

## Severe Weather Events Recovery Review Panel

12 September 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

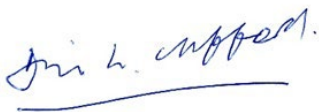
Dear Ministers

### **SEVERE WEATHER EMERGENCY RECOVERY (AUCKLAND FLOOD RESILIENCE WORKS) ORDER 2024**

On 12 September 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.

Yours sincerely

A handwritten signature in blue ink that reads "Denis Clifford". The signature is written in a cursive style and is underlined with a single horizontal line.

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

<b>REPORT AND RECOMMENDATION OF THE REVIEW PANEL</b>
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### **SEVERE WEATHER EMERGENCY RECOVERY (AUCKLAND FLOOD RESILIENCE WORKS) ORDER 2024**

1. We have been provided with a Draft of the Severe Weather Emergency (Auckland Flood Resilience 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 seven 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 Orders in Council; and
  - b. the Panel's recommendations may also address:
    - i. whether the Draft Order in Council is sufficiently certain and clear, and if they are not, options to improve;
    - ii. the identification of any unintended or unforeseen but likely outcomes of the Draft Order in Council, and ways to address these; and

- iii. any other matters the Panel considers relevant to the scope of its review of the Draft Order in Council.
- 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.
- 7. To assist in reviewing the Draft Order, officials provided the following materials:
  - a. the Draft Severe Weather Emergency (Auckland Flood Resilience 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 – Auckland Council flood recovery works;
  - d. the consultation document; and
  - e. a table summarising the feedback received during consultation activities.
- 8. Other than as stated in this report, we have not undertaken any further enquiries.

### **Reasons Recommendations and Brief Comments**

- 9. Since the Auckland Anniversary Floods and Cyclone Gabrielle, the Auckland Council has worked with the Government, pursuant to the Government's Future of Severely Affected Land Risk Categorisation Framework (FOSAL) and as part of its Making Space for Water Programme, to address the ongoing risk to individuals of the continued occupation of affected residential land.<sup>1</sup>
- 10. As a result of that work, a jointly funded program of community-level flood protection works (the Flood Resilience Works) has been agreed to be undertaken in two specific areas to reduce what would otherwise be the assessed, current, "intolerable" risk of injury or death of continued residential use of affected properties (Category 3) to a "tolerable" risk (Category 2C). The Flood Resilience Works are designed to achieve that outcome by improving the discharge of flood waters from two local streams into the Manukau Harbour. On that basis the 376 dwellings located in those two areas will be able to continue to be used for residential purposes.
- 11. The Draft Order would speed up the completion of the Flood Resilience Works by amending current legislative processes to reduce timeframes and provide certainty

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<sup>1</sup> 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.

for gaining the necessary consents for those works. To that end the Draft Order, in summary:

- a. Defines the two areas where the Flood Resilience Works will be carried out (within the lower reaches of the Harania and Te Ararata catchments), on publicly owned land.
  - b. Categorises the Flood Resilience Works, which for Resource Management Act 1991 (RMA) purposes would otherwise be discretionary or non-complying, as controlled activities (which must be approved subject to conditions determined by the relevant consent authority).
  - c. Modifies consent pathways, including removing the need for public notification and hearings and substituting a specific comments and engagement regime to enable feedback on relevant issues during the consenting process.
  - d. Removes 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.
  - e. Provides a schedule of possible conditions to be placed on the consent for the Flood Resilience Works.
12. The key assessments required to reach the conclusion the Draft Order is “necessary or desirable” are in our view (i) whether the Flood Resilience Works, as facilitated and enabled by the Draft Order if made, are necessary or desirable; (ii) whether the removal of standard RMA process and appeal protections is a proportionate response to the impact of the relevant severe weather events (iii) including, in particular, whether the consent required to be provided to the Flood Resilience Works will in fact be subject to conditions that respond adequately and proportionately to the potential adverse effects of those Works.
13. On the basis of: (i) our discussions with officials’ (from the Ministry for the Environment and the Auckland Council); (ii) the materials provided to us, in particular relating to the process adopted by the Auckland Council to respond to the Auckland Anniversary Floods and Cyclone Gabrielle; (iii) the counterfactual for affected properties of an unfacilitated RMA process to address the assessed “intolerable” risk; and (iv) the advice we have received as to the conditions which, in fact, the consent to the Flood Resilience Works will be subject to, we are satisfied each of those questions may be answered in the affirmative and, hence, that you may consider the Draft Order is “necessary or desirable” and “no broader than reasonably necessary” in terms of the Act.
14. We comment briefly on the third of those considerations:
- a. As the Auckland Unitary Plan explains:
    - A1.7.2. Controlled activity
    - .....
    - Activities are classed as controlled where the activity is in keeping with the existing environment and the likely effects are well understood and able to be avoided, remedied or mitigated by conditions.

- b. The Flood Resilience Works are not such activities. Under a standard RMA consenting pathway the Flood Resilience Works would require a range of complex consents under the Auckland Unitary Plan and, potentially, national environmental standards. They would be non-complying or discretionary activities. As such, their consent applications would be publicly notifiable, if granted, subject to bespoke conditions to ensure overall compliance with the RMA and subject to public hearing and appeal rights accordingly.
- c. Categorising the Flood Resilience Works as controlled activities means consent must be granted. Moreover, the imposition of conditions is at the discretion of the controlling authority. Any such conditions would, in general terms, be limited to the conditions set out in Schedule Two of the Draft Order. To conclude that the Draft Order is “necessary or desirable” it is, therefore, necessary to take a view on the conditions likely to be imposed on the consent for the Flood Resilience Works.
- d. To do so, we have considered the extent to which consent to the Flood Resilience Works is likely to be given on a basis that, other than as regards the pathway benefits provided by the Draft Order, is less controlling than would be the case if they were not controlled activities.
- e. Based on (i) discussions with Auckland Council officials, (ii) the approach taken by the Auckland Council to consents granted in similar circumstances to New Zealand Transport Agency Waka Kotahi and - most importantly, on (iii) the general framework of the RMA and the substantive obligations it imposes on consenting authorities, we are satisfied it is unlikely consents to the Flood Resilience Works will be given on such a basis. Rather we are satisfied the conditions imposed are likely to be such that the effect of the Draft Order will be limited to its process benefits (speed and certainty) rather than any material relaxation of RMA environmental controls more generally, including as provided by the Auckland Unitary Plan.

15. It is on that basis we have reached the conclusions set out in 13 above.

16. That said, we consider the Draft Order would be improved by the inclusion in the definition of Flood Resilience Works of an express reference to the controlling purpose of the Act. One way of doing so would be (i) to substitute a comma for the full stop at the end of Clause 6(2) and (ii) to add the following as a new subparagraph “in each case to the extent necessary or desirable to assist the affected communities and the local authority to respond to and recover from the impact of the Auckland Anniversary Floods and Cyclone Gabrielle on the locations in the Auckland region specified in sub-clause 4”.

*Denis Clifford*

The Honourable Denis Clifford

**Convenor, Severe Weather Events Recovery Review Panel**

**12 September 2024**