

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

in response

14 November 2018

MAY IT PLEASE THE PANEL:

- 1 This Memorandum responds to that filed on behalf of the submitters Mr Emms and Ms Tait-Jamieson and the timetable suggestions from the Officers.

The officer's suggestions

- 2 The Applicant cannot provide any assurance as to the date by which the joint groundwater statement will be provided. It will do its best to try to ensure that its expert comment on the further groundwater monitoring is provided by 7 December. However, that is dependent upon the date by which the further field work being completed in the next two weeks. If that can be achieved, then (subject to the availability of the GW expert) the joint statement may be available by 14 December.
- 3 Accordingly, it seeks that there be no direction in relation to the timing of the Applicant's report on the joint statement, except that they be made available on the website as soon they are available. I also note that whilst a joint statement would be desirable it may be more efficient for the Applicant to provide its report prior to Christmas and any response from the GW expert to be provided as part of the s 42A report. (Particularly if the hearing is delayed until May as suggested by the officers.)
- 4 In relation to this matter, I note that neither the Groundwater or Ecological reports are the subject of a formal request by GW. They are additional information which has been agreed between the Applicant and the officers. (GW officers considered that this work was critical in terms of their recommendations in the s42A report.) Given that there has been no formal request for this information there is no requirement that these reports be the subject of any timing direction.

5 The availability of GW officers in January and therefore the timing of the s42A report is beyond the Applicant's control. The Applicant has no objection to the report being delayed until after 1 February if that is necessary. Assuming that the Applicant's groundwater evidence is available prior to Christmas (and hopefully the joint statement) it would seem that the section 42A report could be provided by 8 February. However, that will need to be confirmed by GW.

6 If the S 42A report is provided by 8 February then the Applicant could still have its evidence (or supplementary evidence) filed by 8 March as it has suggested. That timing could be maintained irrespective of when the hearing commences. The Applicant can be ready for an 18 March hearing but that would not allow submitter expert evidence to be filed 5 working days prior to the hearing and would only provide one week for submitter responses and no opportunity for written responses to that from GW or the Applicant.

When it discussed the tentative 8 April commencement date with GW the Applicant was unaware that Ms Arnesen was unavailable for much of April. The Applicant would have no difficulty with the hearing commencing 6 May or after. That would provide Ms Arnesen with time to respond to any issues arising out of submitter evidence and the Applicant's reply to that.

Response to Memorandum on behalf of submitters

7 It seems that the primary concerns of these submitters in relation to timing, is that they have sufficient time to respond to the Applicant's evidence and the s 42A report.

8 The Applicant has no objection to the submitter's expert evidence being provided later, so long as it is available at least 10 working days before the hearing commences.

- 9 Although the Applicant does not consider that conferencing with experts for the submitters is necessary, it has no objection to joint conferencing of *groundwater and ecological experts* after the submitter's expert evidence has been made available. It does not support any wider conferencing. (For example on planning and policy matters). The Applicant would prefer that the Panel the submitter's expert evidence is available before deciding whether conferencing would be useful.
- 10 Given that all of its experts are from outside of the region, it would prefer that if conferencing is directed, that, it be during the first hearing week. This has the advantage, that by this time the submitters will have the Applicant's reply to their experts. By this point, all of the areas of agreement and disagreement should be apparent. If the Panel considers conferencing to be useful that can be directed at further exploring the points of difference to see whether some can be resolved. (There is no barrier to the relevant experts conferencing during the hearing.)
- 11 Finally, I note that at this stage the submitters have not advised who their experts are or requested any meetings between those experts and the Applicant's experts.

Claims of lack of action by the Applicant

- 12 The suggestion that the Applicant has done nothing to meet the timetable which it proposed, are unsubstantiated and incorrect.
- 13 The Applicant is also frustrated by the delays in this process and in particular what it sees as significant deficiencies in the PNRP and the delays in the PNRP decision making. Since lodging the application, a huge amount of time and expense has gone into trying to address the PNRP issues and working with the GW officers and experts to address their concerns and their formal and informal information requests. That work is ongoing.

- 14 The Applicant has made every effort to ensure that the Groundwater and Ecological joint statements were provided on the dates indicated. Regrettably there have been and continue to be delays to both of those reports which are beyond the Applicant's control.
- 15 The scope of the further groundwater fieldwork was not envisaged when the prior timetable was agreed and has taken longer than was anticipated due to weather constraints. The results of that work need to be analysed, fed into models and be reported on by the Applicant's expert. There then needs to be time for the GW expert to consider the report and for the joint statement to be prepared. (If the Panel requires a joint statement.)
- 16 The submitters in question have a raised groundwater issues, which this field work and further assessment are directly related to these issues. The further work will assist their expert and the Panel to assess these issues. This is to their advantage and is in *the interests of the community in achieving adequate assessment of the effects of a proposal*.
- 17 The joint ecological statement is of critical importance to the conclusions of the s42A report and to your decision making. The Applicant would have preferred that this report was available weeks ago, however because of the unavailability of both experts, the final report has been delayed. Further questions will be directed to those experts by both the Applicant and the GW reporting team this week.
- 18 The joint ecological statement will be quite detailed. That will mean that submitters will have the vast majority of ecological evidence (and hopefully groundwater evidence) prior to Christmas and well prior to when it would normally be available. (10-15 working days prior to the hearing). Accordingly, there is no basis for the claims of prejudice or inaction.

Suspension versus waiver and claims of prejudice

- 19 It is the Applicant's choice as to whether or not it requests suspension. It has decided not to do so, because that would achieve nothing.
- 20 It is difficult to see how suspension of processing (ie. the Regional Council and its experts halting work) until late January (which is when the suspension would cease) could assist the submitters. To the contrary, that would further delay the joint groundwater report, the section 42A report and the hearing.
- 21 Unlike the suspension process, an application for waiver requires the consent authority to consider the interests of any person directly affected by the waiver.
- 22 The Memorandum for Emms and Jamieson, suggests that the 130 working day total exclusion period which applies to suspension should be applied to an application for waiver. With respect, that is misguided and would result in an error of law.
- 23 The suspension provisions are quite separate from the waiver provisions. The Act is clear, that time limits can be more than doubled if the Applicant agrees, provided that the consent authority considers this appropriate after considering the matters set out in section 37A(1). I have addressed those matters in my request. Provided that those matters have been addressed and the Consent authority agrees to the waiver there can be no suggestion of "abuse of process".

Claims of prejudice to these submitters

- 24 The postponement of the hearing date from 18 March until at least 8 April (or if necessary until May) will be to the submitter's advantage because (as requested by these submitters) it will provide more time for submitters to respond to the section 42A report and the Applicant's evidence than would be possible with a March hearing and will allow

for conferencing with submitter experts, if the Panel considers that to be desirable.

25 These submitters also claim prejudice based on an unsubstantiated claim, that the *use* of their properties is somehow affected by a delay to determining the Application. The *application* has no effect on the use of neighbouring land. The question of whether or not granting consent will have any effect on any person or land, is a matter for the Panel to determine.

26 It is accepted that the delays to this application being determined create uncertainty for submitters and the Council. That is regrettable and is frustrating for the Council and the community. The delays have in large part been caused by uncertainties created by the Proposed Natural Resources Plan and the unanticipated delays in that hearing process. The delay has also been caused by the desire of both Councils to try and narrow points of difference and fill some information gaps.

27 Proceeding to an 18 March would run counter to the submitter's requests at paragraphs 5 to 9.

Collaboration between experts

28 With respect, I do not understand Councils' point at paragraph 8. The Applicant and Regional Council agreed that their groundwater and ecological experts would collaborate and provide joint statements. The Councils indicated this proposal to the Panel and the Panel agreed to allow time for this process.

29 There is nothing unusual or improper in this approach, indeed it is helpful to the Panel and all parties and is in the best interests of good decision making. There is nothing in this approach which is contrary to the Panel's directions in terms of these joint statements.

30 The submitters will have access to the joint statements as soon as they are finalised. Their experts will have an opportunity (and much more time than usual) to respond as they think fit. The current collaboration does not preclude later caucusing with the submitter's experts if the Panel considers that to be useful.

Dated: 14 November 2018

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

Philip Milne: Counsel for the Applicant