MEMORANDUM

Subject: **Motukawa HEPS replacement consents: existing environment**

To: Lisa Mead, Manawa Energy

From: ChanceryGreen

Date: 27 October 2022 ***By email***

Introduction

1. You have asked us to respond to Wynn Williams' 24 August 2022 memorandum ("Wynn Williams memo") regarding the existing environment in the context of Manawa Energy Ltd's ("Manawa") application for new resource consents for its Motukawa Hydroelectric Power Scheme ("Motukawa HEPS" and the "Proposal").

Executive summary

2. The Wynn Williams memo addresses three questions:[1]

   (a) We agree that the Council **can**[2] impose conditions requiring fish passage improvements to the existing structures. However, for the reasons traversed in the AEE and as we go on to outline, Manawa says that additional fish passage requirements beyond those proposed by Manawa **should not** be imposed for the reasons comprehensively addressed in the AEE and supporting technical reports.

   (b) We agree that the Council **can** consider effects of the entire proposed water take of 7.5 cumecs into the Motukawa Race, not just the proposed increase in take (being the difference between the current take of 5.2 cumecs and the proposed take of 7.5 cumecs). The AEE and supporting technical reports have approached the assessment of the applications on that basis.

   (c) We agree that the Council **can** impose conditions requiring minimum flows into the Mako Stream notwithstanding the stream was historically dammed and no residual flow is currently provided for. However, based upon the conclusions of the technical assessments, Manawa does not consider that conditions of this nature are warranted.

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1 Paragraph 3(a)-3(c) of the Wynn Williams memo.
2 By "can" we mean there is no jurisdictional bar.

(d) We also largely agree with the Wynn Williams memo's summary of the general legal principles applying to the existing environment in the context of consent applications for infrastructure/activities.

(e) However, having stated the simple (on their face) broad legal principles, we disagree with the application of those principles to the exercise of assessing effects of the Proposal. For example, there is insufficient consideration of how *Ngāti Rangi*[3] would apply practically at the Motukawa HEPS without producing a fanciful and/or unrealistic effects assessment which would further the panel and stakeholder understanding of the scale and degree of effect. We accept that it is in essence an artificial exercise and can in some cases be complex, but importantly in our view it must be undertaken so as to avoid a fanciful or unrealistic effects assessment. Quite separate to *Ngāti Rangi*, other superior court authorities have confirmed the requirement to approach assessments in a "real world", workable manner, and given the complexities of the Motukawa HEPS we question whether that can be achieved by adopting the conclusions of the Wynn Williams memo.

3. *Ngāti Rangi* does not mean that the effects associated with the existing consents need to be assumed to have never existed (including a return to a "naturalised" flow regime and corresponding ecology). To the extent the Wynn Williams memo proposes or implies an existing environment being a return to a "pre-scheme" or "naturalised"/"pristine" environment, we disagree with this. Approaching the existing environment on such a basis is not required by the case law and would lead to unrealistic and unworkable outcomes, especially for infrastructure/structures of this nature. In the context of the Proposal, including the fact that the Motukawa HEPS has been in operation for 90 years (including the creation of Lake Ratapiko), it is simply not feasible, realistic or indeed helpful to usefully postulate a pre-scheme environment, and attempts to do so are fraught because it would rely on many assumptions and unknowns. To do so would also be contrary to a real-world analysis.

4. The relevant effects of the Proposal are those associated with the ongoing operation of the Motukawa HEPS, including the continuing water takes/diversions and the continuing presence of the structures. These have been comprehensively assessed in the AEE.

5. We think it is important to record that, contrary to the Wynn Williams memo[4], the AEE does not assert, nor does Manawa seek, that the existing environment includes *all* effects associated with the existing scheme such that the *status quo* is the existing environment and the "like for like" replacement elements of the proposal have "no effects". That is, Manawa is

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3 *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948.

4 Paragraph 27

not suggesting that all effects including those associated with discharges and damming are "ignored" or completely "discounted".

6. The approach to the existing environment proposed by Manawa is consistent with *Ngāti Rangi* in that it would be fanciful or unrealistic to assess the existing environment without the infrastructure/structure in place and importantly, Manawa is not arguing for a 'like for like' approach so that here are no relevant effects. It is also consistent with the line of cases that emphasise that the existing environment must be assessed in a real world fashion. Ultimately this is because, in our view, it is a more useful comparator for the decision-maker.

7. We also comment on other aspects of the Wynn Williams memo below.

The law

8. The "existing environment" refers to the environment against which a proposal's effects must be assessed. As stated in the Wynn Williams memo, a leading case on the existing environment for consent application for existing activities is the High Court's decision in *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council ("Ngāti Rangi")*[5]. In *Ngāti Rangi* the High Court held that the Environment Court was wrong to consider the existing environment as including the existing consented activities.[6] In other words, for replacement water permits, the existing environment against which effects are assessed should be the environment as if the consented activities do not exist.[7]

9. The Court in *Ngāti Rangi* considered several competing lines of authority,[8] and followed the judgment of the Environment Court in *Port Gore Marine Farms v Marlborough District Council* which held:[9]

> *… we need to bear in mind that we must imagine the environment, for the purposes of s104(1)(a) of the Act, as if the three marine farms are not actually in it.*

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5 [2016] NZHC 2948. The decision related to applications for replacement water permits for the Raetehi Hydroelectric Power Scheme near Ohākune.

6 As summarised in *New Zealand Energy Ltd v Manawatu-Wanganui Regional Council* [2017] NZEnvC 141 at [4]. The Environment Court decision (which was appealed to the High Court), had found that under the circumstances of the "unusual" case, *"…it is difficult to reach any other conclusion than the receiving environment within which the discretionary applications for additional allocation of water is assessed includes the Scheme as currently operated." (New Zealand Energy Ltd v Manawatu-Wanganui Regional Council* [2016] NZEnvC 59 at [49]).

7 The existing environment analysis is relevant for both notification and substantive decisions (refer for example *Knowles v Queenstown Lakes District Council* [2019] NZHC 3227 at [89]).

8 Curiously, the Court did not address all relevant decisions. Earlier decisions supporting the position that replacement consents do form part of the existing environment (some of which were cited by the High Court in *Ngāti Rangi*) include: *Tainui Hapu v Waikato Regional Council* A063/2004 at [103]-[110]; *Bay of Plenty Regional Council v Fonterra Cooperative Group Ltd* [2011] NZEnvC 73 at [45] and [48]; and *Marr v Bay of Plenty Regional Council* [2010] NZEnvC 347 at [62]. *Marr* followed *Rodney District Council v Eyres Eco-Park* Ltd [2007] NZRMA 1 in which the High Court held that existing use rights relating to existing activities could be construed as part of the existing environment. The Court in *Marr* also referred to *Mason & Keall v Bay of Plenty Regional Council* D098/207 and *Tainui Hapu and the Regional Council* A63/2004 (above).

9 [2012] NZEnvC 72 at [133]. The High Court decision in *Ngāti Rangi* accordingly distinguished several other decisions and lines of authority.

10. *Port Gore* was a decision on marine aquaculture and in our view assessing effects without floating platforms was practicable and materially different from imagining 'a no scheme' environment. The *Ngāti Rangi* decision observed that not following *Port Gore* when assessing the effects of a proposal in the context of that case would be to "lock in" hydro-electricity water takes and flow rates for as long as the controlled activity status was retained, thereby preventing adverse effects from being avoided or mitigated.[10] In support of its finding, the Court highlighted the principle that it should not be assumed that existing consents with finite terms will be renewed or renewed on the same conditions.[11] In relation to this principle, the Court cited with approval the following passage from a leading textbook:[12]

> *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 …*

11. Given the High Court endorsed the entire passage outlined above, we consider paragraph 16(a) of the Wynn Williams memo (stating that the Court *"did not expressly endorse the exception for structures")* is unduly legalistic. If the High Court had disagreed with the exception identified in the textbook, it surely would have said so.

12. The Court went on to confirm:[13]

> *To analyse the existing environment as excluding the scheme as it currently operates in these circumstances is also feasible. The Makotuku River can be assessed immediately upstream of the NZEL take in order to disregard the current scheme.*

13. *Ngāti Rangi* has been cited with approval in several subsequent cases.[14] In *Otago Fish & Game Council v Otago Regional Council* the High Court confirmed that *Ngāti Rangi* is *persuasive* authority that the existing environment for water take consent replacements is the environment prior to the existing consents: *"in other words, a rejection of the status quo baseline".*[15] However, the decision in *Lindis Catchment Group Inc v Otago Regional Council* notes that the authorities

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10 At [63].
11 At [65].
12 At [65].
13 At [68].
14 *Ngāti Rangi* is cited in *Otago Fish & Game Council v Otago Regional Council* [2021] NZHC 3258; *Colley v Auckland Council* [2021] NZHC 2365; *Colley v Auckland Council* [2021] NZHC 2366; *Flax Trust v Queenstown Lakes District Council* [2020] NZEnvC 84; *Lindis Catchment Group Inc v Otago Regional Council* [2019] NZEnvC 179; *Lindis Catchment Group Inc v Otago Regional Council* [2019] NZEnvC 166; *Aotearoa Water Action Inc v Canterbury Regional Council* [2018] NZHC 3240; *New Zealand Energy Ltd v Manawatu-Wanganui Regional Council* [2018] NZEnvC 160; *New Zealand Energy Ltd v Manawatu-Wanganui Regional Council* [2018] NZEnvC 151; *Friends of Nelson Haven and Tasman Bay Inc v Tasman District Council* [2018] NZEnvC 46; *New Zealand Energy Ltd v Manawatu-Wanganui Regional Council* [2017] NZEnvC 141; and *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* [2017] NZEnvC 35. See also the endorsement of the *Ngāti Rangi approach in Horowhenua District Council v Manawatu-Wanganui Regional Council* [2018] NZEnvC 163.
15 [2021] NZHC 3258. The decision concerned a plan change.

"are confusing".[16] As identified in the Wynn Williams memo, later decisions have also reinforced that the assessment of what constitutes the existing environment requires a real world approach:[17]

> *The assessment of what constitutes the "environment" calls for a "real world" approach, not an artificial approach, to what the future environment will be. A consent authority must not minimise the effects of a proposed activity, either by comparing it with an unrealistic possibility allowed by the relevant plan, or by ignoring its effects on what is, or undoubtedly will be, part of the environment in which the activity will take place.*

14. *Otago Fish & Game Council v Otago Regional Council* also highlighted that the judgment in *Ngāti Rangi* was concerned with a reconsenting application for *water take permits.*[18] It provides no direct authority in relation to structures.[19] We agree with the Wynn Williams memo that in many ways the existing environment for structures is more problematic but our clear view is that its fanciful and unrealistic to attempt to assess without them there.[20]

15. We note previous Wynn Williams legal submissions summarise *Ngāti Rangi* as follows: *"The High Court has confirmed that 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.*** *This is binding authority on what constitutes the "environment".*[21] We agree.

The existing environment for the Motukawa HEPS Proposal

16. Contrary to the Wynn Williams memo, the AEE does not assert, nor does Manawa seek, that the existing environment includes all effects associated with the existing scheme such that the *status quo* is the existing environment and the "like for like" replacement elements of the

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16 [2019] NZEnvC 179 at [51].

17 *Knowles v Queenstown Lakes District Council* [2019] NZHC 3227 at [95] (footnotes omitted). *Knowles* refers to *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009 and *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815, (2013) 17 ELRNZ 585. This is consistent with the Court of Appeal decision in *Arrigato Investments Ltd v Auckland Regional Council* CA84/01 at 38: *"Reflecting on the competing contentions in this area has reinforced us in the view that there should be no rigid rule of law either way. That conclusion should relieve consent authorities of the anxieties expressed by counsel while also allowing applicants for consent to seek a factually realistic appraisal. What is permitted as of right by a plan is deemed to be part of the relevant environment. But, beyond that, assessments of the relevant environment and relevant effects are essentially factual matters not to be overlaid by refinements or rules of law."* See also *Nash v Queenstown Lakes District Council Nash v Queenstown Lakes District Council* [2015] NZHC 1041 at [95].

18 [2021] NZHC 3258 at [138].

19 The Wynn Williams memo also identified this point at paragraph 16(b), although without reference to any authority.

20 The Wynn Williams memo states at paragraph 16(b) that any comments in *Ngāti Rangi* regarding structures are not binding authority. This appears inconsistent with the memo's strict application of *Ngāti Rangi* to structures.

21 Refer to the *"Legal submissions in support of the reporting officers for Otago Regional Council",* 2 October 2019, Lucy de Latour, at paragraph 6(a). For completeness, this aligns with the summary of the law in the AEE for the Proposal at section 2.1.

proposal have no effects (i.e. their effects are "ignored"[22] or completely discounted).[23] This would be a perverse outcome and would mean that the only relevant effects of the Proposal – and the only effects for which conditions[24] could be imposed – are those associated with departures from the current operation of the scheme (e.g. the 2.3 cumec increase in flow from the Manganui River). More widely, under such an approach it is difficult to see how a replacement consent application could ever be determined to have an effect on the environment.

17. Consistent with *Ngāti Rangi* and the wider case law, the existing environment for the Proposal must be approached on a real world and non-fanciful basis. Simply asserting that the *"effects on the environment from reconsenting the Motukawa HEPS should not be assessed as if the activities authorised by the expiring regional consents were not present"* is not instructive – finer grained analysis is required as to what the legal framework means practically in the context of the assessment of effects of the Proposal and which is cognisant of legacy effects.

18. The relevant effects of the Proposal are those associated with the ongoing operation of the Motukawa HEPS, including the continuing water takes/diversions and the continuing presence of the structures.[25]

19. *Ngāti Rangi* does not mean that the effects associated with the existing consents need to be assumed to have never existed.[26] *Ngāti Rangi* does not require, nor is it consistent with a real world analysis or feasible in the case of the Proposal, to attempt to precisely imagine the existing environment as a "pre-scheme" or historic "naturalised"/"pristine" environment. The "legacy" effects of the Scheme resulting from its 90 years of operation are relevant to the existing environment.

20. In the context of the Proposal, including the fact that the Motukawa HEPS has been in operation for 90 years such that legacy effects are apparent (and some are irreversible) it is simply not practicable to usefully postulate a pre-scheme environment, and attempts to do so are fraught. The complexity of the Motukawa HEPS differs considerably from the marine farms considered in *Port Gore* and the particular hydro scheme in *Ngāti Rangi*.[27] The relatively modest generation output of the Motukawa HEPS belies its complexity and geographical footprint. Motukawa HEPS

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22 The Wynn Williams memo refers to the "ignoring" of effects at paragraph 17.

23 The email from Sarah Miller to Lisa Mead dated 6 October 2022 acknowledges that the AEE and expert reports do not purport to discount effects via the existing environment analysis. Other applicants have, over the years, purported to run "no effects" arguments, including the applicant in *Ngāti Rangi.*

24 RMA s108AA, as referred to in the Wynn Williams memo.

25 This is consistent with the AEE (refer to section 2.1).

26 Previous legal submissions by Wynn Williams adopt this approach also (refer to the *"Legal submissions in support of the reporting officers for Otago Regional Council",* 2 October 2019, Lucy de Latour.) While acknowledging the law has developed since the time these earlier submissions were drafted, they submissions are not consistent with the Wynn Williams memo.

27 Noting the High Court's comments at paragraph 66 of *Ngāti Rangi*, we do not suggest the age of the scheme is somehow determinative with respect to the existing environment.

(shown in Figure 1) relies on a network of artificial structures including a 4.6 km long water race, a large silt pond, an aqueduct, a large man-made lake, a 2.8km tunnel, penstocks and power station/tail race. Water that is taken from the Manganui River ultimately discharges many kilometres to the northeast at the Makara Stream and subsequently to the Waitara River. Questions that arise as a consequence include:

(a) If it is to be assumed all of that infrastructure does not exist and that there is no water in the Motukawa Race or Lake Ratapiko, what is in their place: pasture or forest or something else? Unlike in *Ngāti Rangi* where the Court found it was feasible to postulate the existing environment via upstream proxy, this option is not practicable or particularly informative in the case of the Proposal (noting that upstream and downstream ecology has been assessed by Manawa's technical experts). Consequentially how should experts account for the impacts of theoretical land use practices on adjacent waterways such as the Mako Stream? Perhaps more importantly, how does that assist the assessment of the Proposal?

(b) Taking the above point further, and with respect to the Ratapiko dam, how do you meaningfully hypothesise an environment without the dam, which involved significant earthworks and structures that have been in place for nearly a century, and which would require a suite of resource consents and other approvals (with associated adverse effects) to remove? In particular:

    i. Should it be assumed that essentially the "floodgates are opened" (i.e. the dam does not exist) and Lake Ratapiko is drained, and if so under what conditions would such a release be?[28]

    ii. How would the Panel approach its assessment when the existing environment without the Scheme relies on securing resource consents to achieve that? How could it be satisfied that these would likely be granted? In the context of the Motukawa HEPS, we doubt that an applicant could successfully consent an environment consistent with *Ngāti Rangi's* "pre-scheme" scenario.[29] Why then would you postulate an existing environment on this basis?

    iii. How far is the analysis taken? If the existing environment is one where Lake Ratapiko does not exist, then does the proposal include the significant positive recreation effects associated with "creating" a lake?

(c) How would the Panel determine what ecological conditions should be imposed on consents associated with the operation of Lake Ratapiko, or other aspects of the Motukawa HEPS

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[28] Such an approach was adopted by Contact Energy when it sought replacement consents for its Clutha Scheme when it was reconsented in the early 2000s.

[29] Noting also the duty to avoid, remedy, or mitigate adverse effects contained in s17 of the RMA.

such as the Motukawa Race and settlement pond when the existing environment is one where the infrastructure does not exist and there is no aquatic ecology present that warrant conditions being imposed?

(d) How will the Panel approach assessing effects of activities for which Manawa is not seeking – and cannot seek – resource consents (for example for the "creation" of a new lake)?

(e) How would some applicants possibly satisfy the legislative and policy framework, including the effects management hierarchy under the National Policy Statement for Freshwater Management, and would applicants need to proffer avoidance measures, mitigation, offset or compensation for effects associated with activities for which they are not seeking?

21. Hypothesising artificial scenarios/environments associated with these lines of inquiry is not necessary or appropriate and leads to absurdities. It is unhelpful, unrealistic, speculative and fanciful, and requires a range of uncertain assumptions. Engaging expert assessments on this basis would require crystal ball gazing.[30]

22. The approach to the existing environment proposed by Manawa is consistent with *Ngāti Rangi*, noting that *Ngāti Rangi* explicitly cautions against fanciful or unrealistic postulation of the existing environment. It is also consistent with the line of cases that stresses that the existing environment must be assessed in a real-world fashion. Ultimately it is a more useful comparator for the decision-maker.[31]

23. Finally, we note that the recent Taranaki Regional Council decision[32] on Opunake Power Limited's applications did not canvass *Ngāti Rangi* or approach the definition of the existing environment by assuming the activities authorised by the existing consents did not exist. It may not have been appropriate to do so in that case, however the decision is silent in that regard.

Other issues with the Wynn Williams memo

24. We consider that the Wynn Williams memo's reference to the Motukawa HEPS structures as "unconsented" is incorrect.[33] Under s124 of the RMA, Manawa may continue to operate under the existing consents until new consents are granted or declined and all appeals dismissed. The memo's use of the defined term "expired consents" is also potentially misleading for similar reasons.

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30 In contrast, imagining and assessing an environment in which a current marine farm, for example, does not exist is a relatively straightforward exercise. This was the factual context for the *Port Gore* decision above (*Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72).

31 *"More useful comparator"* is the language used in *Otago Fish & Game Council v Otago Regional Council* [2021] NZHC 3258 with reference to the various "existing environments" proposed by the parties in that case.

32 15 March 2022

33 Wynn Williams memo, paragraph 16. From discussions with Mike Doesburg, one of the authors of the Wynn Williams memo, we understand Wynn Williams does not in fact consider the Motukawa HEPS structures to be unconsented.

Conclusion

25. We would be happy to discuss this memorandum with you.

ChanceryGreen
Jason Welsh (Partner)

Figure 1

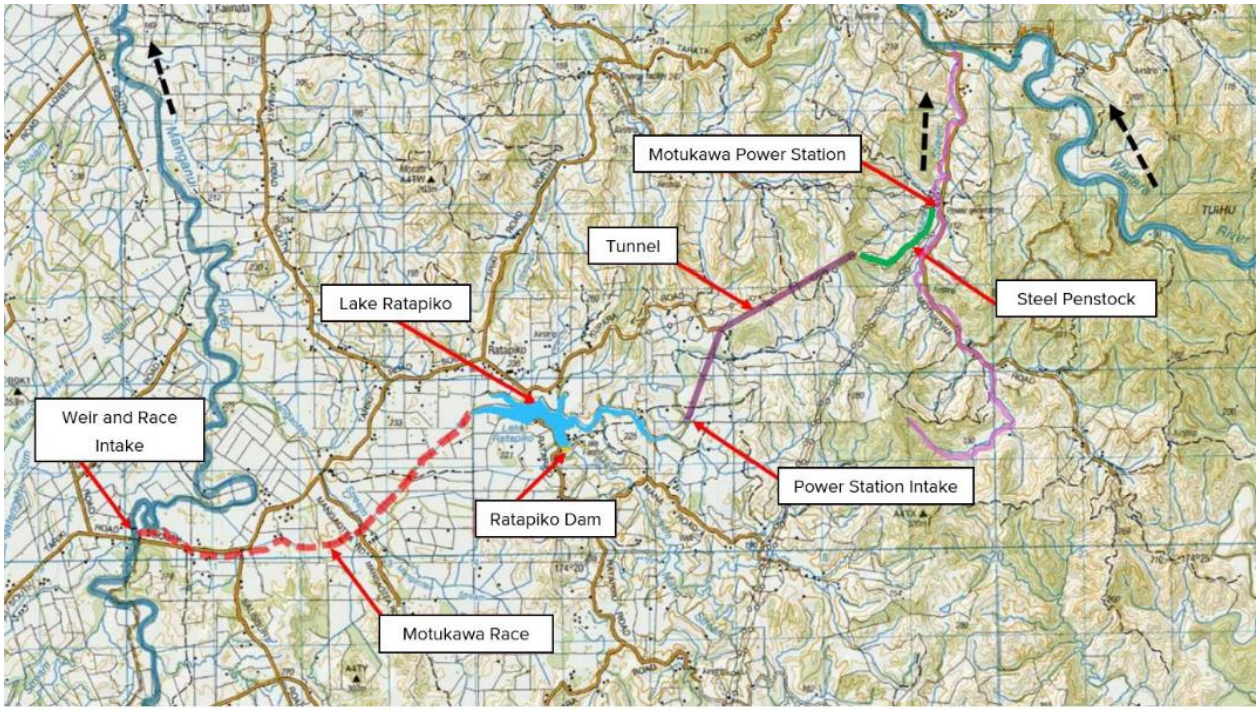

Figure 1: Schematic of the Motukawa Hydro-Electric Power Scheme