

**Before Commissioners for Wellington Regional Council GWRC WAR 170229
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

7 May 2019

MAY IT PLEASE THE PANEL:

- 1 This Memorandum responds to a direction in the Panel's 5th Minute and raises various additional matters and seeks various procedural directions. The Memorandum was in preparation when the Panel's issued its 6th Minute late on 6 May. Unfortunately, Counsel had not been advised of the Panels intention to do. Nor was the Applicant advised of the Regional Council officers requests to the Panel which were not made available to other parties to comment upon. Accordingly, some of the directions which the Applicant seeks are at odds with the Panel's Minutes. I have added comment to this Memorandum in response to the Panel's further directions.

Response to query from Garrick Emms

- 2 Mr Emms has asked whether the application should have been renotified given the amended assessment of potential effects to shallow bore water supplies and the mitigation proposed in draft condition 17.

Prior to irrigating treated wastewater to land, the consent holder shall offer to provide, potable water supply from the SWDC owned and managed Featherston town supply, to all shallow bore owners identified as being at risk from the discharge in Table 6 (where it is confirmed that a particular bore user is using the bore for potable water supplies). This provision of this supply shall be at no cost to the land owner and shall be implemented prior to commencement of irrigation. There shall be no charge to the landowner for the capital costs of providing this supply and no usage charge for reasonable volumes of potable use consistent with the occupation of property concerned:

3 The question of whether renotification is required depends upon whether the proposal does or does not remain within the scope of application as notified. In my submission it clearly does remain within scope for the following reasons:

- a) The activity for which consent is sought has not changed. That activity includes the discharge of treated wastewater to land.
- b) The issue of potential contamination of groundwater and potential health risks has been a live issue and has been directly raised by some submitters including Mr Emms.
- c) Although the assessment as to potential health risks has changed as a result of further investigations that does not change the activity. Changes to the assessment of effects of an application between lodgement and the close of a hearing are common. That is part of the process of refining and improving on information leading to a hearing and part of the process of addressing submissions such as that from Mr Emms.
- d) The Applicant is not seeking consent to supply potable water to affected bore holders. Rather, it is proposing a condition which would require it to *offer* such a supply *...to all shallow bore owners identified as being at risk from the discharge in Table 6 (where it is confirmed that a particular bore user is using the bore for potable water supplies).*

4 The proposal is that if the offer is accepted by a particular user, then SWDC will need to supply potable water to those particular bore users (who have accepted the offer) at its cost for

reasonable domestic use. SWDC is about to commence further consultation with potentially affected bore users.

5 If consent is granted, draft Condition 17 will need amendment to better reflect the Council's proposed approach. I understand this is as follows: (details will follow in evidence).

6 The intention is that these users would not be charged a water connection fee but would be charged a water rate. New connections normally pay a capital contribution of currently \$3,736.83 plus GST as well as installation costs to connect the town supply to the property boundary. This connection fee will be waived for current owners of these properties who choose to become part of the town water supply for potable water. All customers connected to the town water supply are currently charged \$560 PA (incl GST) and charged \$1.84 per m³ for what they use over 350 cubic meters per year. To be fair to other users of the town water supply, these water rates charges will need to be paid by those who choose to become part of the town water supply.

7 If the Panel seeks further information on the jurisdiction issue that can be addressed in my submissions to the Panel and in submissions from Counsel for Mr Emms and/or the Counsel advising GW officers.

Officer comment on draft conditions

8 The s 42A report does not provide any comment on the draft conditions as originally proposed. I have indicated to GW officers that the draft conditions may well be further adjusted to reflect issues raised by submitters, officers or the Panel or suggested by

particular witnesses. The draft conditions are, of necessity, work in progress. That is normal.

- 9 I agree that the Panels directions on this matter are appropriate but suggest that the direction be a little more specific.

That GW officers provide any comments on, and suggested amendments to, the draft conditions proposed by the Applicant in its evidence by 5pm on 15 May 2019. That such response include a revision marked version of the Word version of the draft conditions.

Provision of legal advice to the officers

- 10 The s 42A report refers in a number of places to legal advice provided to the officers and appears to rely on such advice in relation to the key issues of:

- a) Interpretation of the definition of “existing” and “new” discharges (and hence activity status)
- b) The appropriate approach to interpretation of proposed plan provisions.
- c) The weight to be given to provisions of the as notified version of the PNRP.
- d) The interpretation and application of section 107 of the RMA.
- e) The appropriate approach to the assessment of the magnitude of effects.

f) Whether the proposal should be assessed against the existing and reasonably foreseeable future environment as outlined in Mr Exeter's evidence.

- 11 In my submission, it is normal and appropriate that all technical and legal advice relied upon by reporting officers be made available as part of the officer's report or at least prior to the hearing. That approach is in accordance with natural justice and is also of assistance to the decision maker. The Applicant must be provided with a fair opportunity to respond to any advice (technical or legal) which informs the officers's recommendations. (That advice should have been attached to the s42A report.)
- 12 I have no objection to the Panel's suggestion that instead of providing the legal advice, the Regional Council's legal submissions be made available to the Panel and all parties by 20 May. In my submission that is essential in order to provide for procedural fairness.
- 13 I oppose the direction that the Applicant provide its legal submissions on the same day as the Regional Councils. Firstly, that does not provide any opportunity to address those submissions in the pre exchanged submissions. Secondly this is not a proposal which I was given any opportunity to comment on until now. Due to other commitments and the need to review reply evidence for the hearing and to consider the officers' comments on conditions I will not be in a position to meet that direction. Finally, I doubt that the panel has power to make such a direction.

- 14 Notwithstanding the above, the Applicant agrees that it would be useful for its legal position to be clear prior to the hearing. With that in mind I propose to provide a *synopsis* of the key legal points in my submissions to the Panel and parties by 9am on Tuesday 13 May. That will ensure that Counsel for the Regional Council officers has time to address all of those points by 20 May. I will then provide my full submissions by 9 am on Friday 24 May. That will allow for pre-reading of the submissions and will save time at the hearing. I have no objection to the Regional Council's legal submissions being presented prior to those for submitters and suggest that should occur immediately after my submissions are presented. (That is, treated on the same topic by topic basis as other issues.)
- 15 I note that the main points of difference are already well known to Counsel for GW and have in some instances have been responded to already in correspondence (which I assume to be the advice relied upon by the officers).
- 16 In summary, it would not be in accordance with natural justice or normal procedure to expect the Applicant's submissions earlier. I have however made some suggestions which in my submission will ensure a fair and efficient process.
- 17 In the present case given that the principal legal disputes are between the Applicant and the Officers and the officers rely on advice from DLA Pipers, it is my submission that all advice/submissions from DLA Piper should be regarded as advice to the officers rather than independent legal advice to the Panel.

The Applicant's evidential response to further evidence from GW officers.

- 18 The Panel's timetabling direction (minutes 3 and 4) concerning pre-hearing exchanges of evidence makes no mention of the Applicant's response to the further evidence from GW officers which is due on 10 May.
- 19 Consistent with normal practice and natural justice, (and as foreshadowed in correspondence provided to the Panel) the Applicant will be responding with written reply evidence at the hearing. (that is consistent with the penultimate bullet point at para 18 of Minute 6)
- 20 To assist the Panel and the parties that response will be in writing. In order to provide the Panel and parties with an opportunity to pre read that material, the Applicant proposes to make as much as possible of the further evidence available by 9 am on Friday 24 May and that it will all be available at the commencement of the hearing.

Order of evidence

- 21 I had indicated to Ms Detheridge-Davies (and the Panel has been copied that indication) that each witness for the Applicant will present a brief summary of their original evidence and any reply by way of speaking to a power point presentation. If the Panel has not been able to pre read any written response, that would need to either be read aloud or time taken by the Panel to read that statement themselves during the hearing.
- 22 Normally, the officers report would be tabled at the commencement of the hearing and any changes from that report

would be summarised before the Applicant presents its evidence. In the present case I anticipate that there may be quite a volume of new material from the officers as part of the 10 May exchange. (Minute 6 indicates that there will be 5 statements).

23 The key points of contention will be addressed in that evidence and in the subsequent responses from the Applicant's experts. In view of that, I respectfully suggest that it would be efficient for the relevant experts (perhaps excluding planners) to present on a topic by topic basis. (That is consistent with the indication given in para 21 of Minute 6.)

24 That approach would:

- Minimise the prospect that the Applicant's witnesses will need to be recalled to respond to the GW or submitter evidence.¹
- Minimise the amount of time that all experts need to be at the hearing.
- Allow the Panel to hear both points of view together rather than move from topic to topic and hear responses days apart.
- Allow submitters to hear all relevant evidence before they present rather than have the officers and their experts present after submitters.

25 Accordingly, I request that the Panel make a direction that:

¹ Only one brief of evidence has been received by submitters and that expert (on pathogen risk) could be heard as part of the relevant group of witness.

- a) *Following the completion of the Applicant's and GW Counsels opening legal submissions expert evidence be heard on a topic by topic basis in the following order.*
- b) *Applicant's evidence, submitter expert evidence (there is only one such brief) Officer/GW expert evidence, Applicant's evidence in reply.*
- c) *The topics be in the following order:*
- *SWDC officers, including timing of staging and cost and availability of alternatives*
 - *Availability of alternatives and I and I issues, pond sizing etc.*
 - *Management of the land treatment system, soil type, potential for ground water mounding and duration and frequency of discharges to stream etc. Aerosols, and odour risks and mitigation.*
 - *Pathogen transmission, health risks (including evidence on behalf of RPH).*
 - *Water quality including nature, frequency and duration of discharge to water at each stage and effects on water quality including nutrients and clarity.*
 - *Aquatic ecology.*
 - *Planning issues and conditions (conditions may need to be readdressed in written reply.)*

- d) *Officers and GW experts to have a right to respond to submitter lay evidence after that has been heard.*
- e) *Applicant's evidence in reply to any new evidence presented at the hearing by submitters or officers to be in writing and provided prior to the Applicant's closing submissions and after the Officers' closing presentation.*
- f) *That the officers closing be limited to new issues/evidence arising during the hearing.*

Caucusing of expert witnesses

- 26 The Applicant agrees that further caucusing of experts would be useful. I have already indicated to the relevant witnesses that they should communicate with their counterparts in order to seek to narrow issues. Accordingly, the Applicant has no difficulty with the Panel's directions in this regard. (The Applicant's witnesses will be caucusing by phone, email skype etc unless it is convenient for them to meet.)

Possible further changes to the timing of stage 2B

- 27 The Applicant is giving further consideration as to whether the stage 2B can be further advanced from the currently proposed end of year 13 (originally year 20). Whether that is *reasonably practicable* depends in part on technical considerations relating to the interrelationship between pond sizing and the timing and effectiveness of I and I. ² If there is any change to the current

² Currently the draft conditions Schedule 1 Condition 38 requires an SWDC review of the timing of Stage 2B at year 8.

suggested timing that will be advised to the Panel and parties by the end of next week.

Potential deferment of the closure of the hearing

- 28 As previously advised, the Applicant is likely (via submissions at the hearing) to be requesting that the Panel defer³ the closing of the hearing until early September 2019, so as to ensure that the Panel is making its decision in the light of decisions on the PNRP provisions.
- 29 Whilst the activity status does not change from whatever it was at the time of application (which is a matter of dispute between the GW officers and the Applicant) the Panel must consider the PNRP provisions as they are at the time of its decision. That has particular relevance in terms of objectives, policies and definitions. The Applicant remains of the view that informed decision making, fairness and efficiency, suggest that your decision should be made in the light of the PNRP decisions.
- 30 The Applicant is likely to make a concurrent application to GW Management for a further *waiver* of the time frame for closing the hearing, and/or to request that processing be *suspended* pursuant to section 91A, after the hearing of evidence (such request can be made anytime prior to the closing of the hearing).
- 31 No decision or direction is required from the Panel or the officers on this issue at this stage. I am simply advising the Panel and the parties of the Applicant's likely intentions, so that all parties are

³ Or recommend deferral to GW management

in a position to address the point at the hearing if the Applicant proceeds with that approach.

Dated: 7 May 2019

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

Philip Milne: Counsel for the Applicant