

Minute from the Hearing Panel – regarding:

Genesis Energy Limited's Memorandum re: Scope issues relating to additional attributes in Table 3.11-1 and to Expert Conferencing.

Introduction

The Hearing Panel (Panel) received a Memorandum from Genesis Energy Limited's (Genesis) legal counsel late afternoon on the 28 March 2019. It sought that the Panel issue a Direction that:

"...submission points requesting the following additional water quality attributes be added to Table 3.11-1 are not within the scope of Plan Change 1 as these submission points are not "on" the plan change:

- (a) Barriers to fish migration;*
- (b) Water flows and levels;*
- (c) Temperature;*
- (d) pH; and*
- (e) Fish / Fish QIBI."*

Genesis also sought that the scheduled expert conferencing on Table 3.11.1 proceed on the basis that the additional attributes identified above not be the subject of the expert conferencing.

In the alternative, Genesis sought that if the Panel determined the experts should proceed to caucus about the additional attributes, then it be granted leave to file late expert evidence by Dr Jacques Boubee *"only on the additional attributes for Table 3.11-1 that may affect the operation of the Huntly Power Station, and for Dr Boubee to participate in the expert conferencing on this limited basis"*.

Panel's Determination

The Panel declines to give a Direction that the additional attributes are out of scope. The Panel's Minute (dated 13 March 2019 directing Expert Conferencing) stated:

- *Expert conferencing proceed on the basis that plan and submission scope issues do not constrain the recommendations the experts make and that, to the extent that those recommendations may differ depending on legal or planning issues, the experts identify the competing positions and provide recommendations in the alternative.*

Footnote 4 in that minutes stated that the Panel would consider scope issues separately. This position reflected the Panel's view on the efficiency of expert conferencing considering all potential attributes at this time, versus potentially needing to regather later in the hearing process to consider and report back on the technical merits of additional attributes. We have accordingly already considered the points made by counsel for Genesis in that regard, and see no reason to alter our position on that account.

Moreover, it would be premature to rule out certain attributes now as the Panel has not heard from all parties in the Block 1 hearing (legal counsel and their expert science witnesses) on Table 3.11.1.

The Panel is aware of the scope arguments that have been put to us by various legal counsel (the Panel has been actively seeking counsel's views on scope), and note in regard to our Minute directing expert conferencing that:

It is likely that the Panel will provide all parties to the PC1 hearings, with the opportunity to review and comment on the outcome of the expert conferencing, and convene a special day(s) of hearings to enable the Panel to ask any questions of the expert witnesses or counsel arising from the joint witness statement of evidence (including any revised Table 3.11-1)

Does the Panel agree to Genesis' request to file late expert science evidence, and for that witness to attend conferencing

The Panel does not agree to the late filing of expert evidence from Dr Boubee, and on this basis does not agree to Dr Boubee participating in the expert conferencing.

It is clear from the submissions of the Director-General of Conservation and Royal Forest and Bird Protection Society, among others, that submitters were seeking provision of additional attributes in PC 1, and temperature (the attribute that appears of most concern to Genesis) is specifically noted in those two submissions in this regard.

Genesis did not file expert evidence in relation to those submissions or rebuttal evidence to those science experts who did file evidence in relation to Table 3.11.1. The opportunity to file rebuttal evidence was afforded to all parties and was clearly set out in the Panel's Minutes in relation the hearings and its process.

Moreover, the Genesis witnesses at the hearing on the 19 March 2019 were aware of the expert conferencing, and discussed both conferencing and the additional attributes that had been sought by other parties. The filing of its Memorandum late on the 28 March 2019 (with the expert conferencing commencing on the 4 April 2019) means there is little or no time to seek the views of those parties seeking the additional attributes on the acceptance or otherwise of any late evidence, let alone time for the parties to review that evidence prior to conferencing.

The experts who are attending the Expert Conferencing have filed expert evidence, with a number of them having provided rebuttal to that evidence. The sole exception is Mr Conland who, at our direction, has filed a 'will-say' statement. In this respect the opinions of those experts are known.

As regards the possibly related request made by counsel for Genesis that consideration of additional attributes be scheduled for the second day of conferencing, the Panel deliberately left the establishment of the Expert Conferencing agenda to the Facilitator and the parties (with some guidance set out the Panel's Minute directing the conferencing). The Panel is very reluctant at this late stage to 'step in' and change the conferencing members and process that has, as the Panel understands, been agreed and commencing on the 4 April 2019. Accordingly, the Panel declines that request also.

A handwritten signature in black ink, appearing to read "Greg Hill", followed by a period.

Greg Hill

Chairman of the Hearing Panel.

29 March 2019