

File: 40030-OTH

18 August 2015

Graeme Hansen  
Hawke's Bay Regional Investment Company Limited  
Private Bag 6006  
Napier 4142  
New Zealand

Dear Graeme

**HAWKE'S BAY REGIONAL INVESTMENT COMPANY LIMITED – RUATANIWHA -  
APPLICATION FOR DISPENSATION UNDER THE FRESHWATER FISHERIES  
REGULATIONS 1983 – 40030-OTH**

***Application***

1. The Hawke's Bay Regional Investment Company Ltd (HBRIC) applied, by letter dated 11 November 2014, for a dispensation from a requirement for fish passage in respect of the proposed Makaroro Dam.

***Decisions Required***

2. Although your initial application was for a “dispensation”, my Department advises me that I must make the following decisions:
  - Whether to require that the upstream water intake structure include a fish facility (fish screen), and if so, what conditions to specify.
  - Whether to require that the downstream water intake structure include a fish facility (fish screen), and if so, what conditions to specify.
  - Whether to require that the dam include a fish facility in the form of a “trap and transfer” system and if so, what conditions to specify. (The Department considers that the “trap and transfer” system is a “fish facility” within the definition in the Regulations.)
  - Whether to require that the dam include a further fish facility (and if so, what conditions to specify).
3. I understand that HBRIC and the Department take a slightly different view of the decisions required, and that the Regulations are somewhat confusing on this matter. HBRIC considers that the decisions required are either “approvals” or “dispensations”, rather than “requirements”. Therefore, in this letter, while I will primarily use the “requirement” framework, I will also express my decisions using the “approval and dispensation” terminology.

***Adequacy of information***

4. In terms of Regulation 43(3), I consider the information supplied by HBRIC adequate to make my decisions.

### **Legal Test**

5. My decision must be made in accordance with the Freshwater Fisheries Regulations 1983.
6. I am aware that the Regulations themselves do not provide much guidance on the relevant matters to take into account, or indeed the legal test to apply, when making the required decisions. The Department proposed the following test, which I have applied when reaching my decisions. It is:

In order to achieve the Department's purposes and functions of:

- promoting and conserving New Zealand's natural and historic resources; and
- preserving indigenous freshwater fisheries and protecting recreational freshwater fisheries and freshwater fish habitats

should the Director-General require a fish facility, or is it acceptable to grant a dispensation, taking into account the practicalities of installing a fish facility and any offsets and mitigation measures?

7. I have also considered the principles of the Treaty of Waitangi, in accordance with section 4 of the Conservation Act 1987, as well as the relevant statutory policy and planning documents.

### **Decisions**

#### *The trap and transfer system*

8. It is clear that the dam will have serious adverse effects on migratory fish. It will present a complete barrier to upstream migration and a significant barrier to downstream migration of those species that migrate as fish rather than larvae.
9. I appreciate that HBRIC will be carrying out off site activities (the "Integrated Mitigation and Offset Approach" or "IMOA") that may benefit species of fish whose passage is affected by the dam. However, I did not accord much weight to these potential benefits in reaching my decisions either on the trap and transfer or on whether to require a further (or alternative) facility to enable fish to bypass the dam. This is because while the IMOA may provide significant benefits, this is simply too uncertain at this stage to be a major factor in my considerations.
10. As you will be aware, one of the functions of the Department is to "*preserve so far as possible all indigenous freshwater fisheries*" (section 6(ab) of the Conservation Act 1987). With this in mind, and also bearing in mind the strong interest iwi have in indigenous freshwater fish, I require a trap and transfer system which includes all indigenous freshwater fish currently present at the proposed dam site. In my opinion it is not sufficient for the trap and transfer system to be focussed predominantly on eels and koaro as appears to be the case in the system proposed in HBRIC's application and required by the resource consents.
11. I have done this by requiring the system to transfer "target fish species", which will be those indigenous species we already know to be present at the site, along with such other indigenous species as may be found during pre-dam monitoring.
12. The Department also, of course, has functions in respect of recreational freshwater fisheries. Section 6(ab) of the Conservation Act also requires the Department to "*protect recreational freshwater fisheries*". In considering this function I paid particular attention to the letter (and

email) from Fish and Game, Hawke's Bay Region, and their concerns about the effects of the dam on trout. With regard to brown trout, I accept my Department's advice that this species is not likely to be significantly affected by the dam. With regard to rainbow trout, I considered extending the "target fish species" to include rainbow trout, but decided against doing so. My reasons are that rainbow trout are not threatened or declining, they are likely to form a self-sustaining population above the dam, (albeit with smaller sized fish than presently), and they may eat other fish if they were trapped together. For these reasons I would prefer HBRIC to focus on designing and operating a trap and transfer system for indigenous fish.

13. The application at present does not provide details of the design or location of the trap and transfer system, and I am therefore being asked to essentially approve a system with limited information. I consider my Department's proposal, whereby I impose a requirement for a trap and transfer system with the details of that system to be approved by the Department (in a certifier role), to be a satisfactory solution to this issue. This certification will be informed by the additional baseline monitoring that I require HBRIC to carry out; and will be dependent on the system meeting the listed criteria. Those criteria and the details of the certification process are set out in the attached Approval and Dispensation document.
14. By requiring the system to meet certain criteria, and by imposing monitoring, annual reporting and review specifications, the trap and transfer system will be the best it can be at the outset, and will also improve over time in response to the monitoring.
15. Therefore, in summary, pursuant to Regulation 44(1), I require HBRIC to design and implement a trap and transfer system, for all indigenous fish species present at the dam site. I consider that this is likely to mitigate the effects of the dam on fish passage. The details of this requirement and associated specifications imposed under Regulation 44(2) are set out in the attached Approval and Dispensation.
16. Using the "approval" terminology, I approve the trap and transfer system proposed by HBRIC, but with significant changes as set out in the attached "Approval and Dispensation".

*Requirement for a further fish facility*

17. I have given some thought to the question of whether fish passage should be provided by requiring an alternative fish facility, either in addition to, or in substitution for, the trap and transfer system. I am aware that dams can be fitted with "engineered" fish passes of different types, for example fish ladders and fish canals, to provide passage.
18. It appears that a good range of engineered pass options was considered by HBRIC, and analysed by both HBRIC's consultants and the Board of Inquiry, and that a further facility would not in fact provide significant benefits. This is because of a combination of circumstances: the height of the dam, the steepness of any such facility and the amount of water available above the dam during the downstream migration period.
19. That being the case, it would not be reasonable or practicable for me to impose a requirement for a further, or alternative, fish facility to enable fish to bypass the dam. It would not help achieve the purpose of preserving indigenous fisheries or protecting recreational freshwater fisheries. Pursuant to Regulation 44(1) I have therefore decided not to impose a requirement for a further fish facility.
20. Using the "dispensation" terminology, I grant a dispensation from any further requirement to provide a fish facility enabling passage past the proposed Makaroro Dam.

*Screens on upstream and downstream water intake structures*

21. In your application you drew attention (in accordance with Regulation 43(2)) to the screens that you propose to use on the upper and lower water intakes, to prevent fish entering those intakes.
22. I have considered the type of screens proposed and the requirements of the resource consent conditions. These conditions include requirements that the upper intake screen comply with the NIWA guidelines and the lower intake screen operate to ensure trout are excluded. I accept my Department's advice that the NIWA guidelines represent current best practice and should be applied to the upper intake, and also that a different standard is appropriate for the lower intake, given that the lower intake finishes in a natural water body.
23. I therefore require HBRIC, pursuant to Regulations 44(1) and (2), to provide fish screens on the upper and lower intakes, with the same conditions as your resource consents impose, and a minor addition which will ensure that the Department receives relevant information.
24. Imposing the same conditions as the resource consents may seem redundant, but I see a potential advantage in having two means of enforcement available, in the unlikely event that this should become necessary in the future.
25. Using the "approval" terminology, I approve the fish screens proposed by HBRIC on the upstream and downstream water intake structures, with the same conditions as your resource consents impose, and a minor addition which will ensure that the Department receives relevant information.

*"Lapse" period*

26. Under Regulation 44(4) there is a default period of 3 years for approvals under the Regulations to expire if the dam is not completed. I have extended this to 10 years, taking into account the scale and complexity of the project.

*Approval and Dispensation Document*

27. To give effect to my decisions, I attach a signed "Approval and Dispensation" document.
28. I also attach for your information a copy of the Department's report.
29. My staff tell me that HBRIC has been prompt and helpful in providing information as required during this process, and I would like to thank you for this.

Yours Sincerely

Lou Sanson

Director-General of Conservation