

Severe Weather Events Recovery Review Panel

1 May 2024

Hon Mark Mitchell
Minister for Emergency Management and
Recovery
Executive Wing
Parliament Buildings
WELLINGTON 6011

Hon Penny Simmonds
Minister for the Environment
Executive Wing
Parliament Buildings
WELLINGTON 6011

via email

Dear Ministers

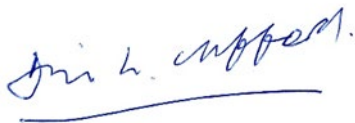
SEVERE WEATHER EMERGENCY RECOVERY (HAWKE'S BAY FLOOD PROTECTION WORKS) AMENDMENT ORDER 2024

On 30 April 2024 the Severe Weather Events Recovery Review Panel (the Review Panel) considered the above draft Order.

As required under section 16 of the Severe Weather Emergency Recovery Legislation Act 2023, please find attached the Review Panel's report on this draft Order, including our recommendations and brief comments.

We conclude that the Minister may reasonably consider this Order to be necessary and/or desirable.

Yours sincerely



The Honourable Denis Clifford

Convenor, Severe Weather Events Recovery Review Panel

Severe Weather Events Recovery Review Panel

THE REVIEW PANEL

The Honourable Denis Clifford (Convenor)

Anne Carter

Dr Veronica Jacobsen

Associate Professor Hamish Rennie

Liana Poutou

REPORT AND RECOMMENDATION OF THE REVIEW PANEL
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SEVERE WEATHER EMERGENCY RECOVERY (HAWKE'S BAY FLOOD PROTECTION WORKS) AMENDMENT ORDER 2024

1. We have been provided with a draft of the Severe Weather Emergency (Hawke's Bay Flood Protection Works) Order 2024 (the draft Order) for review under section 16 of the Severe Weather Emergency Recovery Legislation Act 2023 (the Act). We provide our recommendations on the draft Order as required by section 16(2) of the Act, based on the following understanding of our remit.
2. The task of the Severe Weather Events Recovery Review Panel (the Panel) is reviewing and making recommendations on the draft Order to assist the relevant Minister to meet the section 8(1) criteria of being satisfied an Order is:
 - a. necessary and desirable for one or more purposes of the Act;
 - b. no broader than reasonably necessary;
 - c. consistent with section 11 (no effect on custody/ detention; no exemption/modification on constitutional legislative entitlements, including the New Zealand Bill Of Rights Act); and
 - d. not an unjustified limit on NZBORA rights and freedoms,
 by supplementing the range of information and advice available to the Minister.
3. Paragraphs 7 and 14 of the Terms of Reference for the Panel expand on this to provide that:
 - a. the Panel has been appointed to provide expert, technical advice and scrutiny of the draft Order; and
 - b. the Panel's recommendations may also address:
 - i. whether the draft Order is sufficiently certain and clear, and if not, options to improve;
 - ii. the identification of any unintended or unforeseen but likely outcomes of the draft Order, and ways to address these; and

- iii. any other matters the Panel considers relevant to the scope of its review of the draft Order.
4. The criteria for the appointment of Panel members found in section 13(3) of the Act reflect the matters on which we consider we are to focus.
 5. Within that context the Panel's focus is the necessity or desirability of an Order as required in section 8(1)(a)(i) of the Act.
 6. We have based our review on our collective assessment of the materials provided to us and on our individual experience and expertise. Other than as stated in this report, we have not undertaken any further enquiries.

Reasons Recommendations and Brief Comments

7. Following Cyclone Gabrielle and the North Island Weather Events, the Hawkes Bay Regional Council and relevant Hawkes Bay local government entities have worked with the Government, pursuant to the Government's Future of Severely Affected Land Risk Categorisation Framework (FOSAL) to address the ongoing risk to individuals of the continued occupation of affected residential land. The FOSAL process creates three categories which local authorities can categorise affected residential properties into:
 - a. Category 3 – where there is an intolerable risk to life that cannot be mitigated (with these properties subject to a voluntary buyout process).
 - b. Category 2 – areas where community (category 2C) or property specific (category 2P) level intervention is required to manage future severe weather risk.
 - c. Category 1 – where repair to previous levels is sufficient to manage future risk.
8. This process has produced an agreed upon jointly funded program of community-level flood protection works (the works). We understand the protection to be provided by the works will, for an up to 1-in-100-year weather event, reduce what would otherwise be the assessed, current, "intolerable" risk of injury or death of continued residential use of those properties to a "tolerable" risk. We understand that the undertaking of works and building of infrastructure to protect these category 2C areas is, therefore, required for people to be able to have certainty over the long-term use of their homes.
9. The works will provide that certainty to up to 975 properties across seven areas categorised as category 2C or category 2A by Hawke's Bay authorities and protect critical infrastructure and industry in one area affected by the weather events.
10. The draft Order proposes a process to speed up the construction of flood protection works in specific locations within the Hawke's Bay. It does so by amending current legislative processes to reduce timeframes for gaining consents for these projects. The amendments include;
 - a. Defining the eight areas for works to take place within;
 - b. making the relevant works, where they would have ordinarily been discretionary or non-complying, a controlled activity (which must be approved subject to conditions determined by the relevant consent authority) and

otherwise modifying consent pathways, including removing the need for public notification and hearings;

- c. creating a specific comments and engagement regime to enable feedback on relevant issues during the consenting process;
- d. removing rights of appeal that would normally exist to the Environment Court against local authority consent decisions for the works. Judicial review remains available, albeit within the order's amended process framework; and
- e. providing a specific conditions schedule.

11. To assist in reviewing the draft Order, officials provided the following materials:

- a. the draft Severe Weather Emergency (Hawke's Bay Flood Recovery Works) Order 2024;
- b. the draft Statement of Reasons;
- c. a Cabinet paper titled 'Proposed Order in Council under the Severe Weather Emergency Recovery Legislation Act 2024 – Hawke's Bay flood works and associated infrastructure';
- d. the consultation document; and
- e. a table summarising the feedback received during consultation activities.
- f. Hawke's Bay Regional Council's Land Categorisation Process and Framework following Cyclone Gabrielle, September 2023

12. The order is therefore similar to the Waka Kotahi/ Kiwirail OICs but provides for new flood protection works in addition to the repair of existing flood protection structures on land not previously affected by such works whereas those orders generally only affected land already subject to road and rail infrastructure.

13. The key assessments required to reach the conclusion the order is "necessary or desirable" are in our view (i) whether the works themselves as facilitated and enabled by the order are necessary or desirable and (ii) whether the removal of standard RMA process and appeal protections is a proportionate response to the impact of the relevant severe weather event.

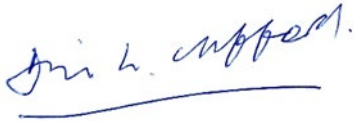
14. On the basis of the material provided to us, in particular relating to the extensive FOSAL process and the counterfactual for affected properties an unfacilitated RMA process to address the assessed "intolerable" risk, we are satisfied both of those questions may be answered in the affirmative.

15. We recommend that the Order would benefit from some clarifications including:

- a. Confirming that the consents will be considered and decided by an independent commissioner.
- b. That in clause 11(2)(e), that the bracketed section '(which may be a desktop assessment)' is removed.
- c. A small number of minor technical drafting issues that have been sent to Ministry for the Environment officials to resolve.

16. We note that this draft Order enables works that are not yet fully designed. Given that this will raise questions for the local community as to their potential effects, we wish to emphasise two points.

- a. That continued engagement by the relevant authorities with local communities, Post Settlement Governance Entities, iwi, hapu, Māori landowners and marae is necessary and important, especially during the design phases of the works, given the reduced appeal rights associated with the Order.
- b. The scope of the work to be completed is not provided by the Order, but we understand that in general fact, the baseline protection will reflect a 1-in-100 year event protection (1 percent Annual Exceedance Probability, based on post-Cyclone Gabrielle conditions) for the relevant land owners.

A handwritten signature in blue ink, appearing to read "Denis Clifford", with a horizontal line underneath it.

The Honourable Denis Clifford

Date: 1 May 2024

Convenor, Severe Weather Events Recovery Review Panel