

Under the Resource Management Act 1991

In the matter of an application for resource consent to discharge
contaminants to land, air and water associated with the
proposed long-term upgrade and operation of the
Featherston Wastewater Treatment Plan

Applicant **South Wairarapa District Council**

**Memorandum of Counsel for the Applicant
and an application to the consent authority for a waiver of time limits**

8 November 2018

MAY IT PLEASE THE PANEL:

1 The purpose of this Memorandum is to update the Panel and submitters as to progress regarding this application, to indicate the Applicant's preferences for the timing of the hearing, and to make an application for waiver of time so as to further defer the commencement date for the hearing.

Applicant to advise whether it intends to proceed with the current application by 19 October

2 The Applicant confirmed to the Panel and GW on 19 October that it will not be withdrawing the current application. However, for reasons which I will outline in this Memorandum, the Applicant is seeking that the commencement of the hearing be further delayed by a month.

Update regarding the PNRP issues

3 This issue was outlined in limited detail in my previous Memorandum dated 5 September (attached to the Panel's Minute 2). There have been discussions between the GW legal advisor and Counsel for the Applicant as to whether the proposal is for a "new discharge" or an "existing discharge". Unfortunately, the issue has not been resolved.

4 That issue is determinative of whether the proposal is for a non-complying or discretionary activity and whether Policy 81 or Policy 83 of the PNRP is applicable.

5 The Applicant maintains that on a purposive interpretation, the proposal is for an *existing discharge* and therefore is for a discretionary activity and that policy 83 is inapplicable. However, it accepts that this is a matter of legal interpretation.

6 If Panel concludes that the proposal is for a new discharge to freshwater and therefore a non-complying activity, then consent can

only be granted if the Panel concludes that the effects are “no more than minor” or the proposal is not contrary to the objectives and policies of the relevant plans.

- 7 Policy 83 (if applicable) and policy 71 in their current form both present significant difficulties in terms of the second gateway. SWDC and others have made submissions seeking amendments to these provisions.
- 8 Clearly, it would be desirable, if all of these related Plan interpretation issues could be addressed by this Panel (and preferably the officers, the Applicant and submitters) within the context of the decisions of the PNRP panel. Unfortunately, the PNRP decisions have been deferred from November until as late as 31 July next year. This means that the decision will no longer be available before the hearing.¹
- 9 SWDC has requested the PNRP Panel to issue at least an interim decision on all of these provisions before this hearing commences. That request has been declined. The PNRP Panel has provided no indication as to the likely date for its decisions.

Timing of the hearing and closure of the hearing

- 10 The Applicant’s strong preference is to have the consents it has applied for granted and commenced as soon as possible, so that it has certainty. That will allow it to proceed with reducing the discharge to freshwater as soon as is practicable.
- 11 Unfortunately, it has become apparent that the ‘as notified’ version of the PNRP (and GW officers’ interpretation of the current provisions) present risks in terms of this Panels decision and therefore risks in

¹ That decision was made by GW officers in August this year, without consultation with the Applicant which is directly affected by the extension of time.

terms of the timing of commencement. The extent of that risk will not be fully known until the s42A report is available.

12 The Applicant has decided to proceed with the hearing, but for reasons outlined below is seeking that the commencement date be deferred until 8 April or later.²

13 The Applicant signals that depending upon the final recommendations in the s42A report and evidence at the hearing, it may request a further waiver to allow the Panel to defer the closure of the hearing until after decisions on the PNRP have been released.³

14 Apparently, this Panel has not been delegated authority to grant the necessary waiver of time to allow for the slight delay to the commencement of the hearing. Accordingly, that decision will need to be made by Regional Council management.

Further amendment to the Applicant's proposal

15 As advised to GW some weeks ago, the Applicant has decided to bring forward stage 2A (irrigation of additional land) to the end of year 5 rather than the end of year 10 (with the result that stage 1B would be reduced from 8 to 3 years). This is additional to the change which was announced in August, of bringing forward stage 2B (storage ponds) forward by 8 years (end of year 13 instead of the end of year 20).

16 In summary the staging proposal is as follows:

² GW officers have indicated that they have no difficulty with that proposal.

³ While there would be considerable merit in deferring the commencement of the hearing until after the PNRP decisions, GW officers were opposed to that course. The Applicant has decided that the best option is to proceed to hearing and request a delayed closure if required.

Stage	Description	Estimated average frequency of direct discharge to Donalds Creek at any flow	Estimated average frequency of direct discharge to Donalds Creek at flows below median flow	Latest Commencement date as per application	Latest Commencement date as now proposed
1A	No irrigation	328 days	146 days	As soon as consented	As soon as consented
1B	Irrigation to 78 ha	186 days	29 days	2 years after commencement	2 years after commencement
2A	Further irrigation to 116 ha	146 days	15 days	10 years after commencement	5 years after commencement
2B	Storage ponds	14 days	0 days	20 years after commencement	13 years after commencement

17 The effect of these changes on the duration of each stage is as follows:

stage	Proposed Duration (as per application)	Amended Duration
1A	2 years	2 years
1B	8 years	3 years
2A	5 years	8 years
2B	15 years under this consent	22 years under this consent

18 The primary reason for these amendments to the proposal is to, so far as is reasonably practicable, reduce the duration of stages 1B and 2A during which potentially more than minor adverse ecological impacts will occasionally occur. (This is without prejudice to the Applicant's position that these effects are *no more than minor* when viewed in the context of the overall proposal).

19 In summary, Stages 1A and 1B will be reduced from 10 years in total to 5 years. Stage 2A will be reduced from 8 years to 5 years.

20 Another reason for this change is to reduce the period of more significant non-compliance with section 107 in terms of "*conspicuous changes to clarity*". (It will be the Applicant's position that any residual non-compliance with s107(1) can be authorised under section 107(2)).

21 The final reason for this change is to reduce the cultural impacts of the proposal by bringing forward all stages of land irrigation so as to reduce

discharges to freshwater as quickly as is reasonably practicable. (In particular Stage 2B has been brought forward by 7 years.)

22 I am satisfied that these amendments to the proposal are within the scope of the current application. (They are amendments which could have been imposed in any event by the Panel if it had found that to be appropriate.)

23 The bringing forward of the discharge to the additional land at stage 2A has potential effects on adjoining landowners, the Applicant's evidence will be that any such effects will be less than minor. Furthermore, the potential effects (if any) are the same as for the notified proposal but will occur 5 years earlier than was originally proposed. Those parties have submitted and can be heard on those effects. Accordingly, there is no potential for prejudice.

Update regarding the purchase of additional land

24 The Council has purchased the Featherston Golf Course land. That purchase has no direct implications for the current application. The Council has not yet decided whether it will utilise this land for additional irrigation, but if it did so, that would not avoid the need to use the land which is proposed as part of the current application. The purchase does however provide additional flexibility for the Applicant and fits within its proposed "adaptive management" approach. The Applicant does not intend to make any application for additional consents for discharge to that land at least while the current application is undecided.

Progress on the joint work commissioned by the Applicant and the Regional Council.

25 Unfortunately, due to availability of various experts for both councils, there has been a delay in the joint report from the freshwater ecologists. A draft has been prepared, however that is still to be reviewed by the Applicant and the GW officers. It is likely that GW or the Applicant will have further questions arising from that. In any event

I understand that the final report should be made available on the GW website by the end of the month at the latest.

- 26 The groundwater experts have also met and made progress. They have agreed to the commissioning of further investigations which will be complete by the end of November. The joint reports from these experts will follow after that monitoring and may not be available until early December. That will require an adjustment to the directions to provide this information to submitters by 26 October. The Applicant proposes that this information be available on the website by 19 December.

Application for waiver of time frames

- 27 For the reasons outlined in this Memorandum, the Applicant requests pursuant to sections 37 and 37A (5) of the Act:

That the Consent Authority grants further waivers of the statutory time limits and in particular the limit under section 103A (2) in order to allow commencement of the hearing at a time which the consent authority (and Panel) consider appropriate, but no earlier than 8 April 2019.

- 28 The statutory timeframes (in this case that the timeframe specified by section 103 2A) may be more than doubled where the Applicant agrees to that and where the consent authority deems that to be appropriate after considering the following:

- (a) the interests of any person who, in its opinion, may be directly affected by the extension or waiver; and*
- (b) the interests of the community in achieving adequate assessment of the effects of a proposal, policy statement, or plan; and*
- (c) its duty under [section 21](#) to avoid unreasonable delay.*

Hearing commencement

- 29 The hearing is currently scheduled to commence on 18 March 2018 and the Panel has issued directions as to the provision of the s42A report and evidence.

30 As a result of further monitoring work agreed with GW, there will be a delay in the joint groundwater report until just before Christmas. (SWDC is also be carrying out additional monitoring of the stream ecology and other parameters).

31 These delays and the availability of GW staff mean that the s 42A report cannot be available until at least late January or early February. Given the availability of its experts and Counsel, the Applicant's evidence would not be available until 10 working days before the hearing if it commences on 18 March. That would be a very tight timeframe for the Applicant because its planner is out of the country for most of February. (There are likely to be significant planning issues arising out of the s42 A report.)

32 Within that context, the Applicant seeks that the commencement of the hearing be delayed until at least 8 April 2019.

33 That delay will provide an additional week for the Applicant's planning evidence, will provide more time for submitter evidence and will allow for GW replies to the Applicant's evidence to be lodged before the hearing commences.

The interests of any person who, in its opinion, may be directly affected by the extension or waiver;

34 A delay to the commencement of the hearing to 8 April or later, would benefit submitters because they would have more time to respond to the section 42A report and the Applicant's evidence than will be the case if the hearing commences on 18 March. (I note that the normal timeframe for the Applicant's evidence would be 10 working days prior to commencement. The normal timeframe for submitter expert evidence is 5 working days before commencement.)

The interests of the community in achieving adequate assessment of the effects of a proposal, policy statement, or plan;

35 The requested delay is in the interests of the community in achieving adequate assessment of the effects of the proposal. In particular it will provide slightly more time for the Applicant to respond to any recommendations regarding conditions or other matters contained in the s42A report. It will also allow for the ongoing collaboration between experts which is occurring.

Its duty under section 21 to avoid unreasonable delay.

36 The question of what is a *reasonable delay*, must be considered within the context of all the surrounding circumstances. The overriding consideration as to what is reasonable must be guided by Part 2 of the RMA.

37 This proposal is to significantly reduce and with 13 years largely avoid discharges to freshwater. That is an outcome which is strongly encouraged at a national and regional level and endorsed by the District Council. To the extent than any delays minimise the risks to this proposal or provide time for improvements to the proposal, that is clearly desirable.

38 The delay is not unreasonable in the circumstances. In particular:

- a) The delay is not unreasonable within the context of the history of this matter, and
- b) The delays to date, have in large part been as a result of the difficulties created by the wording of the provisions of the PNRP.
- c) The delays to date and going forward have also resulted from further work and collaboration between GW and SWDC experts

on important issues.⁴ It is in the best interests of good decision making to allow that process to run its course.

- d) The delay will allow the Applicant slightly more time to respond to any suggestions advanced by the Regional Council via the s 42A report or earlier (eg. in relation to conditions).
- e) Ongoing discussions between the Applicant and GW officers has the potential to reduce the current level of debate over critical issues. That should ultimately make the Panel's task easier.
- f) The month further delay may result in a more robust decision from this Panel and therefore lower the risks of appeals which would further delay the Applicant in achieving its objective of reducing discharges of treated wastewater to freshwater as soon as possible.

Timetabling

39 If the waiver is granted, the Applicant requests that the Panel cancel its earlier directions (which have been overtaken by events) and that it issue directions as follows:

⁴ I note that this is information which could have been the subject of a further information request prior to notification. That would have avoided the post notification delays but probably would have resulted in the same outcome in terms of a hearing date.

Summary of the Applicant's proposed timeframes if the hearing is to commence on 8 April 2019

On or before 30 November	Joints statement from freshwater ecologists to be filed
20 December	The Joint Groundwater statement to be posted on the website by 20 December.
1 February	S 42A report (including legal advice to the Panel) to be available on the website.
8 March	Applicant's evidence to be available on the website
22 March	Submitter's expert evidence to be available on the website.
29 March	Any supplementary s42A report to be provided by the GW and available on the website.
5 April	Applicant's response to Submitter's expert evidence and any additions or changes to the s42A report to be available
8 April (or later if required by the Panel)	Hearing to commence

- 40 The Applicant is hopeful that most of its initial expert evidence (excluding any response to the s 42A report) will be available in draft form prior to Christmas to be made available to GW officers. That will allow that evidence to be taken into account in the s42A report. However, because of the availability of its experts over coming weeks it cannot commit to that. (Noting too; that the groundwater and ecological experts are still working on joint reports.)
- 41 The Applicant proposes removing the directions for caucusing and joint statements. There has already been extensive caucusing of the relevant experts for the Regional Council and the Applicant. There will be joint statements available on freshwater ecology and ground water prior to Christmas. There are opportunities in the above timetable for any areas of dispute to be discussed or resolved informally, or highlighted via evidence.
- 42 There is insufficient time between the date for submitter expert evidence and the Applicant's response to that, to allow for caucusing.
- 43 The question of whether there should be caucusing can be revisited at the hearing and can occur during the hearing.
- 44 There is nothing to prevent further caucusing between the Applicant's and the Regional Council's experts after the s42A report becomes available if both parties see merit in that. There is no need for that to be directed.
- 45 If the Panel sees fit to further delay the commencement of the hearing beyond 8 April, then that would provide an opportunity for formal caucusing prior to the hearing if the Panel considers that to be appropriate.

The process for determining the application for waiver and directions

- 46 In view of the delegations to the Panel, the application for waiver will need to be determined by officers, however that can be on the recommendation of the Panel.
- 47 If the Panel thinks fit it may wish to provide an opportunity for submitters to comment on the application and the proposed timetable before it makes its recommendation and issues directions.

Dated: 8 November 2018

A handwritten signature in black ink, appearing to read 'Philip Milne', with a horizontal line underneath it.

Philip Milne
Counsel for the Applicant