sup> The remaining policies relate to procedural matters; BOPRC plan making, the use and development of land, or features that are not adversely affected here (natural inland wetlands and outstanding water bodies).

*health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community."* Granting the section 127 application in part would be consistent with that concept.

- [098] Policy 2 is that tangata whenua are actively involved in freshwater management (including decision making processes) and Māori freshwater values are identified and provided for. That will be clearly achieved by granting the section 127 application in part. That will not adversely affect the habitats of indigenous species or trout and the purpose of the proposal is to enable tangata whenua monitoring (or observation) of Lake edge conditions. Granting the section 127 application in part is therefore consistent with NPSFM Policies 9, 10 and 13.

#### **5.4 New Zealand Coastal Policy Statement**

- [099] The New Zealand Coastal Policy Statement is not relevant.

#### **5.5 Regional Policy Statement**

- [100] The Bay of Plenty Regional Policy Statement (RPS) became operative on 1 October 2014. The RPS provisions were assessed by Mr Brown.<sup>53</sup> Mr Brown considered that relevant RPS provisions related to integrated resource management, iwi resource management, matters of national importance and water quality and water quantity. We note his conclusions to be:

- the proposal was consistent with RPS objectives and policies relating to integrated resource management;
- the proposal promotes principles of Iwi Resource Management and is consistent with RPS Objectives 11 and 12, and Policies IR 3B and IR 4B, as it enables Ngāti Pikiao to practice kaitiakitanga over Lake Rotoiti and is not contrary to the Te Arawa Cultural Values Framework Iwi Management Plan;
- the proposal was consistent with matters of national importance Objectives 18, 20, 21, 22, and Policies MN 1B, MN 3B, MN 7B, MN 8B, MN 5B because the Lake level trial will be undertaken with the support of Ngāti Pikiao over a limited duration and on a one-off basis, any disruptions to public lake access will be short term and the drawdown will adversely affect ecosystems in Lake Rotoiti; and
- the proposal was consistent with provisions relating to water quantity and quality. His conclusion on water quantity was based on his view that the proposal would not adversely affect the use and enjoyment of the Lake from a recreational, social and economic perspective in the long term.

- [101] We accept Mr Brown's assessment and, on that basis, we consider that granting the section 127 application in part would also be consistent with the RPS.

#### **5.6 Regional plans**

- [102] The relevant regional plan is the Regional Natural Resources Plan (RNRP). The provisions of the RNRP were assessed by Mr Brown.<sup>54</sup> We note his conclusions to be:

- the Lake level trial would have no impact on Lake levels in the long term and it will enable a degree of 'mauri monitoring', in accordance with the recommendations of the CMP. The Lake Level Control Observation Monitoring Plan provided a framework for Ngāti Pikiao to observe key beaches and sites, observe the Lake itself, report on their findings, and discuss observations/findings with the wider community. Consequently, the proposal was consistent with the outcomes sought by the RNRP kaitiakitanga objectives and policies; and
- as the proposed one-off and temporary Lake level drawdown trial does not introduce a new artificial lake level management regime, it is consistent with the RNRP objectives and policies relating to the integrated management of water and the water quality of lakes and the objectives and policies that relate to water quantity.

<sup>53</sup> Section 42A Report, section 9.2.

<sup>54</sup> Section 42A Report, section 9.1.



- [103] We accept Mr Brown's assessment of the proposal against the provisions of the RNRP and, on that basis, we consider that granting the section 127 application in part would also be consistent with the RNRP.

### 5.7 Iwi and hapū management plans

- [104] No iwi and hapū management plans were drawn to our attention in the applicant's AEE and evidence,<sup>55</sup> nor in Mr Brown's Section 42A Report.

### 5.8 Duration

- [105] The issue of duration is not relevant because under section 127(1)(b) of the RMA "*no holder of any consent may apply for a change or cancellation of a condition on the duration of the consent.*"

### 5.9 Other matters

- [106] Mr Brown addressed three other matters in section 9.5 of his Section 42A Report.
- [107] He firstly referred to the Te Arawa Lakes Settlement Act 2006 (TALSA) because some submitters considered that the proposal was illegal under the TALSA, which assures recreational use of the Lake and continuance of existing lake structures. In her opening legal submissions<sup>56</sup> counsel for the applicant stated "*These provisions<sup>57</sup> seek to preserve the right of structures to remain and recreational activities to occur without regulation by TALSA. They do not provide a continued assurance of structure occupation or access, or recreational use, under the RMA which governs this Proposal.*"
- [108] Mr Brown also noted that some submitters considered that the proposal was contrary to the Special Lease of Crown Land under Section 67(2) of the Land Act 1948. Counsel for the applicant submitted<sup>58</sup> "*One submitter argues the change is contrary to the special lease of Crown Land under s67(2) of the Land Act 1948. That provision enables the Crown to enter in to a lease for land it does not wish to dispose of. It does not raise an obligation which would require consideration as part of a s127 application under the RMA in respect of a resource consent which has already been granted.*"
- [109] Mr Brown advised that the BOPRC are deemed to be a Person Conducting a Business or Undertaking (PCBU) under the Health and Safety at Work Act 2015 (HSWA) and so they have obligations to meet with regards to the Lake drawdown trial. Counsel for the applicant submitted<sup>59</sup> "*The Applicant acknowledges its obligations under the Health and Safety at Work Act and the need to meet all other relevant statutory requirements.*" In her written Reply submissions counsel clarified that "*It is also incorrect to suggest that Council has responsibilities under the HSWA for maritime safety issues occurring on the Lake. It is the MTA which governs those matters. ... While the Council is responsible (through its Chief Executive) for providing safe working conditions for Council employees (including the harbourmaster) when they are working on the Lake, it is not responsible for the general conduct of the public using the Lake.*"<sup>60</sup>
- [110] We find that these 'other matters' do not weigh against granting the section 127 application in part.

## 6 Part 2 matters

- [111] Following the Court of Appeal's judgement on *RJ Davidson Family Trust v Marlborough District Council* we have not separately assessed Part 2 matters as we consider that the relevant plan provisions have clearly given effect to Part 2 and so assessing the Part 2 matters "*would not add anything to the evaluative exercise*". We note Mr Brown was of the same view.<sup>61</sup>

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<sup>55</sup> Including that of Joe Tahana.

<sup>56</sup> Paragraph 82.

<sup>57</sup> Section 32 of that Act.

<sup>58</sup> Opening submissions, paragraph 83.

<sup>59</sup> Opening submissions, paragraph 32.

<sup>60</sup> Paragraph 12.

<sup>61</sup> Section 42A Report, section 10.

## 7 Determination

[112] Pursuant to the powers delegated to us by the Bay of Plenty Regional Council under section 34A(1) of the Resource Management Act 1991, we record that having read the application documents, evidence and legal submissions; the BOPRC Section 42A Report; the submissions and submitter evidence, and having considered the various requirements of the RMA, we find that the section 127 application can be granted in part because:

- a) Based on the evidence before us, the actual and potential adverse effects of granting the application in part will not result in significant adverse effects on the environment over and above those occurring naturally in a period leading up to an attempted Lake level lowering trial and, in all likelihood, any additional constraint on activities undertaken on the Lake during a successful trial will be no more than minor; and
- b) Granting the application in part is not inconsistent with the provisions of the relevant statutory instruments.

[113] We therefore grant the application lodged by Bay of Plenty Regional Council - Integrated Catchments (applicant) in part to allow a one-off reduction in the water level of Lake Rotoiti for the purpose of enabling an inspection of the Lake shore to address matters raised in the Cultural Management Plan<sup>62</sup> prepared on behalf of on behalf of the Ohau ki Rotoiti Kaitiaki Group and Ngāti Pikiao Environmental Society (NPES).

[114] Our reasons are summarised above and are expanded upon in the body of this Decision.

## 8 Conditions

[115] Having concluded that the section 127 application can be granted in part we have considered what changed conditions should be imposed.

[116] There is clearly no need for the conditions that related to the 12 April to 30 June aspect of the trial. There is also no need to mandate a Lake Level Control Observation Monitoring Plan because the BOPRC and Rotorua Lakes District Council can undertake whatever monitoring or observation of Lake side facilities that they consider to be appropriate at the time. We do not need to compel them to do so. Similarly, members of the public can make and record whatever observations they wish to during a successful trial.

[117] We see merit in consent conditions that require the consent holder to facilitate observation of the Lake shore conditions by Ngāti Pikiao, given that is the primary aim of the whole exercise. However, consent conditions should not preclude the consent holder involving others parties to participate in the 'observation exercise'.

[118] We also see merit in ensuring that a successful deliberate lowering of the lake to RL 278.85m only occurs once during the remaining duration of the consent. We note Mr Tahana seemed content with such a constraint.

[119] In light of the concerns expressed by submitters, we also see merit in the applicant's proposed condition regarding the Okere Falls Voluntary Rural Fire Force and Rotorua Lakes Coast Guard that was offered as part of the written Reply submissions. We have imposed that condition in a modified form.

[120] The changed conditions are attached. We consider them to be well within the scope of the changed conditions recommended to us by Mr Brown in Appendix 1 his Section 42A Report and by the applicant in their Reply submissions.

[121] It is conceivable that the attached changed conditions may contain minor errors or omissions. Accordingly, should the applicant or the Bay of Plenty Regional Council in its regulatory capacity identify any minor

<sup>62</sup> Cultural Management Plan for Okere Gates and Ohau Weir, Atkins Holms Majurey, 7 October 2016 ["the CMP"]

mistakes or defects in the attached conditions, then we are prepared to issue a revised schedule of changed conditions under s133A of the RMA correcting any such matters. Consequently, any minor mistakes or defects in the changed conditions should be brought to our attention prior to the end of the 20-working day period specified in section 133A of the RMA.

Signed by the commissioners:

*Poto Davies.*

Poto Davies

A handwritten signature in dark ink, appearing to read 'Rob van Voorthuysen', with a long horizontal stroke extending to the right.

Rob van Voorthuysen (Chair)

Dated: 6 October 2022

### Conditions to be changed under CH22-02259 (65979)

#### ***New condition under the heading Purpose (assuming the existing condition is relabelled 2.1)***

- 2.2 To enable a one-off temporary draw-down of the Lake level to RL278.85 metres for a maximum period of 5 days to give effect to a joint proposal by the Bay of Plenty Regional Council and the Ngāti Pikiao Environmental Incorporated Society to enable observation of the Lake shore at that time.

#### ***New Conditions***

- 7.5 Notwithstanding conditions 7.4(a) to (e), but subject to conditions 7.4(f) to (j) with any necessary modifications, the consent holder may draw down the Lake level to RL 278.850 metres on one occasion only during the duration of this consent. The Lake may be held at RL 278.850 metres for up to 5 days.

- 7.6 The Lake level draw down enabled by Condition 7.5 may only be attempted if:

- a. the Lake has reached RL 278.945 metres under the normal operating conditions set in in Condition 7.4; and
- b. the consent holder has complied with conditions 7.7 to 7.10.

- 7.7 The consent holder must consult the chairperson (or their nominee) of the Rotorua Te Arawa Lakes Operational Liaison Group (RTALOLG) at least 5 days prior to commencing the draw down attempt.

*Advice Note: The purpose of the consultation is to enable the chairperson of the RTALOLG to discuss the proposed draw down with RTALOLG members and provide any feedback to the consent holder prior to the drawdown commencing.*

- 7.8 The consent holder must provide written notice to the following organisations at least 2 days prior to commencing the draw down attempt. That notice must identify the date and anticipated start time of the draw down attempt. Written notice may be provided by email to a confirmed email address provided by the relevant organisation representative:

- a. Ngāti Pikiao Environmental Society;
- b. The Chair of the RTALOLG;
- c. The Chair of the Lake Rotoiti Community Association (LRCA);
- d. The Commodore of the Bay of Plenty Trailer Boat Squadron;
- e. The Chair of the Lake Rotoiti Classic and Wooden Boats Association; and
- f. Rotorua Lakes District Council.

- 7.9 The consent holder must, at least 2 days prior to commencing the draw down attempt:

- a. Place signage at all Lake Rotoiti public boat ramps advising of the draw down attempt;
- b. Prepare and provide to the chairperson of the LRCA for their use a written media release or other communication regarding the draw down attempt;
- c. Publicise the draw down attempt on the Bay of Plenty Regional Council website and on other social media forums being utilised by the Bay of Plenty Regional Council at that time; and
- d. Provide notification the draw down attempt to local news media.

- 7.10 Prior to undertaking the draw down attempt, the consent holder must have received written confirmation from both the Okere Falls Voluntary Rural Fire Force and Rotorua Lakes Coast Guard that they are satisfied that they can conduct their operations effectively during the potential draw down period. The consent holder must provide a copy of that written confirmation to the Bay of Plenty Regional Council and the organisations listed in condition 7.8 prior to undertaking the draw down attempt.

- 7.11 The consent holder must facilitate an inspection of the Lake shore by representatives of Ngāti Pikiao during the 5 days when the Lake may be held at RL 278.850 metres. The consent holder may involve other parties in the inspection, including but not limited to representatives of the bodies list in condition 7.8.