



# ENVIRONMENTAL MANAGEMENT GROUP + Policy



SAFEGUARDING YOUR ENVIRONMENT + KAITIAKI TUKU IHO



## Dangerous Dams Policy 2006

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## **Environmental Management Group Policy Report**

### **Environmental Regulation Section**

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### **Building Act 2004 Dangerous Dams Policy 2006**

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## 1.0 INTRODUCTION AND POLICY CONTEXT

This document sets out the draft dangerous dams policy to be adopted by Hawke's Bay Regional Council (HBRC) in accordance with the new requirements of the Building Act 2004. Relevant sections of the Building Act are given in Appendix 1.

### 1.1 DANGEROUS DAMS POLICY

Section 161 of the Building Act 2004 requires all regional authorities (RAs) to adopt a policy on dangerous dams by 30 September 2006. The policy must state:

- (a) the approach that the regional authority will take in performing its functions under this Part; and
- (b) the regional authority's priorities in performing those functions; and
- (c) how the policy will apply to heritage dams.

### 1.2 DEFINITIONS

The definition of a dam in the Building Act 2004 is:

- (a) means an artificial barrier, and its appurtenant structures, that –
  - (i) is constructed to hold back water or other fluid under constant pressure so as to form a reservoir; and
  - (ii) is used for the storage, control, or diversion of water or other fluid; and
  - (iii) retains 3 or more metres depth, and holds 20,000 or more cubic metres volume, of water or other fluid; and
- (b) includes –
  - (i) a flood control dam; and
  - (ii) a natural feature that has been significantly modified to function as a dam; and
  - (iii) a canal; but
- (c) does not include a stopbank designed to control floodwaters.

The definition of what constitutes a dangerous dam is set out in section 153 of the Building Act 2004 and in the related regulations that define moderate earthquakes and moderate floods.

A dam is dangerous if the dam:

- (a) is a high potential impact dam or a medium potential impact dam; and
- (b) is likely to collapse;
  - (i) in the ordinary course of events; or
  - (ii) in a moderate earthquake; or
  - (iii) in a moderate flood; or
- (c) is a leaky dam.

This definition establishes a 'two tier' test in order for a dam to be classified as a dangerous dam. A dam must first be a High or Medium Potential Impact Dam and then likely to collapse during either the ordinary course of events, or in a moderate earthquake or moderate flood, or be a leaky dam, in order for it to be classified as a dangerous dam.

Regulations that further prescribe the standards and criteria used in section 153 such as medium or high potential impact dams are proposed and have yet to be finalised. The proposed standards and criteria are set out in "Regulations for the Dam Safety Scheme: Discussion Document May 2006" released by the Department of Building and Housing in May 2006. There is the potential for the standards and criteria, once finalised, to differ from the ones currently proposed.

The proposed standards and criteria determine the dams that might be affected by this Dangerous Dam Policy.

### **1.3 POLICY DEVELOPMENT PROCESS**

HBRC is required to follow the special consultative procedure set out in section 83 of the Local Government Act 2002 when developing and adopting this policy, and will have regard to any relevant principles in the Building Act 2004. This policy will be reviewed every five years.

In the event of a change to the relevant sections of the Building Act or changes to regulations, particularly ,given that the regulations prescribing the standards and criteria will not be in place before the date on which this Policy is required to be adopted, HBRC will review this policy and, if necessary, make changes.

## **2.0 POLICY APPROACH**

### **2.1 BACKGROUND**

In the Hawke's Bay Region there are approximately 90 dams with resource consents issued under the Resource Management Act, of which approximately 70 are likely to meet the Building Act definition of a dam. There are a number of other dams that have been identified from GIS information that might also meet the definition of a dam under the Building Act.

In the main, these dams are earth dams and are used for a variety of purposes including water supply, flood control, hydro electric generation, irrigation, farm stock supply and recreation.

Hawke's Bay is located above the subduction interface of the boundary between the Pacific and Australian tectonic plates and is therefore in a zone of high deformation. There are also numerous active earthquake faults in the Hawke's Bay Region. One of the bigger fault zones is the Ruahine - Mohaka system, which is the western most fault zone in Hawke's Bay.

There are also a number of surface fault zones along the eastern boundary of Hawke's Bay include across Hawke Bay and the Mahia Peninsula.

Infrastructure in the Hawke's Bay Region, such as dams, must therefore be constructed in such a manner to take account of a potentially significant earthquake.

Many of the region's dams are constructed on watercourses and are subject to the effects of flooding. The combined impact of flooding and a dam collapsing could have potentially significant downstream impacts.

This policy seeks to reduce the risk of dam failure over time in a way that is acceptable in social and economic terms.

Priorities for action have been developed. These are listed in this policy.

### **2.2 IDENTIFICATION AND INVESTIGATION PROCESS**

There is a continuum of approaches that regional authorities can adopt for the identification of dangerous dams. These range from a totally passive approach where the regional authority acts only when a dam has been brought to its attention as possibly requiring a safety assessment, to the proactive comprehensive investigation of all medium and high potential impact dams in its region.

HBRC will compile a list of dams requiring a safety assessment over time in response to owners providing information / dam classifications and complying with the dam safety assurance process, and in response to complaints or relevant information. Those dams will be followed up with an investigation by Council officers assisted, as considered appropriate, by technical specialists to establish the nature of the danger or the state of the dam. The purpose of this action is to determine whether a dam meets the specific criteria for a dangerous dam and thus satisfy the Council whether it is dangerous or not.

The authority for making the determination that a dam meets the specific criteria for a dangerous dam lies with the Chief Executive Officer of HBRC. The dam owner will be advised of the determination in writing by way of letter.

A list of dangerous dams will be collated according to the results of the assessments and categorised as follows:

- Category 1** – Medium and High PIC Dams which are likely to collapse during the ordinary course of events;
- Category 2** – Medium and High PIC Dams which are likely to collapse in a moderate flood;
- Category 3** – Medium and High PIC Dams which are likely to collapse in a moderate earthquake.

These categories are based on the potential likelihood that failure may occur and will be considered when determining acceptable time periods for any actions to reduce or remove the danger.

### **2.3 GUIDING PRINCIPLES FOR DEALING WITH DAM OWNERS**

Before exercising its powers under Sections 154 to 159 of the Building Act, HBRC will seek to discuss options for action with owners, with a view to obtaining from the owner a mutually acceptable proposal for removing or reducing the danger.

Whilst HBRC's preferred approach is to encourage a dam owner to voluntarily reduce the risk posed by their dam to an acceptable level, HBRC will pursue legal outcomes if required as it has statutory obligations to take all practical measures to ensure public safety and well-being. In the event that discussions do not yield a mutually acceptable proposal, HBRC will serve a formal Notice as outlined in Section 2.4 of this policy.

### **2.4 ASSESSMENT CRITERIA**

The definition of dangerous dams is given in Section 153 of the Building Act 2004. High and medium potential impacts have not been defined. Neither have what is a moderate flood, or a moderate earthquake. It is expected that these will be defined in draft regulations developed in due course. However, the regulations will not be in place before the date on which this Policy is required to be adopted.

Once regulations that prescribe the standards and criteria used in section 153 are gazetted, HBRC will use those definitions.

When assessing whether a dam is dangerous, HBRC officers and technical specialists will use "The New Zealand Dam Safety Guidelines (NZSOLD 2000)" and any subsequent update or recognised replacement of that guideline, for guidance.

### **2.5 TAKING ACTION ON DANGEROUS DAMS**

On being satisfied that a dam is dangerous, HBRC will:

#### **2.5.1 Provide information to and liaise with dam owners**

Provide to the owner all information or reports obtained as a result of inspections or investigations and encourage dam owners to voluntarily reduce any risk posed by their dam to an acceptable level.

### **2.5.2 Advise other agencies (including civil defence agencies and territorial authorities)**

Advise relevant agencies of the location of dangerous dams in the region as they become known and keep them informed of action required.

### **2.5.3 Provide Advice to potentially affected parties and other agencies**

If necessary, HBRC will give Notice to those likely to be immediately affected in the event of a dam failure. HBRC may also attach a Notice to the dam or nearby that warns people not to approach the structure; and / or erect a hoarding or a fence to prevent people approaching the structure.

### **2.5.4 Issue Notice requiring work to be carried out**

Where HBRC is satisfied that a dam is dangerous and the owner has not taken voluntary steps to reduce or remove the danger then a Notice may be issued pursuant to Section 155 of the Act.

Notices served on dam owners will:

- specify the work that needs to be carried out
- the time in which it is to be completed; and
- whether the owner of the dam is required to obtain building consent in order to carry out the specified work.

When setting a timeframe for action, HBRC will consider the nature of the issue, the classification of the dam and the priorities established in this policy. The time frame will not be less than 10 days after the notice is given under section 155.

HBRC will ensure that copies of notices are sent to both the owner of the dam, any occupier, and any party with an interest in the land on which the dam sits as defined in s155 of the Building Act. If appropriate, HBRC will notify potentially affected communities downstream of the dam.

Copies of notices will also be sent to interested parties such as Civil Defence, the local Territorial Authority, and the New Zealand Historic Places Trust (when appropriate).

At the end of the time in which the remedial work is to be completed, HBRC will inspect the dam and review reports supplied.

### **2.5.5 Dam-break analysis**

If a dam break study is not available as part of the owner's Dam Safety Assurance Programme, it will be necessary to provide one within the timeframe defined by HBRC and at the owner's expense.

### **2.5.6 Regional Authority to carry out work**

HBRC will carry out the work required in a Notice issued under Section 154 itself or via contractors if any work required under the Notice is not completed within the time frame given in the Notice. HBRC will give the owner not less than 10 days written notice of its intention to seek the order from the District Court to give authority to HBRC to carry out building work.

All costs which HBRC incurs will be recovered from the owner of the dam (refer s156 of the Building Act).

HBRC will offer extensions to the set time frames upon receipt of a request from the dam owner where the request is consistent with the Council's statutory obligations.

#### **2.5.7 Regional Authority to carry out work in case of immediate danger**

Where it is considered measures are necessary to avoid immediate danger Section 157 of the Building Act gives power to regional authorities to take swift action to remove immediate danger without first serving Notice on owners.

Without limiting this section, HBRC will make reasonable efforts to contact the dam owner(s) prior to taking action.

All costs which HBRC incurs will be recovered from the owner of the dam (refer s157 of the Building Act).

#### **2.5.8 Dispute by owner of classification**

In the event that a dam owner does not agree with HBRC's assessment that a dam is dangerous, the owners will have two months to consider HBRC's assessment and provide any information on the performance of the dam that may influence the assessment. A dam owner may choose to undertake their own detailed assessment using a recognised engineer (as defined by regulations). HBRC will meet with an owner of a dam to discuss the respective parties views and advice.

HBRC, where appropriate, will use technical specialists to review the information provided by the dam owner. If HBRC is then satisfied that the dam is not dangerous, the status of the dam will be changed and the owner advised.

Should HBRC still consider a dam to be dangerous and the owner continues to dispute the dangerous classification, the dam owner can make an application for a 'Determination' pursuant to Section 177 of the Act to the Chief Executive of the Department of Building and Housing as set out in the Building Act 2004. The determination of the Chief Executive is binding on HBRC and the dam owner.

#### **2.5.9 When the danger has been reduced or removed**

Once a dam owner has undertaken and completed work to reduce or remove the dangers in accordance with any agreement or notice, HBRC officers and technical specialists will reassess the dam according to the dangerous dam criteria defined in the Act and regulations. If the work undertaken by the dam has reduced or removed the danger to such an extent that the dam no longer meets the criteria of a dangerous dam, the status of the dam on the dangerous dam register will be changed to reflect that. HBRC officers and technical specialists will use 'The New Zealand Dam Safety Guidelines (2000), or any subsequent update or recognized replacement for that guideline in determining if a dam is still dangerous.

#### **2.5.10 Advise other parties when danger has been reduced or removed**

HBRC will advise all parties previously notified of any dangerous dam when the danger has been removed and will update its records accordingly.

## 2.6 IDENTIFICATION OF DAM OWNERS

Whilst most dams will be the direct responsibility of the owner of the land on which they are located, there may be circumstances where a landowner will claim that they 'inherited' the dam, and were not responsible for either its construction or its maintenance. It is likely however that there will be few cases where a landowner could claim that they purchased the land in circumstances where they could not reasonably have known there was a dam on the property.

HBRC considers that landowners in this situation are in a practical sense no different to landowners who have constructed a dam, which is now subject to the provisions of new legislation. In both cases, it is the retrospective nature of this aspect of the legislation that creates the responsibility on the part of the owner in regard to the safety of the dam.

Therefore unless there is clearly a party other than the landowner who is responsible for any particular dam, HBRC will adopt the definition of 'owner' under s7 of the Building Act for the purpose of identifying the person responsible for a dam.

There may however be a small number of cases where a dam was built on a property without the approval of the landowner - this would probably only occur under the provisions of older mining legislation. HBRC will consider requests from such landowners for special treatment in these cases.

## 2.7 DAMS ON PUBLIC LAND

There may also be cases where a dam is located on public land, for example the bed of a river.

The Building Act 2004 is binding on the Crown, so dams located on public land will be the responsibility of the Crown where they are the 'landowner', unless there is a clear responsible owner (for example the holder of a hydro easement on public land).

## 2.8 ACTIONS REQUIRING CONSENT

When building / resource consent(s) are necessary for any action:

- required in a Notice served by HBRC; or
- in a formal proposal supplied by a dam owner

HBRC will give priority to that consent process where practicable.

## 2.9 RECORDING OF THE DAM STATUS

HBRC will keep a register of all dangerous dams. The following information will be placed on file for each dangerous dam:

- the address and legal description of the dam and the land which supports it
- whether the dam has a heritage listing
- a statement that the dam is considered to be dangerous
- the date by which action to remove or reduce the danger is required (if known)
- Status of actions set out in any mutually agreed risk reduction plan or set out in any formal Notice

- Status and verification that the danger has been reduced or removed to the satisfaction of HBRC;
- Statement to confirm that the dam is no longer considered dangerous, where relevant.

This information will be kept on file indefinitely.

## 2.10 AVAILABILITY OF INFORMATION

Information concerning the ‘*dangerous*’ status of a dam will be contained in a Council file and GIS system. If a notice under section 154 is issued in respect of any dangerous dam then a record of that will also be available on the relevant file and dangerous dam database.

In granting access to information concerning these dams, HBRC will conform to the requirements of the relevant legislation.

## 2.11 ECONOMIC IMPACT OF THIS POLICY

Without overriding the paramount aim of protecting public safety, when deciding what actions must be taken in respect of a dangerous dam, HBRC will take into account economic impacts that may arise from those actions.

Where the dam has heritage value, HBRC will look at alternative actions to avoid removal of the dam and will encourage private owners to seek funding for remedial works from existing financial incentive programmes such as the National Heritage Preservation Incentive Fund.

Where a dam has significant ecological or biodiversity value, dam owners are able to apply for a grant under HBRC’s Regional Landcare Scheme.

HBRC will incur costs associated with this policy, where an investigation to determine whether a dam is dangerous takes place. Actual and reasonable costs of determining a dam is dangerous will be recovered from the dam owner.

## 2.12 APPROACH FOR DAMS AND ASSOCIATED BUILDINGS HAVING HERITAGE STATUS

Under Section 161 of the Building Act 2004, the Council’s policy on dangerous dams must state how the policy will apply to heritage dams. For the purposes of this policy, a heritage dam (including associated structures) includes all dams listed as a heritage resource in the relevant territorial authority’s District Plan and/or those registered by the New Zealand Historic Places Trust (NZHPT). Section 4(2)(l) of the Building Act recognises the “need to facilitate the preservation of buildings of significant cultural, historical, or heritage value”.

HBRC recognises the need to retain heritage fabric, but also the need to reduce or remove the danger to mitigate the risk of loss of life in the event of a collapse. When considering heritage dams under this policy account will be taken of the need to facilitate the preservation of dams with significant cultural, historical, or heritage value.

When dealing with dangerous heritage dams, HBRC will seek advice from the NZHPT and the relevant territorial authority (if appropriate) before any actions are undertaken under sections 153 – 160 of the Act. HBRC may engage the skills of suitably qualified professionals with heritage expertise to advise and recommend actions. Copies of all served notices will be provided to the NZHPT.

HBRC will record the heritage listing of all dangerous dams it is made aware of in its dangerous dams register and supply this information to the relevant Territorial Authority for inclusion on the relevant LIM.

### **2.13 PRIORITIES**

Under Section 161 of the Building Act, this policy must contain the regional authority's priorities in performing its functions in relation to dangerous dams.

HBRC will prioritise the requirement to reduce or remove dangerous dams as follows:

First priority: to ensure public safety at all times

Second priority: economic welfare

Third priority: heritage values

### **2.14 DATE ON WHICH THIS POLICY BECOMES OPERATIVE**

This Policy will become operative three months following the date on which the Department of Building and Housing Regulations for the Dam Safety Scheme take effect.

## **APPENDIX 1 – RELEVANT LEGISLATION**

### **BUILDING ACT 2004 – KEY SECTIONS**

#### **3. Purpose**

The purpose of this Act is to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings, to ensure that—

- (a) people who use buildings can do so safely and without endangering their health; and
- (b) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
- (c) people who use a building can escape from the building if it is on fire; and
- (d) buildings are designed, constructed, and able to be used in ways that promote sustainable development.

#### **7. Definitions**

Owner, in relation to land and any buildings on the land,—

- (a) means the person who—
  - (i) is entitled to the rack rent from the land; or
  - (ii) would be so entitled if the land were let to a tenant at a rack rent; and
- (b) includes—
  - (i) the owner of the fee simple of the land; and
  - (ii) any person who has agreed in writing, whether conditionally or unconditionally, to purchase the land or any leasehold estate or interest in the land or to take a lease of the land and who is bound by the agreement because the agreement is still in force.

#### **153. Meaning of dangerous dam**

A dam is dangerous for the purposes of this Act if the dam—

- (a) is a high potential impact dam or a medium potential impact dam; and
- (b) is likely to collapse—
  - (i) in the ordinary course of events; or
  - (ii) in a moderate earthquake (as defined in the regulations); or
  - (iii) in a moderate flood (as defined in the regulations); or
- (c) is a leaky dam.

**154. Powers of regional authorities in respect of dangerous dams**

- (1) If a regional authority is satisfied that a dam is dangerous, the regional authority may—
  - (a) put up a hoarding or fence to prevent people from approaching the dam nearer than is safe;
  - (b) attach in a prominent place on, or adjacent to, the dam a notice that warns people not to approach the dam;
  - (c) give written notice requiring work to be carried out on the dam, within a time stated in the notice (which must not be less than 10 days after the notice is given under section 155), to reduce or remove the danger.
- (2) This section does not limit the powers of a regional authority under this Part.
- (3) A person commits an offence if the person fails to comply with a notice given under subsection (1)(c).
- (4) A person who commits an offence under this section is liable to a fine not exceeding \$200,000.

**155. Requirements for notice given under section 154**

- (1) A notice given under section 154(1)(c) must—
  - (a) be fixed to the dam concerned; and
  - (b) state whether the owner of the dam must obtain a building consent in order to carry out the work required by the notice.
- (2) A copy of the notice must be given to—
  - (a) the owner of the dam; and
  - (b) an occupier of the dam; and
  - (c) every person who has an interest in the land on which the dam is situated under a mortgage or other encumbrance registered under the Land Transfer Act 1952; and
  - (d) every person claiming an interest in the land that is protected by a caveat lodged and in force under section 137 of the Land Transfer Act 1952; and
  - (e) any statutory authority, if the land or dam has been classified; and
  - (f) the New Zealand Historic Places Trust, if the dam is a heritage dam.
- (3) However, the notice, if fixed on the dam, is not invalid because a copy of it has not been given to any or all of the persons referred to in subsection (2).

**156. Regional authority may carry out work**

- (1) A regional authority may apply to a District Court for an order authorising the regional authority to carry out building work if any work required under a notice given by the regional authority under section 154(1)(c) is not completed, or not proceeding with reasonable speed, within—
  - (a) the time stated in the notice; or
  - (b) any further time that the regional authority may allow.

- (2) Before the regional authority applies to a District Court under subsection (1), the regional authority must give the owner of the dam not less than 10 days' written notice of its intention to do so.
- (3) If a regional authority carries out building work under the authority of an order made under subsection (1),—
  - (a) the owner of the dam is liable for the costs of the work; and
  - (b) the regional authority may recover those costs from the owner; and
  - (c) the amount recoverable by the regional authority becomes a charge on the land on which the dam is situated.

#### **157. Measures to avoid immediate danger**

- (1) This section applies if, because of the state of a dam, immediate danger to the safety of persons, property, or the environment is likely.
- (2) The chief executive of a regional authority may, by warrant issued under his or her signature, cause any action to be taken that is necessary in his or her judgment to remove that danger.
- (3) If the regional authority takes action under subsection (2),—
  - (a) the owner of the dam is liable for the costs of the action; and
  - (b) the regional authority may recover those costs from the owner; and
  - (c) the amount recoverable by the regional authority becomes a charge on the land on which the dam is situated.
- (4) The chief executive of the regional authority and the regional authority are not under any liability arising from the issue, in good faith, of a warrant under subsection (2).

#### **158. Regional authority must apply to District Court for confirmation of warrant**

- (1) If the chief executive of a regional authority issues a warrant under section 157(2), the regional authority, on completion of the action stated in the warrant, must apply to a District Court for confirmation of the warrant.
- (2) On hearing the application, the District Court may—
  - (a) confirm the warrant without modification; or
  - (b) confirm the warrant subject to modification; or
  - (c) set the warrant aside.
- (3) Subsection (1) does not apply if—
  - (a) the owner of the dam concerned notifies the regional authority that—
    - (i) the owner does not dispute the entry into the owner's land; and
    - (ii) confirmation of the warrant by a District Court is not required; and
  - (b) the owner pays the costs referred to in section 157(3)(a).

**159. Building work includes decommissioning and demolition of dam**

Any work required or authorised to be carried out under section 154(1)(c), or action taken under section 157, may include the decommissioning and demolition of a dam.

**160. Power of regional authority not limited**

The provisions of sections 154 to 159 are in addition to, and do not limit, the powers of a regional authority under section 157.

**161. Regional authority must adopt policy on dangerous dams**

- (1) A regional authority must, within 18 months after the commencement of this Part, adopt a policy on dangerous dams within its district.
- (2) The policy must state—
  - (a) the approach that the regional authority will take in performing its functions under this Part; and
  - (b) the regional authority's priorities in performing those functions; and
  - (c) how the policy will apply to heritage dams.

**162. Adoption and review of policy**

- (1) A policy under section 161 must be adopted in accordance with the special consultative procedure in section 83 of the Local Government Act 2002.
- (2) A policy may be amended or replaced only in accordance with the special consultative procedure, and this section applies to that amendment or replacement.
- (3) A regional authority must, as soon as practicable after adopting or amending a policy, provide a copy of the policy to the chief executive.
- (4) A regional authority must complete a review of a policy within 5 years after the policy is adopted and then at intervals of not more than 5 years.
- (5) A policy does not cease to have effect because it is due for review or being reviewed.

**177. Application for determination**

A party may apply to the chief executive for a determination in relation to 1 or more of the following matters:

- (a) whether particular matters comply with the building code:
- (b) a building consent authority's decision to—
  - (i) issue, or refuse to issue, a building consent, code compliance certificate, or compliance schedule; or
  - (ii) refuse to allow, under section 52(b), an extension of the period during which building work must be commenced before a building consent lapses; or
  - (ii) issue a notice to fix; or

- (iv) refuse to allow, under section 93(2)(b)(ii), an extension of the period during which the building consent authority must decide whether or not to issue a code compliance certificate; or
  - (v) amend a building consent, notice to fix, or code compliance certificate; or
  - (vi) impose a condition on a notice to fix or compliance schedule or to amend that condition:
- (c) a territorial authority's decision to—
- (i) grant or refuse a waiver or modification of the building code under section 67; or
  - (ii) issue, or refuse to issue, a certificate of acceptance under section 96; or
  - (iii) amend a compliance schedule under section 106 or section 107; or
  - [(iiia) issue or refuse to issue a certificate for public use under section 363A; or]
  - (iv) issue, amend, or impose a condition on a notice to fix:
- (d) the exercise by a territorial authority of its powers under sections 112 and 115 to 116 (which relate to alterations to, or changes in the use of, a building) and the issue by a territorial authority of a certificate under section 224(f) of the Resource Management Act 1991:
- (e) the exercise by a territorial authority of its powers under section 124 or section 129 (which relate to dangerous, earthquake-prone, and insanitary buildings) or the failure to exercise those powers:
- (f) the exercise by a regional authority of its powers under subpart 5 of Part 2 in relation to a dam or the failure to exercise those powers.