

**Before Commissioners for Wellington Regional Council
At Featherston**

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 requesting amended directions
concerning the timing of the hearing and pre hearing matters.;**

AND

**An associated Application to Greater Wellington Regional Council officers for
a further waiver of time for the release of the decision**

10 May 2019

MAY IT PLEASE THE PANEL:

- 1 This Memorandum responds to that from the Counsel for the Regional Council and the suggestion, that if the Applicant seeks a deferral of the decision, that it would be preferable that it also seeks the deferral of the commencement of the hearing. The Applicant agrees with that suggestion and accordingly requests that the Regional Council grants a further waiver under sections 37 and 37A of the Act, to extend the time for your decision until 15 November 2019 and that the Panel defer the commencement of the hearing until September 2019.

Background

- 2 The Applicant has been indicating since last year that it would be preferable that decisions on this application be made after PNRP decisions. In particular see the discussion in my Memorandum and Application dated 8 November 2018.

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 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.

- 3 My memorandum of this week indicated such an application remained likely. I agree with Counsel for GW, that it would be more efficient and convenient for the Panel and all parties if the entire hearing to be deferred. I have sought instructions and the Council (SWDC) has today

confirmed that approach. The intended approach has been discussed with GW management.

Reasons for the suggested deferment

- 4 Firstly, the suggested approach (if adopted) would avoid further unnecessary and legal and planning debate as to the meaning and effect of provisions which will inevitably be different by August. (The exception being activity status which will need to be determined in the light of the current provisions).
- 5 The primary basis of the officers' recommendation to decline consent is their conclusion that the proposal is a non-complying activity (which is disputed) and that it fails both gateways. (also disputed). Their conclusion that the proposal is contrary to the objectives and policies of the PNRP is based upon the as notified version which will inevitably change in the decision version.¹ Furthermore, the assessment of effects for the purposes of the other s 104D gateway is necessarily influenced by those same objectives and policies (in particular policies 71, 81 and 83).
- 6 If the hearing proceeds this month there will be significant debate around provisions which will be redundant by the time of your decision (if you do defer your decision) or (if you do not), by the time any appeals are heard. That is clearly an undesirable scenario and unnecessarily places the Panel in a difficult position.
- 7 Secondly, for the reasons outlined by Counsel for GW, if the decision is deferred it would be more efficient and convenient for the Panel and parties, if the hearing was also deferred. That will result in a shorter hearing than will be required if the matter proceeds this month. A

¹ Submitters including SWDC have sought changes and the officers have recommended significant changes.

deferred hearing would also avoid planning witnesses, counsel and potentially submitters having to attend a reconvened hearing.

- 8 Thirdly, that option would also allow for further consultation with submitters, the community (including the Maori/iwi representatives) and with GW officers (that might also include the option of an independently facilitated pre hearing meeting or mediation.) Such consultation can now occur in a context where all key evidence will be available to all parties by the end of May. (The Applicant is proposing that if the hearing is deferred, it continue to file its reply evidence by 27 May.)

Process

- 9 GW has not delegated the power to grant waivers to the Panel. Accordingly, the decision regarding deferral of the decision lies with the officers but should in my view be strongly influenced by the Panel's views, since the Panel is in the best position to form an independent view.
- 10 If a waiver of the decision timeframe is granted, then the decision as to the commencement date of the hearing and consequential revised directions rests with the Panel.

Application by the Applicant for a waiver of time limits so that the decision on the application is not required until 15 November 2019

- 11 I now address the section 37A matters.
- the interests of any person who, in its opinion, may be directly affected by the extension or waiver**
- 12 The party most affected by the proposed waiver and deferment is the Applicant acting on behalf of its ratepayers. The grant of the waiver will reduce the risks to SWDC arising out of the PNRP provisions in their current unsatisfactory form. That will make appeals less likely and is likely to lead to greater certainty sooner than would a decision made

under the current PNRP. In contrast, the current recommendation of the officers if accepted could lead to years of delay to achieving the Council and the community's desire to significantly reduce discharge to Donald Creek as soon as is reasonably practicable.

- 13 The only other way of addressing the difficulties caused by the delay to the PNRP decisions (originally scheduled for December 2018) would be to withdraw the Application and relodge it after the decisions are released. That would have very significant cost consequences for the Council/ratepayers.
- 14 It is difficult to see how deferment of decision making could adversely affect submitters. Ensuring that your decision is made in the light of the decision version of the PNRP (which will be the version before the Environment Court if there are appeals) is in the interests of all parties. That course will have benefits in terms of certainty and efficiency and will avoid unnecessary debate over provisions which will inevitably change as a result of decisions.
- 15 The deferment of the decision will allow deferment of the hearing which has additional benefits for all parties which are discussed below.
- 16 There are also advantages to submitters and the wider community in providing further time for consultation in the light of the evidence now available. (As from 27 May all key evidence will be available since the Applicant proposes to file its reply evidence by that date if the hearing is deferred.) There has been a significant amount of additional work carried out over the last year which is now reflected in the evidence and joint statements. The exchange which is occurring today, the Applicant's response to GW and caucusing will further clarify and narrow remaining points of difference. (If the application is deferred, the Applicant will be requesting that caucusing continue in June.
- 17 I have in previous Memoranda addressed the suggestions by Ms Tancock, that deferment of the decision or hearing will lead to an

increased period of uncertainty for the community and submitters. For the reasons outlined in memoranda last year, I do not agree. To the contrary, proceeding with a decision within the context of the current PNRP provisions involves uncertainty and increases the risks of delay to the upgrade. (I also note that Ms Tancock only represents her clients not all submitters.)

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

- 18 Deferment of the hearing and decision will allow the Panel and all parties to address and assess the effects of the proposal against the independently considered (decided) objectives, policies and other provisions of the PNRP, rather than the current unsatisfactory provisions which will almost certainly change. It will also make it more likely that if there are appeals, the Court will be considering the proposal against the same provisions as the Panel.
- 19 Deferment will also allow GW officers to reconsider their position in the light of the PNRP decisions, rather than relying on provisions which have been acknowledged by officers (in reports/evidence to the PNRP Panel) as being problematic and in need of change.

its duty under section 21 to avoid unreasonable delay

- 20 I note that this matter is only one of the three matters which the Council is required to consider and cannot be elevated to a threshold requirement in terms of the application for waiver. All three matters must be balanced.
- 21 In any event, within the unusual context and the history of this application the further deferment of the hearing will not amount to *unreasonable delay*. To the contrary, the deferment is likely to result in the upgrade proceeding earlier by reducing the risk of the PNRP provisions resulting in the consent being declined and a resultant appeal. If consent is declined that will lead to years of delay (and resultant uncertainty) in achieving the desirable outcome of reducing and ultimately largely removing the discharge to the stream.

22 In the circumstances, proceeding to make a decision within the context of soon to be amended provisions would be “unreasonable” accordingly the further delay is not unreasonable.

Application to the Panel for deferment of commencement of the hearing

23 If GW grants the waiver, then in my submission (and reflecting the comments of Counsel for the Officers) the Panel should defer the commencement of the hearing until September. That will allow all parties time to reconsider the application in the light of the PNRP decisions which are required by the end of July.

24 If the decision is to be deferred, there are clearly additional benefits in terms of efficiency and convenience in deferring the entire hearing. These are as follows:

- Efficiency in avoiding unnecessary and time-consuming debate relating to the meaning and effect of provisions which will have changed by the time you make your decision.
- Consequential shortening of the hearing
- Avoiding the need for reconvening the hearing
- Ensuring that your decision is made whilst the evidence is fresh in your mind.
- Providing an opportunity for further consultation to occur with submitters and the wider community including Maori/iwi.
- Providing an opportunity for further dialogue with GW officers in the light of the s 42A report, evidence and the caucusing results and pre-exchanged legal submissions.

Legal advice and submissions

- 25 I continue to maintain that the legal advice relied upon by the officers should have been attached to the officers 'report. I agree that this omission can be rectified by allowing myself and other parties adequate time to respond to the GW submissions provided in advance of the hearing.
- 26 I have had an opportunity to advance my synopsis of submissions this week and will be able provide a detailed outline to the Panel and parties on 15 May (if the hearing is to proceed on 27 May) or by 20 May if not.
- 27 That will allow counsel for the officers to comply with the Panel's direction by 22 May (if the hearing proceeds) and will ensure that those submissions address the matters in dispute. That should minimise the need for further responses from other counsel at the hearing and ensure that my reply is addressed to the remaining points of difference. That will also allow the Panel to pre-read those submissions.
- 28 I will be amplifying some points at the hearing and addressing the case law in more detail. That is the normal approach followed in the Courts where synopsis of submissions are pre exchanged. I will also be responding to any new evidence from GW which has a legal content, since that will not be reflected in the synopsis I will be providing.
- 29 The approach I have proposed is fair and efficient. Furthermore, contrary to the submissions for GW, I remain of the view that the Panel does not have the power to direct the Applicant or submitters to provide legal submission prior to the hearing.
- 30 Section 41C clearly relates to *time limits* for presentation of evidence or submissions at the hearing. That must be contrasted with the power in section 41B to make a direction to provide evidence "before the hearing". Within that context, the Panel can not direct either the Applicant or the submitters to provide submission before the hearing. Nor would it be fair or efficient to request Ms Tancock provide

submissions before she has seen the submissions from the Applicant and GW. It would be helpful if her submissions were volunteered to the Panel prior to the hearing so as to allow for pre reading but that cannot be directed.

31 You do however have an inherent power to require that any legal advice relied upon by the officers for their opinions in the s42A report (including evidence due this week) is provided well before the hearing. That is because that advice necessarily forms part of the s42A report (or is advice requested by the Panel). I agree however that it would be more useful if that was in the form of legal submissions rather than a copy of the advice provided to officers.

32 If the hearing is deferred, then in my submission it would remain appropriate for the submissions on behalf of the officers to be provided as soon as is practicable. That is because of the various significant propositions advanced in the officers' report which have a legal component. (It would not however be necessary for that legal advice to canvas PNRP provisions except in terms of activity status.)

Order of evidence

33 With respect, I cannot understand the basis of Counsel for the officers' opposition to a topic by topic approach. It is up to the Panel as to which approach it finds to be most efficient and helpful.

34 I remain of the view that a topic by topic approach (which may or may not include "hot tubbing") would be more efficient and useful to the Panel, at least in terms of the key topics in contention. That is also consistent with the joint witness statements and the required caucusing approach. That approach will reduce the amount of time that witnesses will need to be at the hearing and that in turn will reduce the expense to the Applicant both in terms of its witnesses and those appearing for the officers. The Panel has signalled that it might require such an approach. If that is to occur it should be decided in advance of

the hearing since that will affect travel and accommodation requirements.

Directions requested by the Applicant if the hearing is to be deferred

35 If the application for waiver is granted and if the Panel agrees to defer the commencement of the hearing, the Applicant seeks the opportunity to request various amended directions and will endeavour to reach agreement regarding those requests with Counsel for the Regional Council.

36 In the interim it seeks the following direction:.

- a) *That the hearing commence on or after 26 August 2019 and that hearing of evidence be completed by 11 October at the latest (closing could potentially be later).*
- b) *That the hearing of evidence exclude the period of 13 to 18 September. (Counsel will be overseas)*
- c) *That the Applicant's evidence in reply to GW evidence be provided in writing by 5pm on 24 May.*

Dated: 10 May 2019



Philip Milne: Counsel for the Applicant