

## MEMORANDUM

**Date:** 24 August 2022  
**To:** Sarah Miller, Consents Officer  
**From:** Mike Doesburg and Kate Dickson

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### MOTUKAWA HYDROELECTRIC POWER SCHEME – EXISTING ENVIRONMENT ON REPLACEMENT RESOURCE CONSENT

1. Taranaki Regional Council (**Council**) is processing an application by Trustpower to replace the resource consents (the **expired consents**) that enable the operation of the Motukawa Hydroelectric Power Scheme (**Motukawa HEPS**).
2. The Motukawa HEPS involves the diversion of water from the Manganui River, via the Motukawa Race, to Lake Ratapiko. From Lake Ratapiko, water is diverted to the Motukawa HEPS (located on Motukawa Road) and discharged back into the Makara Stream (a tributary of the Waitara River). Seepage and spillway overflows from Lake Ratapiko enter the lower section of the Mako Stream, but the Mako Stream otherwise receives no residual flow. Trustpower has applied to replace the expired consents (including the consents for the dam structures themselves), while also seeking to increase the rate of take / diversion from the Manganui River from 5.2m<sup>3</sup>/s to 7.5m<sup>3</sup>/s.
3. You have asked for our advice on what constitutes the “existing environment” when considering the application to replace the expired consents. In particular, you have asked:
  - a. Where structures impede desired fish passage, but have been in place for over 90 years, can the Council require (and therefore consider) an assessment of clause 3.26(1) of the National Policy Statement for Freshwater Management 2020 (**NPS-FM**), and potentially impose conditions requiring improvements to certain aspects of the structures?
  - b. Can the Council consider effects of the whole water take (7.5m<sup>3</sup>/s) into the Motukawa Race from the Manganui River – not just the proposed increase in take (the difference between 5.2m<sup>3</sup>/s and 7.5m<sup>3</sup>/s)?
  - c. Can the Council consider the introduction of an environmental flow into Mako Stream (where previously the stream has been dammed and no residual flow has been provided for downstream of the dam)?

### Summary

4. Case law confirms that consents granted by a regional council should not be considered as part of the existing environment when those activities are being reconsented. Regional consents are granted for a finite term, and it cannot be assumed they will be renewed when reconsenting.<sup>1</sup> The leading case is the decision of the High Court in *Ngāti Rangī Trust*, regarding applications to replace existing consents for the Raetihi Hydro-Electric Power Scheme.
5. We agree parts of the summary of the case law as set out in the AEE, however, we disagree on the extent to which structures that require replacement consent form part of the existing environment. Applying *Ngāti Rangī* the actual and potential effects on

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<sup>1</sup> *Ngāti Rangī Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948, at [65].

the environment from reconsenting the Motukawa HEPS should be assessed as if the activities authorised by the expiring regional consents were not present.

6. In our opinion, fish passage under clause 3.26 of the NPS-FM is a relevant consideration when considering the resource consent application for the Motukawa HEPS. While the scheme is currently in place, we consider that the application must be assessed having regard to the effects that the structures will have as if they were not there. This includes consideration of effects on passage by fish in terms of POL 5A.5.1. The Council will be able to impose conditions requiring improvements in fish passage if it considers the Motukawa HEPS is having adverse effects on fish passage.
7. While there is some difficulty with how structures should be treated, the case law is clear about how expiring resource consents to take water should be treated. The Council must assess the effects of the entire proposed take, rather than just the increase in take (being the difference between the existing consented take of 5.2m<sup>3</sup>/s to the proposed 7.5m<sup>3</sup>/s).
8. In our opinion, the Council should consider the effects of damming the Mako Stream as if the activities authorised by the expired consents did not exist. On that basis, if the Council concludes that there would be adverse effects on the Mako Stream from providing no residual flow, it may impose conditions requiring a residual flow to be maintained.

#### **The existing environment on replacement of regional consents**

9. When considering a resource consent application, a decision-maker must consider the effects of the activity on the environment. "Environment" has a broad definition under the RMA. Case law has confirmed that the environment includes the environment as it may be modified by permitted activities, and the implementation of resource consents which have been granted (and where it appears likely that those consents will be implemented).<sup>2</sup>
10. A resource consent is required to use, erect, reconstruct, place, alter, extend, remove or demolish any structure in, on, under or over the bed of a river, unless the activity is expressly allowed by a national environmental standard or a rule in regional plan.<sup>3</sup> Similarly, resource consent is required to take, use, dam or divert water, unless the activity is expressly allowed by a national environmental standard or a rule in a regional plan.<sup>4</sup> Such consents can only be granted for a maximum of 35 years.<sup>5</sup>
11. Case law has confirmed that consents granted by a regional council should not be considered part of the existing environment when those activities are being reconsented. The leading case is *Ngāti Rangī Trust v Manawatu-Whanganui Regional Council*. In that case, the High Court considered whether the Environment Court made an error of law in assessing an application to replace the existing consents for the Raetihi Hydro-Electric Power Scheme as if the existing scheme was part of the environment. The Raetihi Hydro-Electric Power Scheme had been in place for nearly 100 years, though the expiring consents were granted for a term of only five years. The Environment Court and High Court appeals were focused on the water takes and flow rates associated with the scheme, rather than the land use consents required for the headwork structures.

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<sup>2</sup> *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424 (CA).

<sup>3</sup> RMA, s 13.

<sup>4</sup> RMA, s 14.

<sup>5</sup> RMA, s 123(c) and (d).

12. The Court considered competing Environment Court authority and concluded that regional consents are granted for a finite term and it cannot be assumed that they will be renewed when reconsenting.<sup>6</sup> The Court confirmed the approach taken by the Environment Court in *Port Gore Marine Farms v Marlborough District Council* that the environment needed to be assessed as if the activity authorised by the expiring consents being replaced was not in it.<sup>7</sup>
13. We generally agree with parts of the summary of the case law as set out in the AEE. However, we disagree on the extent to which structures that require replacement consent form part of the existing environment.
14. The AEE summarises *Ngāti Rangī* as follows:<sup>8</sup>

Differing approaches to defining the existing environment have been adopted when considering applications for replacement resource consents. The High Court in *Ngāti Rangī Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948 concluded that it should not be assumed that existing consents with finite terms will be renewed or renewed on the same conditions. The Court adopted the position that the existing environment cannot include, in the context of renewal applications, the effects caused by the activities for which the renewal consents are sought – unless it would be fanciful or unrealistic to assess the existing environment as if those structures authorised by the consents being renewed did not exist.
15. The relevant passage from the High Court’s decision says:<sup>9</sup>

I am reinforced in my conclusion by two reasons. First, the learned authors of *Environmental and Resource Management Law* note a principle has emerged in which it should not be assumed that existing consents with finite terms will be renewed or renewed on the same conditions. The text says:

Accordingly, the existing environment cannot include, in the context of a renewal application, the effects caused by the activities for which the renewal consents are sought, unless it would be fanciful or unrealistic to assess the existing environment as though those structures authorised by the consent being renewed did not exist ...

...
16. On close reading of the decision, we do not consider that the High Court has adopted the position that the existing environment includes unconsented structures as suggested by the AEE:
  - a. The Court expressly referred to the textbook *Environmental and Resource Management Law* in support of the limited proposition that “it should not be assumed that existing consents with finite terms will be renewed or renewed on the same conditions”. The Court did not expressly endorse the exception for structures.
  - b. As noted earlier, the Court’s focus was on the water takes and flow rates, not structures. As structures were not at issue, any comments regarding structures are not binding authority.

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<sup>6</sup> *Ngāti Rangī Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948, at [66].

<sup>7</sup> *Ngāti Rangī Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948, at [59].

<sup>8</sup> AEE, section 2.1, page 12.

<sup>9</sup> *Ngāti Rangī Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948, at [65].

- c. In any event, the Court went on endorse the assessment of the replacement consents for the Raetihi Hydro-Electric Power Scheme by disregarding the current scheme.<sup>10</sup>
- 17. We have not been able to find any decisions made after *Ngāti Rangī* that expressly address the approach to structures in the bed or lakes or rivers that may be impractical to remove. More recent case law confirms that a “real world” approach should be taken to assessing the environment,<sup>11</sup> however, we do not consider that is authority for the proposition that unconsented structures should be assumed to be part of the “environment” and associated adverse effects ignored.
- 18. Applying *Ngāti Rangī* the actual and potential effects on the environment from re-consenting the Motukawa HEPS should be assessed as if the activities authorised by the expired consents were not present.

### **Assessment in respect of fish passage on re-consenting an existing structure**

- 19. Clause 3.26(1) of the NPS-FM requires every regional council to include an objective relating to fish passage in its regional plans (without using the Schedule 1 process).
- 20. This objective refers to maintaining or improving the passage of fish by instream structures (except where it is desirable to prevent the passage of some fish species in order to protect desired fish species). This has been included within the Taranaki Regional Freshwater Plan (**RFP**) as POL 5A.5.1.
- 21. In our opinion, this is a relevant consideration when considering the resource consent application for the Motukawa HEPS. While the scheme is currently in place, we consider that the application must be assessed having regard to the effects that the structures will have as if they were not there. This includes consideration of effects on passage by fish in terms of POL 5A.5.1.
- 22. Conditions may only be imposed on a resource consent if:<sup>12</sup>
  - a. the applicant agrees to the condition;
  - b. the condition is directly connected to:
    - i. an adverse effect of the activity on the environment;
    - ii. an applicable district or regional rule, or a national environmental standard;
    - iii. a wastewater environmental performance standard under the Water Services Act 2021; or
  - c. the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.
- 23. Given our conclusion above regarding the existing environment, if the Council concludes that the Motukawa HEPS is having adverse effects on fish passage, it may impose conditions requiring improvements to provide for fish passage.

### **Can the Council consider the effects of the whole take, or just the increase in take?**

- 24. While there is some difficulty with how structures should be treated, the case law is clear about how expiring resource consents to take water should be treated. The

<sup>10</sup> *Ngāti Rangī Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948, at [68].

<sup>11</sup> For example, *Knowles v Queenstown Lakes District Council* [2019] NZHC 3227, at [95].

<sup>12</sup> RMA, s 108AA.

Council must assess the effects of the entire proposed take, rather than just the increase in take (being the difference between the existing consented take of 5.2m<sup>3</sup>/s to the proposed 7.5m<sup>3</sup>/s).

#### **Potential introduction of an environmental flow into Mako Stream**

25. The expired consents for the Motukawa HEPS did not provide for a residual / environmental flow into the Mako Stream, where the stream has previously been dammed (other than the flow from seepage or from the spillways).
26. In line with our conclusions above, we consider that the Council should consider the effects of damming the Mako Stream as if the activities authorised by the expired consents for the Motukawa HEPS did not exist. On that basis, if the Council concludes that there would be adverse effects on the Mako Stream from providing no residual flow, it may impose conditions requiring a residual flow to be maintained.

#### **Recommendation**

27. This advice is underpinned by our reaching a different conclusion from the AEE on the approach to identifying the existing environment in the context of resource consent applications to replace expiring consents for an existing scheme.
28. Given this fundamental difference, it may be appropriate for the Council to provide Trustpower an opportunity to consider and respond to this opinion, prior to finalising the notification decision.
29. Please contact us if you have any questions or would like to discuss our advice.

**Wynn Williams**