BEFORE THE EXPERT PANEL UNDER THE FAST-TRACK APPROVALS ACT 2024

IN THE MATTER OF an application for resource consents by Manawa Energy Limited (**Manawa Energy**) for activities associated with the listed Kaimai Hydroelectric Power Scheme (**Kaimai HEPS**) Re-Consenting Project

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MEMORANDUM OF COUNSEL FOR THE APPLICANT IN RESPONSE TO MINUTE 7 RFI

FTAA-2502-1024 – 2 APRIL 2026

Introduction

1. This Memorandum responds to the Expert Panel's Request for Information (**RFI**) contained in Minute 7 and dated 20 March 2026.

2. In particular, the Panel has asked:

> [2] The Panel notes that in terms of the receiving environment, the High Court in *Ngāti Rangi v Manawatu-Whanganui Regional Council* [2016] NZHC 2948 has said that, for renewal applications, the receiving environment does not include the effects of the current activity (paras [63]-[68]). The Application (pp 25-27) refers to this case, and to an older Environment Court case (*Alexandra Flood Action Society Inc. v Otago Regional Council Decision No C 102/2005*) which appears to adopt a different approach to the High Court. The Panel notes that the High Court provided a useful summary of *Ngāti Rangi* in *Otago Fish and Game Council v Otago Regional Council* [2021] NZHC 3258 (paras [129] to [137]) (in that case distinguishing *Ngāti Rangi* on the basis that this case related to a private plan change).
>
> [3] Given reference has been made to both the High Court and Environment Court case law, the Panel requests the Applicant to clarify what they consider

the legal position is. If the Applicant's position is not that the High Court's judgment in *Ngāti Rangi* applies, the Applicant is to clarify why this is so.

Executive summary

3. The legal position is that according to the doctrine of *stare decisis*, higher authority should be followed where relevant. Whether *Ngāti Rangi* is the most relevant authority, requires an assessment of the facts however. The relevant environment is a factual matter which should not be subject to a rigid rule of law either way.[1]

4. The Applicant's position is that *Ngāti Rangi* does not apply in this case for two reasons:

   (a) *Ngāti Rangi* is not relevant, because it is not factually analogous with the reconsenting of the Kaimai HEPS given the small nature of the Raetihi Power Scheme in question in *Ngāti Rangi*; and

   (b) Given the physical size and layout of the Kaimai HEPS, it would be fanciful or unrealistic to treat the receiving environment as one which does not include the effects of the Kaimai HEPS. This is consistent with the stated exception in *Ngāti Rangi*, where the High Court quotes with approval the following excerpt from the text *Environmental and Resource Management Law* (emphasis added):

> 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** …

[1] Consistent with the statement in *Arrigato Investments Ltd v Auckland Regional Council* CA84/01 at [38].

5. Accordingly, the Applicant does not assess effects against a pre-scheme environment.

6. In short, the Applicant says that the decision in *Ngāti Rangi* can be distinguished, and that it can be distinguished on exactly the terms that the High Court itself recognised were a limitation on its own finding. To do otherwise would be to apply the findings of the Court in *Ngāti Rangi* outside the scope where the Court considered they ought to apply.

7. This position is consistent with Policy H(1)(a) of the National Policy Statement for Renewable Electricity Generation (**NPSREG**).

8. With respect to flow regimes, the Applicant nevertheless has sought to avoid the situation identified by the High Court in *Ngāti Rangi*, that when assessing the environmental impacts of a proposed consent, not assessing effects against a pre-scheme environment, is to lock in hydro-electricity water takes and flow rates for so long as the controlled activity status is retained thereby preventing adverse effects being avoided or mitigated.[2] Therefore, the technical assessments commissioned by the Applicant:

   (a) Have sought to provide context as to the environment that may have existed prior to the construction of the Kaimai HEPS where feasible (including through the use of previous aerial photography and the comparison of comparable river reaches);

   (b) Do not seek to discount effects caused by the ongoing activities at the Kaimai HEPS.

[2] *Ngāti Rangi v Manawatu-Whanganui Regional Council* [2016] NZHC 2948 at [63].

Relevant caselaw

9. A relevant re-consenting decision, which concerned a hydro-electric power scheme, is *Alexandra District Flood Action Society Inc v Otago Regional Council*.[3] In *Alexandra*, the Court considered appeals against consent renewals for the Clutha Hydro-Electric Power Scheme, which involved control structures at the Lake Hawea outlet and two major downstream dams.

10. The Environment Court held in that particular case that the most realistic existing environment was the environment as it was during the hearing, but allowing for seasonal variations as they come and go, as opposed to the 'Armageddon' scenario (i.e. gates fully opened with uncontrolled release) or the 'Eden' scenario (i.e. a pre scheme environment).[4] The importance of the scheme to electricity generation meant the 'Eden' scenario was unrealistic, and the potential significant adverse downstream effects from an uncontrolled release, and the need to authorise these by way of consent, meant the 'Armageddon' scenario was unrealistic. Notably, the Court said:[5]

> The important point is, in our view, that a consent authority considering an application for resource consent does not usually compare "environments", it usually compares "effects" on one environment. That is because effects are effects on someone or something.

11. *Alexandra* cites the Court of Appeal statement in *Arrigato* that assessments of the relevant environment and relevant effects are essentially factual matters not to be overlaid by refinements or rules of law.[6]

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[3] *Alexandra District Flood Action Society Inc v Otago Regional Council* C102/2005, Environment Court; Judge Jackson.
[4] *Alexandra* at [69].
[5] *Alexandra* at [70].
[6] *Alexandra* at paragraph [58] noting that strictly the statement was obiter but it is still authoritative; *Arrigato Investments Ltd v Auckland Regional Council* CA84/01, 11 September 2001, (2001) 7 ELRNZ 193, [2002] 1 NZLR 323, [2001] NZRMA 481, [2001] ELHNZ 359 at [38].

12. More recently, the High Court in *Ngāti Rangi v Manawatu-Whanganui Regional Council* [2016] NZHC 2948 said that the approach to be taken should exclude the scheme as it presently operates. Otherwise, when assessing the environmental impacts of a proposed consent, the effect would be to lock in hydro-electricity water takes and flow rates for so long as the controlled activity status is retained thereby preventing adverse effects being avoided or mitigated.

13. The High Court quoted with approval the following text:

> 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 ...

14. As the Expert Panel has noted, *Ngāti Rangi* has been distinguished in *Otago Fish and Game Council v Otago Regional Council* [2021] NZHC 3258 (paras [129] to [137]) on the basis that this case related to a private plan change. While that specific distinction is not relevant in this case, it does illustrate that *Ngāti Rangi* can be distinguishable, depending on the facts of the case being considered.

NPSREG

15. The amended NPSREG now contains, effective 15 January 2026, a policy as to existing REG assets forming part of the existing environment. Policy H(1)(a) states:

> **Policy H: Reconsenting, upgrading and repowering existing REG assets and activities**
>
> (1) For reconsenting, upgrading and repowering of existing REG assets and activities, decision-makers must:

(a) recognise that existing REG assets form part of the existing environment;

16. The term "existing REG assets and activities" is defined to mean:

> **existing renewable electricity generation (REG) assets and activities** mean REG assets and activities that are:
> (a) lawfully established and constructed; or
> (b) authorised by an unimplemented resource consent or designation, or by another authorisation, that has not lapsed

Application to the Kaimai HEPS

17. On the basis of *Arrigato*, what constitutes the existing environment is a matter of assessment for the Expert Panel.

18. The Raetihi Power Scheme considered in *Ngāti Rangi* is an extremely small run-of-the-river (i.e. no storage via a dam) scheme. Water is diverted from several streams to a small headpond which drops the water through a penstock into the powerhouse, then discharges the water back into a stream.[7] The water takes in question were all below 500 L/s.[8] The Raetihi Power Scheme generates around 1.75 GWh per annum, which equates to enough electricity to sustain approximately 220 households per year.[9]

19. The type of infrastructure associated with the Raetihi Power Scheme meant that, as identified by the High Court, it was feasible to analyse the existing environment as excluding the scheme by assessing the river immediately upstream of the take.[10]

20. The Kaimai HEPS involves significantly larger and more permanent infrastructure than that involved in *Ngāti Rangi*. The Kaimai HEPS, the various

[7] *Ngāti Rangi* at [7].
[8] *Ngāti Rangi* at [10]-[17].
[9] *Ngāti Rangi* at [8].
[10] *Ngāti Rangi* at [68].

diversions, canals, gates, and their impact on the flow regime, have shaped the environment over a 50 year period, meaning it is not a case of simply taking an upstream assessment to determine what the existing environment would be, as was the case in *Ngāti Rangi*.

21. In contrast to the Raetihi Power Scheme, the water takes and diversions at the Kaimai HEPS are much larger. The current resource consents authorise cumulative takes and diversions in the order of approximately 60m^3/s. The Kaimai HEPS produces 169 GWh (although can exceed 200 GWh in some years), which amounts to approximately 25,000 – 29,000 households.[11] This demonstrates the clear difference in scale between the Kaimai HEPS and the Raetihi Power Scheme.

Kaimai HEPS structures / assets

22. In particular, the structures of the Kaimai HEPS that enable the various diversions and scheme operations are extensive. These include the following:

    (a) In the Eastern Diversions, the Omanawa Weir, which is a 26 m long and 4.3 m high concrete weir, that spans the width of the Omanawa River, and the Mangapapa Weir, which is a concrete, steel and wooden structure that extends across the width of the riverbed and is 3.65 m in height.

    (b) In the Western Diversions, the Opuiaki Weir, which is a 21.6 m long, 3.65 m high and 1 m wide concrete weir and spillway structure, and the Ngatuhoa Weir, which is a concrete and wooden weir that is 17.52 m long and 1.52 m high.

[11] Statement of Evidence of Todd Mead dated 12 February 2026 (submitted as part of Response to Comments) at paragraphs 12 and 23.

(c) The Mangaonui Dam and Diversion, which is a 22 m high and 150 m long concrete and earth embankment. Directly to the east of the dam embankment is a 15.8 m long and 6 m deep concrete weir, and a spillway with four steel remotely operated gates. Lake Mangaonui's position as the uppermost storage reservoir is the most critical in terms of flow regulation for the remainder of the Kaimai HEPS, given flows released from the lake then feed the two following / lower lakes.

(d) The Matariki Dam, a concrete embankment dam which is 37 m long, 1.95 m wide and 30 m high. The lake acts as a storage reservoir for the Lower Mangapapa Power Station which is located approximately 0.6 km north of the dam. Lake Matariki is the largest of the three lakes in the Kaimai HEPS and is located downstream of Lake Mangaonui with an area of approximately 15 hectares and a total storage volume of approximately 3,050,000 m^3 at maximum normal operating level.

(e) The Mangakarengorengo Ford, which is located on the lower reaches of the Mangakarengorengo River before it converges with the McLaren River. The Mangakarengorengo Ford is a 36.7 m long concrete structure and spillway.

(f) The McLaren Falls Dam, a concrete embankment which is 20 m long at its crest and 23 m in height, creating Lake McLaren. Lake McLaren is the lower most storage reservoir within the Kaimai HEPS. The lake is formed within the bed of the Mangapapa River by the McLaren Falls Dam. A concrete spillway (approximately 52.8 m long x 2.2 m wide) is provided over the McLaren Falls Dam and a remotely operated recreational release gate is located on the northeastern edge of the dam. The spillway enables the discharge of water into the Wairoa River downstream.

(g) The Ruahihi Canal and penstocks, which form the final diversion of the Kaimai HEPS. Inflows from Lake McLaren, at the canal intake, are diverted via an approximately 20 m wide canal for 2.3 km north before the water passes through the Ruahihi penstocks to the Ruahihi Power Station. A concrete emergency spillway is located along the western edge of the Ruahihi Canal that is only utilised when water levels in the canal are high. Water that discharges over the spillway enters the Wairoa River.

23. The Kaimai HEPS operates in reliance on each individual piece of infrastructure operating as an integrated unit, and each of those components contributes to the overall generation capacity of the Kaimai HEPS. The removal or severance of any individual component would undermine the function, integrity and value of the Kaimai HEPS as a whole. It is unrealistic to view any part of the Kaimai HEPS in isolation to any other part.

24. Accordingly, it would be fanciful or unrealistic to assess the existing environment as though those structures authorised by the consents being renewed did not exist.

25. The structures described above would also all meet the definition of REG assets under the NPSREG, being assets that were lawfully established and constructed. In accordance with Policy H(1)(a) of the NPSREG, which is expressed in directive terms, the Expert Panel must recognise that existing REG assets form part of the existing environment.

Kaimai HEPS flow regimes

26. Once the Expert Panel accepts that the Kaimai HEPS structures / assets form part of the existing environment, on the basis of both the exception expressed in *Ngāti Rangi*, and Policy H(1)(a) of the NPSREG, then it follows that the most realistic environment is the environment as it exists today (in line with

Alexandra). This is because it becomes too difficult and unrealistic to postulate an alternative environment, and risks hypothesizing and comparing alternative environments.

27. This is illustrated by considering how an environment with a different flow regime might be approached. For example:

(a) The Expert Panel would need to determine how the flow regime would be stopped or altered – in particular, whether diversions would be closed, and if so at once and entirely, allowing all three lakes to drain and flows to pass uncontrolled downstream (potentially creating an environment where the downstream environment experiences significant adverse effects). The Expert Panel would need to determine whether there would be controlled releases through partial openings of structures (where applicable), or different releases at different times through different structures, to allow a gradual release.

(b) Further considerations would include whether the infrastructure of the Kaimai HEPS would be able to cope with increased or uncontrolled flows, whether the downstream rivers (i.e. the Wairoa River) would be able to cope with increased or uncontrolled flows, and what this would mean for flooding risk downstream. There are related maintenance considerations such as dewatering requirements, and whether structures would remain safe and stable under different flow regimes.

(c) The resource consents for the Kaimai HEPS do not anticipate decommissioning of the structures. The release of waters from the various dams, weirs and diversions would quite likely require discharge permits. In the absence of actual applications for these activities being made, the Expert Panel would need to make various assumptions about these effects (including hydrology, ecology, landscape, recreation, geomorphology, dam safety and public safety), and whether it is likely

that a consent would be granted when considering some impacts that might ensue. There would also be impacts on power generation and downstream flood management.

28. It is difficult to see how a scenario which requires an alternative environment to be postulated, which could have adverse environmental impacts and likely require resource consents, could be said to form the starting point of the existing environment. There is no authority for this proposition, and it runs contrary to established caselaw which requires a "real world" approach.

The substantive application

29. It is submitted that the mischief which *Ngāti Rangi* seeks to address, is an existing environment which locks in existing operations and prevents adverse effects from being avoided or mitigated.[12]

30. The Applicant has sought to avoid this mischief by ensuring that the technical assessments commissioned by the Applicant:[13]

(a) Have sought to provide context as to the environment that would have existed prior to the construction of the Kaimai HEPS where feasible (including through the use of previous aerial photography and the comparison of comparable river reaches);

(b) Do not seek to discount effects caused by the ongoing activities at the Kaimai HEPS.

31. Taking one example, the Aquatic Ecology and Water Quality Assessment by Dr Greg Ryder,[14] with respect to water quality, considers monitoring from sites upstream of the Kaimai HEPS (in the Opuiaki River, Mangaonui stream and

[12] *Ngāti Rangi* at [63].
[13] Substantive application, section 3.1, page 27.
[14] Appendix J to the substantive application.

Omanawa and Mangapapa Rivers). That has then enabled Dr Ryder to assess the water quality impacts of the Scheme further downstream. His assessment then considers that:

(a) Implementing a residual flow at the Mangapapa weir should minimise the decreases in DO concentrations in the Mangapapa River immediately downstream of the intake weir, therefore reducing this effect [on DO] to no more than minor;[15]

(b) The introduction of residual flows, with continued monitoring below the Mangakarengorengo ford, would appropriately minimise potential effects of increased temperatures, effectively reducing the environmental effect to no more than minor;[16]

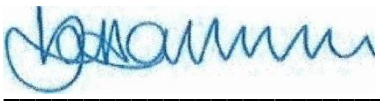
(c) The implementation of a residual flow for the Wairoa River (downstream of the McLaren Falls Dam) will ensure the potential risk of [DO and temperature] adverse effects occurring due to the operation of the Scheme will be no more than minor.[17]

32. In other words, the treatment of the existing environment as including the Kaimai HEPS, has not prevented Dr Ryder from considering the ongoing effects of the Kaimai HEPS and appropriate measures to avoid, remedy or mitigate those effects.

33. On this basis it is submitted that the Expert Panel can be satisfied that the Applicant has not sought to lock in the existing environment as a means to prevent adverse effects from being avoided or mitigated.

[15] Appendix J, section 4.1.2.1, page 100.
[16] Appendix J, section 4.1.2.5, page 101.
[17] Appendix J, section 4.1.3, page 102.

DATED at Tauranga this 2nd day of April 2026



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