

Minute from the Hearing Panel – regarding:

The Hearing Panel's response to The Director-General of Conservation (DOC) seeking to file supplementary expert planning evidence (a section 32AA further evaluation) for the Block 2 Hearing.

This Minute formalises the Hearing Panel's (Panel) oral decision made on 25 June 2019 to not accept the supplementary expert planning evidence from Ms Kissick for the Block 2 Hearing.

DOC's counsel, Ms Tumai, filed legal submissions on 20 June 2019 and attached a "*Further evaluation of relief sought under s32AA of the RMA*". That further evaluation had been prepared by DOC's expert planner Ms Kissick on the policies and rules being heard as part of the Block 2 hearing.

The Panel considered this further evaluation was supplementary expert evidence.

The Panel issued a Minute (dated 21 June 2019) requiring DOC to seek leave if it wanted the Panel to consider whether or not to accept the supplementary evidence. This was based on the Panel's Hearing Procedures and Directions document (5 November 2018) which sets out at section 12 - Late or supplementary evidence (paragraph 60)

Late or supplementary evidence will only be accepted at a hearing session:

- a. where circumstances make it necessary for such evidence to be provided; and*
- b. with the leave of the Hearing Panel.*

DOC sought leave for Ms Kissick to present the supplementary planning evidence. This was by a Leave Request filed by Ms Tumai dated 25 June 2019. In that Leave Request, Ms Tumai stated that the Panel "*correctly consider this further evaluation to be supplementary evidence*"¹

The Panel also provided an opportunity for other parties to be heard on whether Ms Kissick's supplementary evidence should be received by the Panel. This was by either filing a memorandum or appearing at the hearing on the 25 June 2019.

Genesis Energy Limited filed a Memorandum (dated 24 June 2019) opposing the introduction of the supplementary evidence.

Panel's Determination on the Supplementary Evidence

The Panel does not accept the supplementary evidence. The reasons for this are:

¹paragraph 2 of the Leave Request.

Ms Tumai recorded in her Leave Request that it was not until the Section 42A report was presented on the first day of the Block 2 hearings that DOC had "*fully appreciated that a cost-benefit analysis would not be undertaken by WRC in relation to the water bodies setback proposed by the Director-General, or potentially in relation to any of the other relief sought by the Director-General*"². She also stated that "*By the time it became apparent that no further analysis would be provided by WRC,evidence-in-chief for Block 2 had already been lodged*"³.

As discussed at the Hearing, it was the Panel's view that DOC was already on notice that the costs of the relief sought by DOC were an issue in the Panel's mind as a result of questions the Panel had posed of its counsel and witnesses in the Block 1 hearings. The Panel considers also that it was apparent when the section 42A report was released on the 5 April 2019 that it provided no quantification of the costs of the recommended relief.

In the Panel's view, DOC had ample time to prepare its own section 32AA analysis, and lodge that with Ms Kissick's evidence-in-chief. In addition, to the extent that DOC sought broader relief than that supported by the section 42A report, it needed to provide the evidential support for that relief itself. It could not reasonably expect the section 42A authors to do so. Following questioning of Ms Tumai, it remained unclear to the Panel why the section 32AA could not have been lodged with Ms Kissick's evidence-in-chief, but also why, even if that was not possible, it was lodged so late (i.e. attached to the legal submissions).

The Panel had reviewed the section 32AA analysis provided by Ms Kissick. This was to determine to what extent she had quantified the costs of the setbacks sought (the benefits having been addressed in DOC's other expert evidence). The Panel regarded this as being relevant to the question whether there were "*circumstances [that] make it necessary for such evidence to be provided*".

Ms Kissick's section 32AA analysis did not quantify the costs of the setback sought by DOC. She provided a more 'general analysis'; that there would be some increased costs. As an example, in relation to Schedule C Stock Exclusion she stated:

Costs (Environmental, Economic, Social, Cultural

The amendments as I have recommended are likely to have economic and social costs for landowners. An increase in setback requirements can result in opportunity costs, in terms of lost agricultural revenues resulting from a reduction in area of productive land. Associated costs may also be related to fence construction or planting of buffer areas, depending on the mechanism used for stock exclusion. In some instances, there may also be costs associated with sourcing an alternative water supply for stock if the waterbody is currently the stock water source.

²paragraph 6 of the Leave Request.

³paragraph 7 of the Leave Request.

The maintenance associated with different methods of stock exclusion can also result in costs for landowners. Riparian planting can incur substantial costs, from the initial planting, to ongoing upkeep through pest and weed control. Vegetated buffer strips, which are effective at intercepting and providing for the infiltration of contaminants, and in some cases can be effective for excluding stock can become saturated with sediment and it is acknowledged that this can alter their ability to function effectively.

In addition, I anticipate that the amendments I have recommended are likely to incur economic and social costs for Council, as the process of identifying and mapping spawning habitats is likely to result in pressure on council staff and resources, or may require training, contracting or recruitment to appropriately manage the new workload

This can be contrasted by a number of parties representing drystock farming interests, who in their evidence, provided some actual costings of stock exclusion, particularly fencing costs.

Given Ms Kissick's section 32AA analysis did not quantify any costs, we do not find it particularly helpful. In this regard it is the Panel's finding that there is no necessity for the supplementary evidence to be accepted.

Had the Panel come to a contrary view on this initial point, it would likely have agreed with the Genesis Energy Limited Memorandum (dated 24 June 2019) opposing the introduction of the supplementary evidence on the grounds of prejudice to other parties (like Genesis) who had already been heard. While that prejudice might potentially have been overcome by providing an opportunity to file supplementary evidence, this would have had adverse implications for the scheduled completion of the Block 2 hearings, before the Panel moves on to other different topics in Block 3. As it is, however, the Panel does not need to consider those issues further.



Greg Hill

Chairman of the Hearing Panel.

28 June 2019