

BEFORE THE NORTHLAND REGIONAL COUNCIL

IN THE MATTER OF

The Resource Management
Act 1991

AND

IN THE MATTER OF

A resource consent
application by Mr Doug
Schmuck C/- Dougs Opua
Boatyard and Interesting
Projects Limited to the
Northland Regional Council

NRC APP. 041365.01.01

**RESPONSE TO COMMISSIONER MINUTE 4A DATED 7TH SEPTEMBER 2020
PREPARED FOR NORTHLAND REGIONAL COUNCIL BY ALISTER
HARTSTONE**

September 2020

Purpose of this Statement

1. This statement is prepared as a formal response to matters raised by the Commissioner in Minute 4A dated 7th September 2020 ('the Minute') regarding a set of draft conditions and ancillary matters following receipt of the Applicants written Right of Reply.
2. The following response addresses the items in the Minute in the order that they are raised. In providing this Minute, I acknowledge the assistance of Mr Paul Maxwell in providing advice on several matters.

Response to Applicants suggested Changes to Conditions

3. The Commissioner has requested that I provide *'a brief statement regarding his (my) position on each of Mr Hood's suggested changes (including all the minor changes). Where Mr Hartstone disagrees with Mr Hood I request that reasons be provided.'*
4. I have reviewed Mr Hoods statement dated 31st August 2020 as well as the document entitled 'H2 Draft Conditions Clean Final 31.8.20 (BH Edits)' – I will refer to this as the 'Right of Reply Conditions'. I understand the Commissioner's instructions require consideration of all changes, including minor changes, identified in the Right of Reply Conditions. Where the changes do not relate to a specific condition, I will reference the page number. On that basis, I comment as follows.
 - a) Pg 3 – inclusion of *'Town of Opua'* is accepted to provide full statement of the legal description of the site.
 - b) Condition 7(d) – reference to 'collection' rather than 'treatment' is accepted. Washwater will be directed to the sewer system rather than treated on the site. Condition 7(e) more specifically addresses the stormwater treatment system.
 - c) Condition 13 – I agree that reference to 'commencement' as amended is acceptable as this better reflects the requirements of Section 116. However, inclusion of *'...commencement in accordance with Section 116...'* (addition underlined) may assist further.
 - d) Condition 13 (a) and (b) – The amendments are accepted in all respects. They clarify / correct the consents that are relevant (as opposed to the conditions) under Bundles A and B and avoids repetition. It is noted that under Bundle A i. a correction should be made to reference *'AUT.041365.09.01'* (addition underlined). The reference to AUT.041365.08.01 is accepted as that relates to use of the marina berths, which follows the works provided for under consents specified in Bundle A.
 - e) Condition 14 - Reference to 'debris' rather than 'refuse' is accepted. 'Debris' better describes any material that is required to be removed in accordance with the condition.

- f) Condition 16 - Inclusion of the words 'by' is accepted, although the correct grammatical approach may be to state '*....that relate to occupation of coastal marine area by, and use of, a jetty structure within one month....*'
- g) Condition 31 – The changes to the body of the condition and Clauses (a) and (b) are accepted. They reflect minor changes to the previous wording without affecting the intent. Clause (c) has been amended to reflect specific times where public access is allowed and includes additional limitations on activities that may take place on the wharf. My understanding is that there is a presumption of public access in the coastal marine area and any structures within it unless there is a specific reason for it not to be provided or be limited in some way. When read together, I consider that the condition inclusive of clauses (a) and (b) but excluding (c) reflects 'reasonable access' and would be commensurate with the previous Court-imposed condition on the 2002 resource consent.

I appreciate that there is balance to be struck that allows the wharf to be used for its intended purpose/s but must allow for reasonable public access. I note that there is no security gate existing at present, evidence at the hearing did not indicate any existing problem with security, the proposal now includes two marina berths which could be continuously occupied over an extended period of time, there is no direct public road/vehicular access available to the wharf, and the wording of other conditions imposed by the Regional Council on other marina/wharf activities¹. In addition, what is now proposed in the Right of Reply Conditions moves some way from what was offered at the hearing.

I am concerned that public access is available only when certain persons (referred to as '*consent holders of the facility*') are on-site. When those persons are absent for any reason public access may not be available. I do not consider that approach will provide for reasonable public access. I consider the situation to be different to the operation of a large(r)-scale marina activity involving a marina management company or similar entity that is actively on site on a daily basis. Hence, Clause (c) was included prior to amendment in the Right of Reply Conditions to ensure unrestricted public access was available during specified times (rather than just 'daylight hours') with the only limitations on public access being outside the specified hours or when working conditions require.

I cannot comment directly on the exclusion of fishing, collection of seafood, and the bringing of any equipment onto the structures as this was not discussed at the hearing. It is not clear why these activities would be specifically excluded at any time other than '*....when working conditions require.*'

- h) Condition 34 – The deletion of the condition is not accepted. I acknowledge Mr Hood's concerns with this condition. However, the purpose of the condition is not confined to monitoring of stormwater discharges. Metal concentrations in sediments may result from activities other than stormwater discharge, notably where compliance with some of the conditions particularly relating to sanding and

¹ By way of example, a condition included in the Opuia Marina consent AUT008385.45.4 states '*The Consent Holder shall not limit access to and reasonable use of....the marina piers by the pedestrian public during daylight hours by arrangement with the Marina Management. The Consent Holder shall erect signage on the pier gateways to advise the public of availability of public access.*'

grinding activities are not complied with. In addition, it is noted that any effects and results may be cumulative over time. Given the consent period of 35 years and proximity to the shellfish bed, it is considered appropriate and prudent to monitor this component of the activity.

Mr Hood states that *'...FNDC discharge consent has no conditions relating to sediments, and some rather vague and virtually unenforceable conditions relating to water quality. Proposed Condition 34 is completely inequitable in that respect.'* The lack of conditions in the FNDC consent is acknowledged but that does not justify exclusion of the condition/s in the current consent. The Regional Council may seek to review the conditions imposed as part of the FNDC consent if there is a concern that appropriate conditions have not been imposed on that consent.

- i) Condition 35(a) – The minor amendment to wording is accepted. It does not change the context or intent of the condition.
- j) Condition 37 – The minor amendment to replace 'wharf' with 'working berths' is accepted for clarity purposes.
- k) Condition 38 – The amendment is not accepted as addressed in h) above.
- l) Condition 43 – The minor amendment to wording is accepted as a typographical error.
- m) Conditions 49 – Inclusion of the word 'chart' is accepted. This is consistent with other wording in the condition referring to 'chart datum'.
- n) Condition 51 – The deletion of the condition restricting maintenance dredging to once in any consecutive 12 month period is accepted. Maintenance dredging is not an activity that should occur on an on-going basis due to potential on-going disturbance effects. However, practically it is an activity that is done as seldom as possible due to cost and interference with existing activities and would be unlikely to be carried out more than once in any 12 month period as a matter of course. There is no specific reason to limit dredging activities in this location
- o) Changes to Schedule 2 – the Amendment is not accepted for the reasons outlined in h) above.

Condition 31(c) – Public access

- 5. Para 6 of the Minute requires confirmation of Condition 31(c) as presented in the conditions agreed by the Northland Regional Council as part of the Right of Reply. I confirm that I have formed the view that a gate is acceptable and that it should be open during the hours specified in the Right of Reply Conditions unless working conditions require. An initial track changes version recorded 'daylight hours'. However, more certainty was sought regarding what that meant. This resulted in the specified hours as contained in the Right of Reply Conditions.

Condition 31 – Security Gate Options

6. Para 7 of the Minute requests further information about security gate options provide for automatic / pre-programmed locking and unlocking of a gate. I have sought and received advice as per the link attached below that includes timers that can be programmed ('Prime Time Digital Timer'). I have been advised that these systems have software 'add-ons' that can be used. In addition, the systems allow operation of the gate remotely, ie. it can be locked/unlocked remotely without having to be on-site.

<https://www.assaabloyopeningsolutions.nz/Other/Securitron/Documents/Brochures/GateLocksAndAccessories/Gate-Fence-Catalog.pdf>

7. This information was passed on to Mr Hood. He advised that he had '*Nothing to add on the gate.*'

Condition 34 – Difference in suggested wording of Condition 34

8. Para. 8 of the Minute requests advice regarding changes to the wording of Condition 34. Firstly, I note that Dr Wilson's letter dated 27th August 2020 was not sighted by myself or Mr Maxwell before finalising the conditions as presented in the Right of Reply. Hence, the wording provided by Dr Wilson was not able to be adopted in the conditions at that time.
9. It is agreed that Dr Wilson's wording of the condition achieves the same intent.

Condition 38 – Monitoring of E Coli

10. Para. 9 of the Minute requests clarification regarding monitoring of E. coli. In discussion with Mr Maxwell, it has been confirmed that monitoring of E. coli is required on the basis of longer-term occupancy of the marina berths and risk of discharges. The provisions in Schedule 2 have been developed by the councils monitoring team as a means of addressing concerns around, and monitoring for, discharges of untreated sewage. Similar conditions and schedule requirements have recently been imposed on replacement consents for the Town Basin marinas and Port Nikau marina in the Hatea River and the marina at Marsden Cove.
11. Schedule 2 of the conditions includes specific reference to E. coli testing. However, there is no link between any condition of the consent and the requirements of Schedule 2 in this respect. Condition 32 in the Right of Reply Conditions is intended to be the condition that directs monitoring of E. Coli but it is acknowledged that this needs to be explicit in the condition. Therefore, Condition 32 should be amended to read as follows:

'There shall be no discharge of untreated sewage into the coastal marine area from vessels berthed at the marina. For compliance purposes, water quality sampling for any E. coli associated with discharges of untreated sewage will be determined in accordance with Schedule 2 attached by way of direct observation of discharges as well as by identification of the presence of human PCR markers within water samples from the marina where these are not present in background water quality.'

Condition 62 – Amended Wording

12. Para. 10 of the Minute request amended wording for Condition 62. I note that the statement of Mr Papesch provided in the Right of Reply had not been sighted by myself or Mr Maxwell before finalising Right of Reply Conditions.
13. Amended wording for condition 62 is provided as follows (with added wording underlined):

'All stormwater from areas of land used for the maintenance of vessels shall be directed to a proprietary stormwater treatment system for treatment prior to discharge to the coastal marine area. That proprietary stormwater treatment system shall utilise a demand driven diversion valve that shall automatically direct a minimum of 2.4m³ of wash down water (trade waste) to the public sanitary sewer system as a 'first flush' when the water blaster is activated. In addition, specific provision shall be made for a 'first flush' of 10 mm of rainfall. The consent holder shall ensure that the slipway is cleaned after any waterblasting of vessels.'

Condition 63 – Rationale for Dilution Factor and Specified Limit

14. Para. 11 of the Minute queries various components of Condition 63. Advice has been sought and received from Northland Regional Council staff regarding the matters raised. The advice received is summarised as follows.
15. The derivation of the dilution factor applied to the heavy metal concentrations in the stormwater discharges as a condition of consent have been calculated by applying a dilution factor of 11 to the coastal water quality standards required by Policy H.3.3 of the PRP. The appropriate dilution factor for this discharge has been determined by council staff using Table 3.3 of a report "Whangarei Harbour Stormwater Dilution Modelling" (Greer et al 2020)² prepared on behalf of the regional council by eCoast Ltd based on a small catchment size (Catchment A – less than 15,000 square metres) using the lower zone with a 30-metre mixing zone and 1-year return interval event. Council staff advise that a similar mixing zone / dilution factor for point of discharge water quality sampling has been applied to the Opua Marina Boat Yard consents.
16. The change in the condition addressing Total Suspended Solids (TSS) was based on an email exchange between Council's Coastal Scientist and Stormwater360 representative in late May 2020. That discussion identified that the 20mg/l requirement proposed was too stringent and not likely to be achievable. The 100 mg/l standard referred to in the Right of Reply Conditions is typically a measure applied to stormwater discharges diverted from areas with land disturbance activities after reasonable mixing. The limit proposed is at point of discharge so would be more dilute at the mixing zone.
17. The Stormwater 360 representative included the following comment: *'This (20mg/l) is the most stringent TSS removal requirement I have seen internationally, across several approvals in the USA, Canada, Australia and New Zealand. I would even suggest that*

² <https://www.nrc.govt.nz/resource-library-summary/research-and-reports/coastal/whangarei-harbour-stormwater-dilution-modelling-greer-et-al-2020/>

this is not achievable, but again it depends on the influent TSS concentration. There is a significant difference between 100mg/l influent TSS and 600mg/l influent TSS, that's the difference between a quiet carpark and a main road.'

18. The removal of previous Clause a) as it relates to particle size was based on a conclusion that it was unnecessary following receipt of the advice from the Stormwater360 representative regarding the typical operating bounds and treatment associated with the system. That advice stated *'Typically pretreatment will aim to remove 50% of TSS with a particle size distribution d50 of 75µm, while basic treatment will aim to remove 75%+ of the same particle size distribution curve. In essence pretreatment aims to remove most of the material >75µm, basic treatment typically removes most of the material >20µm. This is largely controlled by Stokes Law, where the particle size will dictate whether it will settle in a system with a certain energy.'*
19. I have been advised that the advice referenced above was sought to inform the conditions for the current application by DOBY and conditions associated with the Opuā Marina boat yard facility.

Offensive Odour and Air Discharge Boundary

20. Para. 12 of the Minute requests advice on a change of opinion regarding the extent of the Offensive Odour and Air Discharge boundary ('the Boundary'). The application as lodged and considered in the Section 42A report included a boundary that encompassed the Exclusive Occupation Area in the coastal marine area and the property boundaries landward of mean high-water springs.
21. I acknowledge the response provided to the Commissioner during the hearing. As best can be recalled, the concern regarding the extent of the Boundary related to the 15 metre setback specified in Mr Stacey's evidence³, how that setback related to activities on the wharf and on land, and the resulting Boundary definition. It was understood that air discharges associated with grinding/sanding and water blasting (subject to the specified conditions) would be unlikely to disperse as far as the 15 metre requirement associated with application of anti-fouling and paints.
22. During discussions regarding draft conditions, the following points were considered:
 - a) The application as lodged, and as recorded in Condition 91 of the Right of Reply Conditions, provides for *'...spot application of antifouling paint using a brush for minor repairs not exceeding 200mm in diameter.'* Such works may be carried out within both the working berths and marina berths. Adopting the 15 metre setback requirement as per Mr Stacey's evidence, this justifies the Boundary extending 10 metre east (seaward) of the marina berths, and the distances shown north and south of the working berths.
 - b) The landward extent of the Boundary is effectively defined by the DOBY property boundary and public reserve land boundaries to the north and south (Secs 1 and 3 SO 68634). It would be possible to reduce the boundaries to extend no further than 15 metres from the slipway within the two reserves. However, that would introduce an arbitrary boundary across reserve land that would need to be defined

³ Pars. 77-81 of his Statement of Evidence dated 20th July 2020.

for the purpose of managing / monitoring discharges and odour on the reserve land. Defining this boundary would not preclude the public using the reserves but it could raise potentially complicated compliance matters for both the Council and the consent holder given the purpose of the Boundary and its potential location running across the middle of a public reserve.

- c) No submission was received from FNDC raising any concern about the extent of the Boundary illustrated in the application.
 - d) There is no practical purpose in reducing the Boundary as it relates to the DOBY property as this remains within the control of the consent holder.
23. Taking into account these matters it is accepted that the most appropriate approach in defining the Boundary is adopting that which has now been presented on Plan 4966. I acknowledge that the boundary defined on that plan is the same as was previously relied on by the applicant in the application.

Inclusion of AUT.041365.10.01 Earthworks in the coastal riparian management area (for slipway reconstruction)

24. Para. 13 of the Minute queries inclusion of a consent AUT.041365.10.01 Earthworks in the coastal riparian management area (for slipway reconstruction). As per Para. 13 of the Section 42A report, consent for this activity is not required and it should be deleted from the Right of Reply Conditions. I apologise for that oversight.

Mitigation for Water Blasting Activities

25. Para. 14 of the Minute requests confirmation of any condition that specifically requires vessels to be pulled up the slipway as far as practicable before they are water blasted. Having reviewed the Right of Reply Conditions, I can advise that no condition was explicitly included to require this.

26. Mr Hood has helpfully suggested that Condition 7 requiring an Operational Management Plan is an appropriate mechanism to address this issue and has suggested including the following clause under 7(g):

(iii) The location of water blasting activities on Area A relative to the walking track.

27. I consider inclusion of this clause is appropriate to ensure that the certified OMP includes the necessary mitigation measures to minimise effects of water blasting on the walkway. However, I have suggested that the wording be amended to read:

*(iii) The location of water blasting activities on Area A relative to the walking track.
Vessels are to be pulled up the slipway as far as practicable before they are water blasted.*

28. The purpose of the additional wording is to make the requirement more explicit. Mr Hood has considered this further amendment to his suggestion and advised that he does not consider the additional wording is necessary. I understand the reason for that will be explained by the applicant.

A handwritten signature in black ink, appearing to read 'Alister Hartstone'. The signature is written in a cursive style with a large initial 'A'.

Alister Hartstone