A Review of the Processing of Recent Major Resource Consent Applications by the Hawke's Bay Regional Council.

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Confidential

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1 Introduction and Background

A review has been carried out on the processing of large groups of resource consent applications to the HBRC to take and use water from the Tukituki, Karamu and Ngaruroro catchments. Hearings of applications, generally in large groups of between about 40 and 90 applications on a catchment basis took place between November 2007 and January 2009. Additionally, some other recent larger consent processes were examined.

Apart from the Tukituki applications, all the large groups of applications have been heard by hearing committees chaired by Councillor Scott. Other commissioners have included Councillor McGregor, several independent technical commissioners and several Maori commissioners.

Fifty-six applications, all in the Ngaruroro catchment, are presently under appeal to the Environment Court. The council is seeking to reach agreement between applicants and appellants. Over 20 other appeals have already been resolved.

Additionally there were a substantial number of cost appeals to the council under the provisions of s357 of the RMA. The hearing of these appeals is continuing. Most have been heard by Councillor von Dadelszen.

Water is a scarce resource in regions like Hawke's Bay. There is strong competition to use the resource, which confers substantial "free property rights" to consent holders. There is also strong competition to the resource between users and advocates for protection of instream values. Irrespective of any future storage proposals, these tensions will continue to increase. This places the council, as the "referee", in a challenging position.

Resource consent applications must be processed consistent with the provisions of Part 6 of the RMA. The Act outlines a conservative, rigid and prescriptive process with a great deal of emphasis on third party rights. There are no "short cuts" in the process.

Good administration of the Act requires well designed and administered processes, a robust list of delegations, competent and well organised staff and good time management. It can be helped by pragmatic decision making.

Sixteen regional authorities are essentially "in the same business" in relation to consent processing. There is a good deal of co-operation on good consent practice, and MfE also contribute to this. As a result of this HBRC processes are subject to comparative scrutiny and constructive comment.

There are a limited number of external consultants in Hawke's Bay with familiarity with regional council consents who are not conflicted out of assisting the HBRC. Accordingly, the capacity to use external contractors efficiently is constrained.

This review uses the lessons from the past, including reference on occasions to good practice elsewhere, to look forward and make suggestions and recommendations for improvement.

2 What Went Well

There are many aspects of these applications that were handled very well:

In general terms internal staff processes are robust and consistent with the requirements of the RMA. There are many examples of what I would consider good practice. Examples include the process for determining if applications are notified or not, and the use of people external to the council to write decisions for council hearings where necessary.

Staff were overloaded by the consents workload for these "renewals". The use of external overload contractors was appropriate, and appears to have been well handled. The external contractors used who I know are skilled and competent practitioners.

Consent holders were written up to three letters reminding them that their consents were soon to expire and that they should apply for them to be "renewed". This is good practice.

Appropriate technical advice was sought were necessary from skilled external consultants. An example is the Poraiti groundwater zone, where a geohydrologist's report was commissioned. As a result of this nine applications to "renew" consents in this zone were processed and decided by staff as non-notified applications.

Large groups of notified applications for a given catchment were handled in one report and hearing. This is a very efficient way of dealing with these, and deserves commendation.

The more recent s42A officer reports that provide advice to commissioners are thorough, informative and well written.[1] They portray the catchment, the issues therein and the difficulties confronted by decision makers very well, and recommend pragmatic solutions for what are very challenging circumstances. A very good example is how hydraulically linked groundwater is assessed.

The reporting back by staff at hearings has been praised. In particular staff are seen as responsive to the issues raised by applicants and submitters during the hearing, and they make the effort to report back in writing, which is commendable.

The hearing committees generally followed staff advice and made pragmatic decisions. In essence these were to grant "renewals" for 5-6 years subject to efficient use of water, decline most new applications, require that all takes be metered and require takes that are not used to lapse.

Granting longer term consents is not a practical proposition for these consents at this time. This is because the regional plan is badly flawed in relation to allocation. This

[1] The earlier reports, notably for the Tukituki hearings, are adequate but not of a similarly high standard.

compromise allows time to resolve plan issues prior to consents being reconsidered. Granting longer term consents would have resulted in costly appeals and (in my view) a very high chance of the decisions being overturned.

External and highly competent consultants were used to write the latter decisions on behalf of the panels. These decisions are extremely well written and cover all essential matters under the RMA.

The hearings have been well organised, chaired and administered.

The hearing process appears to have efficiently run. For instance, the contractor who writes the decision attends the hearing and takes comprehensive notes, but there is no duplication of this as there is no committee secretary present.

The current senior staff are held in high regard by councillors and external contractors. In my view senior staff have dealt with challenging circumstances very well, and they deserve praise for this.

3 What Has Not Gone Too Well

The letters advising people of possible costs of deciding their applications grossly underestimated those costs. This has led to some strongly felt grievances among consent applicants, and many appeals against costs imposed by council. In fairness to present staff, turnover has meant that they were initially somewhat "blindsided" by this, but being more proactive and responding more quickly would have limited the damage to the council's reputation.

Pre-hearings run by the council do not often achieve resolution, and sometimes there is a lack of clarity about their purpose.[2]

Occasionally hearing days are very long and run well into the evening. While this reflects an admirable desire to finish the business as quickly as possible, it does tax commissioner's powers of concentration.

The decision making process is seen by some participants as somewhat labored, and questions have been asked if it can be made more efficient.

The issues confronted by decision makers require a good level of technical understanding of the provisions of the Act and the Plan, surface and groundwater hydrology, and the process for setting minimum flows and allocatable volumes. As a "professional" commissioner with a strong background in water management, I would describe the issues raised by these reports, particularly those in the Tukituki and Karamu catchments, as challenging. I consider that for non-technical Councillors they would be daunting. Some councillors interviewed (by their own admission) do not have those

[2] Any resolution however generally requires all submitters to be present, and to be "mandated" to make decisions on behalf of the submitter that they represent. This is often not the case for groups like Forest and Bird or iwi.

skills to chair such hearings. One of the councillors that does have those skills is not used to chair consent hearings.

Sometimes the delay between the hearing and the decisions being released is too long. For instance the Tukituki decisions took over six months to be released from the time of the hearing. Commendably, the most recent large decision of 67 applications in the Ngaruroro catchment took less than two months.

The sections of the RRMP that deal with water allocation are badly flawed. In particular, the allocatable volume is zero in many smaller streams, and in other cases was much exceeded by the "renewals" sought.[3] This put decision makers in an invidious position.

Criticism has been made that consents staff are making "policy on the hoof". This criticism is justified, but was necessary because the plan is badly flawed. The approach taken by staff, and largely adopted by decision makers is pragmatic and steers a middle line between satisfying applicants and not provoking appeals that would result in decisions being overturned by the Environment Court.

The s357 cost objections are the "squeaky wheel" in this process. Many objections have been made, and all that have been heard have resulted in some cost reduction to consent applicants. To date these cost reductions total some $40,000, all revenue lost to council. Considerable staff, commissioner and consultant time has also been spent on preparing for, making and writing these decisions. None of these further costs – which would amount to many tens of thousands of dollars - are recoverable.

The s357 decisions are made on a case by case basis with no clear principles available to guide decision making. Decision making has been made more difficult by some staff charging processes not being transparent.

Concern was expressed that neither the chairman nor CEO are very familiar with the council's consent process. It is a key, core function of council that is at the sharp end of the business – particularly when it appears to go wrong. Fortuitously, good management and sound hearing and decision practices mean that it does not frequently go too wrong.

4 Hearings

4.1 The Hearing Committee

There are four councillors on the hearing committee. It is chaired by Councillor Scott, with other members being Councillors von Dadelszen, McGregor and Remmerswaal. Councillor Scott currently chairs all hearings, while Councillor von Dadelszen often chairs pre-hearing meetings and has heard and decided almost all of the s357 cost objections.

All four councillors have passed the Ministry for the Environment "Making Good Decisions" Programme, and so are qualified hearing commissioners. Councillors Scott and von Dadelszen have also qualified as registered chairs of hearing committees.

[3] If the allocatable volume is zero, then no consents should be granted to take water from that particular stream. If applied strictly, many consent "renewals" would have had to be declined.

4.2 Use of Other Commissioners

Three Maori commissioners have been used. All are considered to add value to decision making while providing valuable advice on, but not over-emphasising Maori values.

On occasions independent commissioners have been used for hearings of complex consents. They are regarded as having contributed strongly. While more expensive, their use is entirely appropriate as they often add necessary technical or legal expertise to the panels. The current RMA amendment bill will allow consent applicants to "demand" the use of entirely independent commissioners.

Some independent commissioners have very high charge out rates. One example that stands out is a fisheries scientist used on one hearing with a charge out rate of $250 per hour. This is not good value, as other more experienced and equally qualified technical commissioners with charge out rates of half to two-thirds of this are available.

5 Suggestions and Recommendations for Improvement

5.1 Internal Staff Processes

Council delegations allowing staff decision making on consent applications are presently outdated. These need to be reviewed, particularly now the RMA Amendment Act has been passed. It is a task that could be carried out once on behalf of all regional authority consent managers, rather than the "wheel being reinvented" 16 times.

Once the delegations are updated, substantial work is also required to update the process oriented HBRC consents manual. This is an essential internal reference document, and is particularly necessary for new staff.

I have not examined whether the current staffing of the consents section is adequate. The workload remains high for at least the next 18 months with around 270 "renewals" to take water in the Twyford-Raupere groundwater zone, a further 50 discharges in that zone and about 15 other major consent applications[4]. Allowing some flexibility around staff levels may be desirable, and ongoing use of external consultants will be essential.

5.2 Pre-Hearing Processes

In general terms pre-hearing meetings can be used in three ways:

To exchange information among hearing participants so they have a better understanding of the views of others.

To try to resolve some or all of the matters in dispute between the parties. This can generally only succeed for smaller activities as it requires all parties to be present and mandated to make decisions on behalf of who they represent. Sometimes steps can be taken to agree some common ground, e.g. evidence on hydrology.

For more lengthy hearings procedures, timelines for exchange of evidence, venues etc can be discussed and specified. These would always be chaired by the chair of the hearing committee.

[4] These include the Napier sewage discharge, several contentious coastal developments, several air discharges with adverse effects and two applications to take large volumes of groundwater in the Ruataniwha groundwater zone.

Some greater clarity about the purpose of the meeting, and allowing more time for discussion and possible resolution of issues is recommended. Also, for more complex hearings, the committees should explicitly consider whether a pre-hearing meeting is needed to establish the ground rules for the hearing, and particularly if evidence should be pre-circulated.

Consideration could also be given to who chairs any pre-hearing. Present HBRC practice is that this be a councillor, and if so, they do not chair the substantial hearing. There are different views and practices about this in different councils. I am ambivalent about the benefits or necessity of having separate chairs for pre-hearings and full hearings, but certainly current HBRC practice is beyond reproach.

An alternative that could be considered is using a skilled external contractor as a facilitator in pre-hearing meetings. This practice is used quite widely, and when handled well can often result in a greater level of resolution.

5.3 Appointment of Commissioners

Either experienced councillors and/or independent commissioners should always be used for complex resource consent applications. This is in line with current HBRC practice. However there is no reason why for some more "black and white" decisions one commissioner sitting alone could not hear and decide an application[5]. Having an odd number (i.e. 1, 3 or 5) of commissioners is also general practice, and is desirable in case of a split vote on a decision.

Pre-hearing meetings can be usefully used to resolve issues, but are not being used to do so at present. Using a different chairperson – perhaps from outside the council – could perhaps improve this process.

5.4 Hearings

Some hearing days are very long, running well into the evening. In my experience it is not possible to concentrate fully in a hearing for more than about 7 hours a day, or for more than two hours in one sitting, particularly if complex technical evidence is being given. While extending hearing days can be efficient to finish a hearing, it is difficult to assimilate fully the evidence being given at the end of a long day (or worse long days).

I suggest that the council adopt a general practice of not continuing hearing days longer than 6.5 hours of hearing time, and that this be capped at 7.5 hours.

5.5 Decision Making by Hearing Panels

The current decision making framework is based on the "10 step" process in the "Making Good Decisions" programme. While thorough, this is also time consuming and can involve some repetition, such as of matters well addressed in the officer's report (e.g. what are the relevant objectives and policies?).

[5] Presently the Annual Plan requires at least three commissioners but I do not consider this is necessary in some cases.

My experience is that many hearing panels do not use this 10 step process but rather focus decision making on the following points:

- What are the adverse effects of the activities for which consent is sought?
- Are any of those adverse effects so compelling that the applications should not be granted (or to put it more colloquially "are there any show stoppers"?).
- If the answer to the above is no, to what extent can conditions be imposed that will avoid or mitigate the adverse effects of the activities for which consent is sought?
- How do the applications sit with the provisions of Part 2 of the Act and the statutory planning framework?
- In light of the above points, and taking account of the positive effects of the applications, what is the panel's broad overall judgment about whether to grant or decline the applications?

I suggest that this framework be used on a trial basis for HBRC decision making on notified consent applications.

5.6 Section 357 Cost Objections

There are some steps that could be taken to improve this process or reduce internal tensions. For example council could decide that as a general principle councillors should not be reviewing other councillors' cost decisions, and that external contractors be used. This has significant cost implications. Alternatively, some internal guidelines or principles could be developed for s357 cost objections. This is not recommended as it could not be prevented entering the public domain, and having the council accused of pre-judging the outcome of any given hearing.

The current "squeaky wheel" approach is very unsatisfactory. It is costly, has to be considered on a case by case basis and takes a good deal of resourcing. None of these costs are able to be recovered.

Present policy in the Annual Plan is quite specific but is very much focused on recovering actual costs.[6] This leaves open questions as to whether or not these are reasonable. An alternative approach would be to develop some further principles for charging for primary hearings that allow for some consistently applied initial discounting, and explicitly address the matters in s36(4) of the RMA. Some examples might be:

Technical investigations for groups of consents shall be charged two-thirds to consent applicants, with one-third of the cost picked up by the council reflecting public benefit.

[6] These are specified on pp26-28 of the Annual Plan. There is ambiguity in the clause "the total calculated amount shall then, if necessary, be adjusted to reflect council's actual and reasonable costs having regard to the factors in s36(4) of the Act."

Staff costs for hearings of five or more applications at one time will be pro-rated equally across all applicants. For hearings of less than five applications, costs will be assigned on the basis of the comparative effects of each application.

Independent commissioners shall be charged to applicants at a rate of no greater than $125 per hour. Their disbursements and any additional charge out shall be met by the council.

Other external consultants shall be charged to applicants at a rate of no greater than $100 per hour. Their disbursements and any additional charge out shall be met by the council.

There are perhaps significant revenue implications for council, although these should be offset by reduced costs in resourcing, hearing and deciding s357 appeals. These revenue implications could be assessed by staff.

If further guidelines are put in place s357 cost objectors could be told to focus solely on how these principles should be applied differently in their particular case. It would provide firm guidelines for decision making on cost objections and reduce the staff input costs (which cannot be recovered). There is considerable political and consents staff support for this approach, and I recommend it be put before the hearing committee and then the council for consideration.

5.7 The Regional Plan

Existing minimum flows, and particularly allocatable volume provisions in the RRMP need to be reviewed urgently. If this is not resolved by the time the consents granted start to expire in 2013, the council will look incompetent and will face very strong criticism. Reviewing these provisions is a substantial undertaking for the council, and it may face Environment Court appeals. This work is provided for in the LTCCP, which is essential.

The science necessary as the starting point for decision making on revised minimum flows and allocatable volumes is well underway in catchments such as the Tutaekuri, Tukituki and Ngaruroro. Other approaches will be suggested in lowland catchments, such as the Karamu.

It is very important that the science regarding flow requirements be used as a key input to decision making, but they certainly should not be the sole input. Section 5 of the RMA requires a balance be struck between environmental considerations, and the social and economic needs of the community. This is a political judgment the council will need to make taking account of all relevant considerations, not just what the science inputs recommend.

5.8 Other Issues

I suggest that each of the Chairman and CEO become more familiar with consent and hearing processes and practices.

I suggest that on occasions the chair of the consents committee could brief the council confidentially about substantive issues raised during consent hearings that may have impacts beyond the immediate matters being considered. Examples are problems that may arise with the council's statutory policies or plans, or if the cost recovery framework is proving difficult to apply.

There are also a few minor issues that should be addressed. One is that staff should not have lunch with the commissioners. This is not appropriate, as staff are often witnesses in the hearing process through presentation of their officer's report, and should not be seen as too close to the decision makers. Another is that the consents issued to take water should strictly be for take and also use. This should be rectified.