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

---

Reply Submissions for Central Hawke's Bay District Council

Hearing Stream 7

Dated 27 January 2023

May it please the Panel

Introduction

1. These legal submissions respond to two matters raised at the hearing on 14 and 15 December 2022 and on which the Panel has requested further comment, namely:

   (a) A written record of comments made in relation to the FirstGas notice of requirement for designation;[1] and

   (b) Comment on matters raised by Transpower, Horticulture NZ and Federated Farmers by way of memoranda dated 13 January 2023.[2]

FirstGas Notice of Requirement

2. My legal submissions presented at the opening of Hearing Stream 7 set out the test for assessment of notices of requirement.[3]

---

1 Twentieth Memorandum and Direction of Hearing Panel, para 5.
2 Twenty-first Memorandum and Direction of Hearing Panel, para 8.
3 Legal submissions for Central Hawke's Bay District Council in relation to Designations and Amendments to RMA relevant to Panel's task, 9 December 2022.

3. While the majority of designations in the PDP have been rolled over from the operative District Plan, or are located on land wholly owned by the requiring authority (in the case of Te Aute School), FirstGas is seeking a new designation over a 12 metre corridor across the District, the vast majority of which is on privately owned land. While all requirements need to be assessed against the statutory tests, the extent of impact on private land means particular attention is appropriate in the case of FirstGas.

4. The FirstGas NoR relates to the operation and maintenance of the Gas Transmission Network. Through the hearings report, and then through written and oral evidence at the hearing, the proposed wording of the designation and conditions to be included in the PDP has been modified by the requiring authority, with the version now sought being set out in the Reply statement by Alison Francis. The current version of conditions has been agreed as between Ms Francis and representatives for FirstGas. The following comments are made in light of that information which has become available since the hearing.

Effects on the environment

5. A concern with the FirstGas NoR was the 'light' approach taken to the assessment of effects on the environment that was included in the NoR documentation and then in filed evidence. The evidence of Mr Roberts acknowledged that there are potentially significant adverse effects, however these were proposed to be managed solely through the outline plan process. There are two concerns with that:

   (a) First, the outline plan requirement applies only to 'construction', and not necessarily to maintenance work. It is clear that FirstGas intends maintenance works to include potentially substantial works, which may have ' construction' elements, but whether an outline plan would be triggered by such works under s 176A RMA is a grey area;

   (b) Secondly, there was a lack of information in the NoR about whether the designation would traverse any Significant Natural Areas or Outstanding Natural Features etc. The NoR commented that there were no known significant cultural sites indicated on the District Planning Maps, however from other hearings the Panel will be aware that not all potentially significant

areas are currently mapped. Mr Roberts subsequently advised that the NoR does not affect any ONFL and only small areas of SNAs.

6. In my view., the conditions which have now been recommended go a significant way to addressing these concerns by clarifying when an outline plan will be required, namely for any activity:

   (a) Not meeting the designation-specific definition of 'maintenance'; or

   (b) That affects a SNA or SASM; or

   (c) When the work proposed involves earthworks which would otherwise trigger a consent.

7. This should remove any uncertainty around whether the need for an outline plan is triggered.

8. The conditions also specifically require an outline plan and assessment against the relevant assessment matters where works are proposed within a SNA or SASM. The requirement to prepare a Construction Environmental Management Plan includes a requirement to address accidental discovery protocol management, which will assist in addressing potential effects on unknown or unlisted sites.

Adequate consideration of alternatives

9. Given FirstGas has acknowledged there is potential for significant adverse effects on the environment, the requirement for the Panel to consider, under s 171(1)(b) whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work is triggered. My opening submissions set out the High Court's approach to assessment of alternatives, and this makes clear that the territorial authority must be satisfied that the consideration has not been 'cursory'.[4] In this case, the gas pipeline is in place and alternatives sites or routes for the pipeline, or methods of transmitting gas, is not required, however in my submission consideration of alternative methods of protection is required. This is

[4] *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 – see Submissions for Hearing Stream 7, para 21.

the approach taken in the NoR, in that it identifies reliance on the easement and/or district plan provisions as alternatives that were considered.[5]

10. The Panel will need to be satisfied that that alternatives assessment is adequate in the circumstances. My understanding is that the assessment is comprised in Sections 3.1, 3.2 and 4 of the NoR and was elaborated on to some extent through evidence given at the hearing.

Is the designation reasonably necessary for giving effect to FirstGas's objectives?

11. In terms of the statutory test regarding whether the designation is reasonably necessary, Mr Roberts disagreed that it is for the Panel to consider reasonable necessity, and instead submitted: [6]

> …the question as to whether or not the designation is reasonably necessary is one for FirstGas to make. FirstGas is obliged to satisfy *itself* that the designation is reasonably necessary to protect the activity for which it's seeking the designation and in this case FirstGas has decided it would like to have a designation …that's at the heart of this matter of reasonable necessity.

12. Mr Roberts' position is legally incorrect. Section 171(1)(c) RMA – and every case that has considered that provision - is clear that the *territorial authority* must have regard to whether the designation is reasonably necessary. The judicial approach to considering reasonable necessity is set out in my submissions for Hearing Stream 7 for the Panel's reference.

13. This issue is something the Panel was understandably grappling with at the hearing, particularly bearing in mind the existence of the easements held by FirstGas, the enabling provisions that have been included in the PDP for network utilities and the quite extensive protections for the gas transmission network that have been included in the PDP. These provisions have been recommended for retention or strengthening through the hearing process.

14. FirstGas's objectives for the designation are:

---

5 At the hearing, Mr Roberts asserted that consideration of alternatives was not required because FirstGas has a sufficient interest in land to undertake the works – see HS7 recording 3.34. In my submission, either significant adverse effects OR not having an interest in land is sufficient to trigger the need to consider alternatives.

6 HS7 recording, 3.15

(a) enable the safe, efficient and effective operation and maintenance (including repair and replacement of assets and the ability to achieve access) of the Gas Transmission Network; and

(b) provide statutory protection to safeguard the integrity of the Gas Transmission Network.

15. The first objective deals with enabling the operation and maintenance of the Gas Transmission Network. The PDP provides for operation, maintenance, replacement and removal of existing network utilities and minor upgrading as a permitted activity, subject to compliance with standards which are unlikely to be applicable to the gas network.[7] Even within SNAs, trimming or clearance of vegetation is proposed to be a permitted activity where it is "*necessary to provide for the ongoing safe and efficient operation, maintenance and upgrading of … network utilities*".[8]

16. In terms of protecting the Gas Transmission Network from other activities, in addition to the easement which provides legal protection, the PDP includes a range of rules designed to achieve the same purpose, namely:

(a) In relation to subdivision, where the following standards are not met, subdivision is a non-complying activity:[9]

(i) that any subdivision in any zone containing the Gas Transmission Network must be able to demonstrate that all resulting allotments are capable of accommodating a building platform for the likely principal building(s) and any building(s) for a sensitive activity that is at least 20m from the Gas Transmission Pipeline and 30m from above-ground equipment forming part of the Gas Transmission Network; and

(ii) The layout of allotments and any enabling earthworks must ensure that physical access is maintained to the Gas Transmission Network where it is located on the allotments, including any balance area.

7 Rule NU-R1 and NU-R2. The standards relates primarily to limits on above ground buildings.
8 Rule ECO-R3(1)(b)(vi). Note the rules are recommended to be amended through subsequent reporting but the content of this permitted activity rule is not proposed to be amended.
9 Rule SUB-R1(5); Standards SUB-S4(4) and (5)

(b) Earthworks within 20m of the Gas Transmission Network require restricted discretionary activity consent is standards are not met, with matters of discretion including the outcome of any consultation with the owner and operator of the gas transmission pipeline;

(c) The General Rural Zone[10] and Rural Production Zone require a minimum setback of buildings from the Gas Transmission Network of 20m or from above ground buildings of 30m.

17. At the hearing, FirstGas supported its designation largely on the basis that it wanted a 'seat at the table' to ensure the network was not compromised. Any development not complying with the PDP requirements set out above will require consent, and will almost certainly trigger some form of consultation or formal notification to FirstGas as owner of the Gas Transmission Network.

18. The Panel will need to consider whether, in light of the PDP protections already in place and the easement, the designation is reasonably necessary to enable the safe, efficient and effective operation and maintenance of the Gas Transmission, or is more of a nice-to-have 'additional layer' of surety. For the designation to meet the statutory test of being reasonably necessary, it needs to be more than just 'expedient or desirable'.

19. For completeness, I respond to Mr Roberts' assertion that having the designation in place means that if there is an application that touches on the designation, Council will not be able to process it further without FirstGas's approval. The processes under s 104 RMA (consideration of application for consent) and s 176 RMA (requirement for written approval from requiring authority) are actually separate, and a consent can be granted without a requiring authority's approval under s 176 RMA having been provided.[11] That is of course appropriate, because s 176 only applies where a proposal will prevent or hinder the designated public work – which is not necessarily in every case – and a decision by the requiring authority not to provide approval is subject to a separate appeal process.

10 Mr Roberts stated this covered approximately 95 – 98% of the pipeline was within the General Rural Zone.

11 See *Bunnings v Auckland Transport* [2020] NZEnvC 92 at [35] – [36] as an example of where resource consents were granted in advance of obtaining s 176 approval.

Transpower / Horticulture NZ / Federated Farmers – National Grid Policy

20. The issue of whether a National Grid-specific policy should be included in the PDP, rather than being 'lumped in' with other network utilities, particularly in Policy NU-P5(6), was discussed between the Panel and the above submitters at Hearing 7. Following the hearing, and in line with the invitation in Minute 21, those parties met and agreed a new policy, subject to some minor areas of disagreement.

21. Ms Kydd-Smith has considered the proposed revised policy and the areas of disagreement in her right of reply. I have little to add to her discussion of the points of difference between the submitters, but for completeness offer some brief comments on the relevance of the decision in *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281, specifically to the issue of whether the words "to the extent reasonably possible" should be included in the new policy[12]

22. The decision in *Transpower* was concerned essentially with whether a rule which stated activities not sensitive to transmission lines were 'provided for' gave effect to the NPSET. The High Court found the Council's decision '*fail[ed] to put in place a comprehensive policy for all zones requiring that activities and buildings, whether or not for uses sensitive to the national grid, do not compromise the grid*'.[13] It also found difficulties in terms of the rules that sought to implement higher order objectives and policies which themselves were required to give effect to the NPSET.

23. The Court's observations in [87] in relation to the 'reasonably possible' rider which are referred to by Ms Whitney in her memorandum were by way of background. In fact, the Auckland Unitary Plan had included an objective which required the efficient development, operation, maintenance and upgrading of the national grid is not compromised by subdivision, use and development. The Court commented that the objective was not qualified by the 'reasonably possible' qualification and that that had not been challenged by any party.[14] As such, whether the 'reasonably possible' wording should be included in a policy was not directly at issue in the case.

24. I note this simply to be clear that the decision in *Transpower* is useful to understand the required reasoning process, but does not specifically direct that the inclusion

12 A copy is provided with these submissions for completeness.
13 *Transpower* at [101].
14 *Transpower* at [96].

of the words 'reasonably possible' are or are not appropriate for inclusion in a new policy which seeks to give effect to the NPSET.

25. Transpower's position is that the words are unnecessary in the policy because the "*rule framework gives effect to the 'extent reasonably possible' component of Policy 10 and therefore makes it appropriate for all other activities which trigger resource consent to have the 'avoid' directive'.*[15] In my submission that reasoning is problematic because it means the rules would not properly give effect to the policy, as is required by s 76(1)(b) RMA. In other words, while the policy would reflect an 'avoid' directive, the rules would not achieve that policy, because they provide for some permitted activities where it has been determined that avoidance is not reasonably possible.

26. The better approach, in my submission, is to include the words 'to the extent reasonably possible' in the policy, and for that policy to be implemented through the rules which reflect where the avoidance directives are and are not 'possible' to be achieved. Any activity which requires consent and is assessed against the new Policy will need to establish why avoidance is not 'reasonably possible'. As Ms Whitney notes, and as stated in *Transpower*, where the area surrounding the National Grid is relatively uncompromised, it will be difficult for an applicant to establish that it is not reasonably possible to avoid interference. As such, I do not consider the inclusion of the words weakens the policy, or fails to give effect to the NPSET.

Asher Davidson
27 January 2023

15 Response to Panel Minute 21 Direction following Hearing Stream 7 – Pauline Mary Whitney for Transpower New Zealand Ltd at para 1.11.1.