

Before the District Plan Hearings Panel appointed by Central Hawke's Bay District Council

In the matter of the Resource Management Act 1991 (RMA)

And

In the matter of the hearing of submissions on the Proposed Central Hawke's Bay District Plan

Legal Submissions for Central Hawke's Bay District Council in response to Minute 6 and matters raised in Hearing Stream 1

Dated 8 April 2022

May it please the Panel

Introduction

1. Minute 6 issued by the Hearings Panel following Hearing Stream 1 requested legal submissions "*with respect to what if any affect [Policy NFL-P5], once operative, would have on the [Ruataniwha Water Storage Scheme] RWSS Consents and their implementation*". My response is set out below.
2. I have also provided a brief response to the legal submissions of Ms Downing on behalf of Royal Forest and Bird, in relation to the same policy.

Effect of Policy NFL-P5

3. Minute 6 set out the following request for legal submissions:

The Proposed District Plan (PDP) contemplates the possibility of water storage in the Mākāroro Gorge through Policy NFL-P5:

NFL-P5 To recognise the regional social and economic significance of water storage within ONF-4 (Mākāroro Gorge) 4.

Evidence relating to NFL-P5 was presented during the PDP Natural and Coastal Environment hearing of 14-15 March 2022, both opposing and supporting it. A significant portion of that

evidence related to the Ruataniwha Water Storage Scheme (RWSS) and the resource consents granted by the Board of Inquiry into the Tukituki Catchment Proposal (RWSS Consents).

To assist in its deliberations, the Hearing Panel is requesting the Council's legal counsel to provide legal submissions with respect to what if any affect this policy, once operative, would have on the RWSS Consents and their implementation. The submissions are to be provided for circulation to all relevant parties by the close-of-business on Friday 8 April 2022

4. The RWSS is currently authorised by 15 regional consents from Hawke's Bay Regional Council and one land use consent each from Hastings District Council and Central Hawke's Bay (CHB) District Council.¹ There is also a designation for the primary distribution system in the CHB operative plan, proposed to be rolled into the proposed plan.
5. The CHB land use consent relates to:

All uses of land associated with the construction, operation and maintenance of:

- A water storage dam and the part of the associated reservoir within the Central Hawke's Bay District on the Makaroro River at Wakarara approximately 35km northwest of Waipawa including facilities for the generation of electricity and an associated transformer;
- Two water intake structures adjacent to the Waipawa River;
- A water outfall structure adjacent to the Mangaonuku Stream;
- A water outfall structure adjacent to the Kahahakuri Stream; and
- All associated works, earthworks (including gravel extraction), vegetation clearance, construction of roads and tracks, structures, proposed plantings, storage and use of hazardous substances, and ancillary activities to the extent required by the Central Hawke's Bay District Plan (including but not limited to the modification of Areas of Significant Nature Conservation Value) within the Central Hawke's Bay District.

6. In terms of what effect NFL-P5 as notified would have on the RWSS consents, I note the following:
 - (a) If the RWSS consents were to be implemented in their present form before they lapse, the policy would have no effect – that is, there would be no further decision-making required which would bring the policy into play;
 - (b) If there was an application to amend the conditions of the CHB land use consent, NFL-P5 would be 'had regard to' under ss 104 and 127 RMA;

¹ [HBRC Report](#), p 18.

- (c) NFL-P5 would be ‘taken into account’ under s 125 as part of any application to extend the lapse period of the CHB land use consent;
 - (d) If there was a requirement for a more than minor alteration to the CHB designation, there would be a requirement to have ‘particular regard to’ NFL-P5 under ss 181 and 168A RMA if the land affected fell within ONF4;
 - (e) NFL-P5 would not be relevant to any application to extend the lapse period of the CHB designation, as s 184 does not require consideration of plan provisions;
 - (f) NFL-P5 would be ‘had regard to’ under s 104 RMA for any new land use consent sought under the District Plan, provided the activity status was at least Discretionary, or under s 168A RMA for any new designation (assuming CHB was the requiring authority, otherwise s 171 RMA)
 - (g) NFL-P5 may be considered in passing in any amendments or extensions to the regional consents, or any new ones, under ss 104, 125 or 127, however the requirement is to have regard to “relevant provisions of” a plan or proposed plan, and the District Plan is unlikely to have significant relevance to the subject matter of the regional consents.
7. Importantly, none of the processes where NFL-P5 will or might be relevant direct a particular outcome. They direct the decision-maker to have regard to or take into account recognition of the regional social and economic significance of water storage, as one factor among all other relevant objectives and policies of the District Plan, and other matters referenced in s 104 and s 168A. In the case of ONF-4, which is proposed to apply to the Mākāroro Gorge, such other provisions include NFL-O1 which requires retention and protection of outstanding natural features from inappropriate use and development, and NFL-P3 which requires protection of the District’s outstanding natural features in various ways.

RFB Submissions

8. Having set out above the effect of NFL-P5 on the RWSS consents, I turn to the submissions of the Royal Forest and Bird Protection Society of New Zealand Inc (**RFB**) and what it says the policy means.

9. RFB argues that NFL-P5 essentially identifies water storage in the Mākāroro Gorge as creating “*a presumption that water storage should occur and that it is appropriate within ONF-4*”.² I disagree with that characterisation of the policy, and consider it discounts the requirement to assess objectives and policies in the round, both at this stage of determining the appropriate content of the PDP, and at the resource consent stage, when the provisions are applied to a particular proposal.
10. If policy NFL-P5 unequivocally stated that water storage in the Mākōroro was appropriate in the context of ONF-4 because of its economic and social benefits, then I would agree with much of Ms Downing’s criticism, however it does not. What the policy requires is recognition of the economic and social significance of water storage for the region as part of any wider assessment, amongst a number of other matters. If the physical aspects of a water storage proposal have such adverse effects as to fail to implement other objectives and policies in the chapter, or elsewhere in the PDP, then it is likely it will not be approved, regardless of any recognition of the social and economic significance. However where such effects might be minor or able to be mitigated, the recognition of the economic and social significance is a relevant factor that a decision maker should take into account when deciding whether it is appropriate for the consent to be granted.
11. In terms of the specifics of the RFB legal submissions, I make the following comments by way of reply.
12. In terms of the description of the statutory framework, and the role of Part 2 following *King Salmon*, Ms Downing’s submissions are consistent with my opening submissions, and there is no dispute as to the legal context of the Panel’s decision-making.
13. At paragraph 14, Ms Downing criticises NFL-P5 as identifying water storage in outstanding value areas as “*appropriate without proper consideration under the current and future planning frameworks*”. I disagree that this is the effect of including NFL-P5. As set out above, NFL-P5 is one of a number of objectives and policies that would be taken into account or had regard to when assessing new or amended consents. Had it been intended to identify water storage as appropriate in the way RFB asserts, then one would expect that policy to have been given effect

² Legal Submissions on behalf of RFB, Hearing Stream 1, 9 March 2022.

to through a rule in the NFL section making that activity permitted, controlled or restricted discretionary. The fact that there is no such rule supports the contention that NFL-P5 does not seek to single out water storage as automatically appropriate, but merely to flag the relevance of other factors in the consideration of whether a specific proposal is appropriate.

14. At paragraph 15, Ms Downing states it is incorrect to predicate plan provisions based on previously granted but unexercised consents. As a matter of principle, I do not consider that is correct. The fact that there are unexercised consents might well be relevant to the content of a plan, particularly where unimplemented consents form part of the receiving environment. It might also be the case that the assessment of the unimplemented consents has involved findings of fact as to the environment or particular values that are at stake that are entirely relevant to the content of a plan.
15. In this case, the process around consideration of the RWSS proposal occupied much attention and resource for the Central Hawke's Bay district and the wider Hawke's Bay region for a number of years, and involved detailed consideration of the environment and the effects – both positive and adverse – of the scheme. NFL-P5 seeks to reflect, in a relatively minor way, the recognition through that process of the economic and social significance of such a scheme. In my submission, there is nothing inherently inappropriate about doing so, again noting that any particular proposal will need to be assessed against the full set of applicable provisions in the PDP.
16. From paragraph 18, Ms Downing argues that an 'overall broad judgement' is unavailable, and that lower order planning documents cannot depart from national policy instruments. She uses the example of *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* where the High Court criticised the use of a 'proportionate response' to providing for regionally significant infrastructure in areas of high indigenous biodiversity.
17. In that case, however, there were clear directives set out in the New Zealand Coastal Policy Statement and the Regional Policy Statement, meaning, in *King Salmon* terms, that recourse to Part 2 was unavailable. Here, however, the NZCPS

is not applicable and the RPS does not contain any relevant directives,³ so the case is clearly distinguishable. Unless RFB is correct that the National Policy Statement on Freshwater Management 2020 (**NPSFM**) is applicable and covers the field in terms of the content of the NFL context (a proposition with which I disagree, as discussed below), then the present case falls into the class of activities where assessment under Part 2 is required.

18. From paragraph 23, the RFB submissions essentially argue that NFL-P5 contemplates development which is inherently inappropriate, and therefore fails to implement Objectives NFL-O1 and ECO-O1. The submissions argue that a water storage facility in the Mākāroro Gorge would fail to maintain the characteristics and values of the gorge.⁴
19. There is no evidence before the Panel to allow you to make that conclusion, and in my submission, it would be entirely inappropriate to assume that to be the case. Any proposal will need to be assessed on its merits, having regard to the objectives and policies, including, but not exclusively, to the direction to recognise economic and social significance of the proposed scheme. That recognition does not undermine or conflict with the objectives referred to by RFB, which will need to be applied on their own terms.
20. As noted above, RFB relies on the NPSFM being a policy document which directs the outcome of the NFL chapter, and which, according to RFB, means that NFL-P5 cannot properly be retained. With respect, that approach significantly oversells the relevance of the NPSFM to how district councils are required to approach management of their outstanding natural features.
21. The NPSFM is a complex document which contains a range of concepts which need to be interpreted in a regional context following active involvement from the community and tangata whenua. This includes active involvement of tangata whenua in identifying the local approach to giving effect to Te Mana o te Wai.⁵ The direction is to the Hawke's Bay Regional Council to engage with communities and tangata whenua,⁶ and my understanding is this process is at a very early stage.

³ Legal Submissions on behalf of RFB, Hearing Stream 1, 9 March 2022, para 36.

⁴ Legal Submissions on behalf of RFB, Hearing Stream 1, 9 March 2022, para 34.

⁵ NPS-FM, 3,4(1)(a).

⁶ NPS-FM, 3.2 Te Mana o te Wai

With respect, a submission from RFB as to what Te Mana o te Wai requires in this instance is premature at best, and, given there had been no tangata whenua input into RFB's views, at worst risks being contrary to the requirements of the NPSFM. In my submission, the Panel should exercise significant caution in assuming the NPSFM directs a specific outcome, particularly where that is said to reflect Te Mana o te Wai given there was no evidence before the Panel as to what that concept requires in this instance.

22. In my submission, including a requirement to recognise the social and economic significance of a water storage scheme does not automatically conflict with any of the matters identified in paragraph 40 of the RFB submissions as being required by the NPSFM, particularly when it is seen in the context of a policy in the Natural Features and Landscapes section. In particular:

(a) The NFL chapter is not directed at the 'health and well-being of water bodies and freshwater ecosystems' but at protecting outstanding natural features from inappropriate development. While the NPS-FM may be indirectly relevant, it is not directed at landscape matters and is not intended to direct outcomes in that sphere. It certainly cannot be said to have 'complete coverage' over relevant matters. In any event, the ability of people to provide for their social, economic and cultural well-being is not irrelevant under the NPSFM— it is simply a lower order priority than other matters. NFL-P5 does not purport to prioritise the economic and social benefits of water storage over other matters, but just to have economic and social significance recognised. This is entirely consistent with the NPS-FM objective;

(b) I agree that freshwater is to be managed in a way that gives effect to Te Mana o te Wai, however:

(i) This chapter is not specifically directed at management of freshwater;

(ii) What Te Mana o te Wai means for the Hawke's Bay region has not yet been defined, and can only be determined with active involvement from tangata whenua;

(iii) NFL-P5 is not inherently inconsistent with Te Mana o te Wai;

(c) In terms of the loss of river extent⁷ and protection of indigenous freshwater species, those policies are reflected in directions to the Regional Council,⁸ and would typically be relevant in applications for regional consent. As noted above, the relevance of NFL-P5 to assessment of applications for regional consents is likely to be very small, if it is relevant at all. In my submission it is a long bow to draw to argue that NPS-FM policies on river extent and freshwater species means that removal of NFL-P5 is necessary to ensure the PDP aligns with NPS-FM directives.

23. In short, RFB overplays the relevance of the NPS-FM in the context of the NFL chapter, and the extent to which NFL-P5 contradicts outcomes directed by that policy statement.

24. The comments from paragraph 45 of the RFB submissions elaborate on its argument that NFL-P5 is intended to signal water storage as being appropriate and that it undermines the requirement for protection of matters of national importance. I have responded to that characterisation of NFL-P5 above. In my submission, the policy refers to recognising the social and economic significance of water storage, but leaves it to the decision-maker to determine the relevance of those matters and whether the development is 'appropriate' in the context of other objectives and policies. It is therefore not inconsistent with the relevant objectives or the requirements of section 6 RMA.



Asher Davidson

8 April 2022

⁷ I note this is policy 7, not policy 6 as in the RFB submissions footnote 29.

⁸ For example, NPS-FM, 3.24 – Rivers; 3.26 – Fish Passage