

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER discharge and land use resource consents for the operation and maintenance of the Wairoa wastewater treatment plant and sewer pump station overflows

BY **Wairoa District Council**
Applicant

**MINUTE OF HEARINGS PANEL
REGARDING OUTSTANDING ISSUES AND INFORMATION**

Introduction

1. At the conclusion of the hearing on 1 December 2020, the Panel indicated that it would issue a minute setting directions for expert conferencing over the wording of identified conditions of consent, in order to address various specific issues as raised in evidence and at the hearing itself.
2. We were left to consider whether such conferencing should take place before the applicant's right of reply (as requested by counsel for the applicant), or after that reply is received (as requested by certain submitters).
3. The Panel has since conferred, and for reasons now explained, instead proposes a different course of action.
4. Conferencing over the detailed wording of specific conditions is still proposed (as addressed later in this minute).
5. However, having reflected on the issues and evidence produced at the hearing, we consider that there are a number of more fundamental issues and concerns regarding the nature and content of the application which need to be addressed by the applicant (Wairoa District Council) at this stage of the process. Expert conferencing over the detailed wording of consent conditions would necessarily be secondary to these more fundamental issues being addressed, as now explained.
6. We need to squarely signal that the formal process of deliberations regarding the application, that is, evaluation of the evidence and information presented and received to this point, with reference to the statutory tests under the Resource Management Act 1991 (**RMA**)¹, is yet to be carried out in any substantive way. The Panel also appreciates that we are yet to receive the benefit of the applicant's reply.
7. The expert conferencing step proposed (as to consent conditions) was itself necessarily "without prejudice" to the Panel's discretion to grant or refuse consent to the application, and aimed at securing a final version of conditions which at least the experts (including in Mātauranga Māori)

¹ As helpfully summarised and thoughtfully reviewed in the Planning Assessment report appended to the application (dated 29 November 2018) prepared by Mr Drury.

considered appropriate,² on the assumption consent was to be granted to the application before the Panel.

8. For the reasons now stated however, and having (as noted above) reflected on the evidence received at the hearing with reference to our understanding of the relevant RMA statutory and planning requirements, we have considerable reservations as to whether the application *as currently framed*, is consentable.
9. The starting point in that regard is the apparent consensus between all parties that the current discharge is “culturally unacceptable”.³
10. The premise of the application is not that the discharge *should* continue in the face of that reality (at least indefinitely), but instead that for a local authority with a limited ratepayer base, and constrained resources, a move to a land-based alternative discharge is currently unaffordable, and reliant on access to land as yet unsecured (regardless of whatever resource commitments are made).
11. As Mr Lawson put it in opening submissions:
 16. ... While the concept of moving to a fully land-based system is easy to say, we cannot avoid the fact that it is currently beyond the financial capabilities of the community and any move to land-based disposal requires long-term commitment, long-term planning and long-term financial management.
 17. In short, the community desire to remove the wastewater discharge from the river must be matched by the willingness and ability of the community to meet the cost of a land based discharge.
 18. The aspirational nature of the proposed consent conditions flow from and reflect the interaction and engagement that has occurred throughout this consenting process. The proposed consent conditions involve a program of action to transition over time if and when that transition is possible from a river based wastewater discharge system to a land based discharge system. As already noted, the whole of the community and the Applicant have the aspiration of ceasing wastewater discharges to the river and improving the health of

² Or at least in order to narrow if not fully resolve all matters in contention regarding the detailed wording of these conditions between those experts, to that end.

³ Wairoa Wastewater Treatment Plant discharge resource consent application and AEE, November 2018, page 59, and *Cultural Impact Assessment of Wairoa Wastewater Discharges to Wairoa River* (prepared for Wairoa District Council by Nigel How, 26 November 2018).

the Wairoa River. Cessation of any discharge to the river relies entirely on storage and land discharge. A full land based discharge requires large amounts of land and soils that are able to accommodate such discharges year-round.

19. Also as noted, any such transition requires long-term planning and financial commitment. The purpose of the condition framework is to lock Council into a continued program of striving towards that transition with the ultimate goal of ceasing discharges to the river and restricting any such discharges in the interim to when storage capacity is nearly full and river flows are at levels that can readily assimilate the discharge and avoid effects on the environment.

(emphasis added)

12. The fundamental difficulty as we see it however is that, as put by Dr Green to Mr Lawson, of “the Package” of measures adopted by the Council in 2018⁴ in order to ultimately “cease” discharges of effluent to the river, the only actions which are currently known to be achievable are the proposed tertiary treatment steps of a sand filter and UV treatment, along with additional storage of *up to* 10,000 m³ of wastewater.⁵
13. That is, the conditions (including the so called “Version 22” as included with the applicant’s evidence), do not actually “lock Council” into the necessary transition, but instead as counsel for the applicant acknowledges, to a continued program of trying or *striving* to do so. The basic concern of the submitters we heard from is that the conditions lack certainty as to timeframes for the specific steps and actions needed to ultimately cease the river discharge. As put more generally by Commissioner Kirikiri to Mr Lawson, they “*lack punch*”.
14. In addition to that point, for our part, we are particularly concerned that what Mr Heath described as a *vital* part of the application,⁶ i.e., the proposed new outfall which would achieve greater dilution and avoid reliance on the current “surcharge outfall” to the riverbank at the Fitzroy Road pump station, is reliant on a concession being obtained under the Conservation Act 1987 (to occupy the Whakamahi Lagoon Government Purpose (Wildlife Management) Reserve).

⁴ Section 3.4 of the AEE, with reference to *Conceptual Design for Wairoa Wastewater Treatment and Discharge Report* (LEI, 2018:C1.0).

⁵ Proposed revised condition 44 (version 22 of the consent conditions).

⁶ Paragparch 21 of Mr Heath’s evidence.

15. Evidence was given to the Panel which gave cause for some considerable doubt as to whether this concession application, which we are advised has 'very recently' been lodged, will ultimately be approved.
16. Regardless of that uncertainty, we do not accept the applicant's argument that this issue is irrelevant.⁷ The new outfall is clearly a key mitigation measure relied on by the applicant to support its application for a renewed discharge permit, with Dr Mead advising that he would be "concerned" if this element of the proposal were to be delayed, given that the new outfall would make (in his words) a "great improvement" in terms of the effects of the current discharge.
17. We do of course acknowledge the applicant's essential case, being that at least from a *western science* perspective, the effects of the current discharge are "minor", in the context of other pressures on the river.
18. As recorded in the AEE:

The exact effects and impact of the discharge are likely being masked by the condition of the river as a whole; and in particular the negative impact from a range of upstream contributors to poor water quality. These include hill country erosion, runoff from production land and various discharges from roading and urban areas.⁸
19. As Dr Mead recorded in his evidence:

Numerically dominant species recorded at the 3 historical sites located relatively close to the outfall are typically considered to be synonymous with degraded/impacted environments; in this case it is likely attributed to local nitrification and siltation. ...

However, other than recording lower abundance of pipi at the sampling sites closer to the outfall in comparison to sites further away from the outfall, which may suggest local impacts, the existing discharge does not appear to be compounding the effects of sediment stress to a substantial degree. Therefore, it is my opinion that the impacts of the existing discharge are considered to be no more than minor and localised (within 100 metres of the existing outfall).⁹
20. This assessment (of a minor localised impact to an otherwise degraded river environment) did not appear to be contested by Mr Smith¹⁰ with reference to his own monitoring and assessment, in giving evidence as

⁷ Paragraphs 33 and 34 of Mr Lawson's submissions, paragraphs 19 and 20 of Mr Drury's evidence.

⁸ Page 11 of the AEE, section 2.3.

⁹ Paragraphs 22 to 25 of Dr Mead's evidence.

¹⁰ Nor, we record for completeness, by Dr Kelly.

an expert for Ngāti Kahangunu Iwi Incorporated (except during periods of river mouth closure, when the impact may be significant in his opinion).

21. But the evidence as to a minor localised additional effect (from a western science perspective) clearly does not reflect our understanding of the view of the predominantly Māori community which the wastewater treatment plant serves (as presented to us in evidence), and as the application acknowledges, the current discharge is “culturally unacceptable”.
22. While we are, as noted, yet to complete deliberations with reference to the statutory tests of the RMA, it seems evident to us that the directive provisions of the National Policy Statement for Fresh Water Management (2020) as now in force (**NPSFM 2020**), and those of the New Zealand Coastal Policy Statement 2010 (Policy 23 in particular) would operate (upon such deliberation) to at the very least require a considerably greater degree of certainty than currently available, that the so called “aspirational” elements of the Package will in fact be delivered, in relation to both the question of whether the current application should be granted,¹¹ and (assuming so), as to the term (or duration) of consent.
23. Again, as put to Mr Lawson, Policy 1 of the NPSFM 2020 is that fresh water is managed in a way that *gives effect to* Te Mana o te Wai. To *give effect to* means to *implement*,¹² and it also seems at least provisionally clear to us that completion of the overall Package would be necessary in order to give effect to Te Mana o te Wai, as regards the matter before us.¹³
24. This new policy directive as now in force, alongside Policy 23 of NZCPS 2010,¹⁴ in our view “gives substance”¹⁵ to the requirement in s 6(e) of

¹¹ Bearing in mind the directions of the Court of Appeal as to the operation of directive provisions of higher order planning instruments, in *Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

¹² As confirmed by the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] 17 ELRNZ 442 (**King Salmon**) at [77].

¹³ Noting that Mr Lawson was invited to present submissions regarding the requirements of NPSFM 2020 as pertain to this application in reply, including with supporting evidence from Mr Drury, as this instrument was not in force when the Planning Assessment (see note 1 above) was completed.

¹⁴ Whereby we must “not allow” the discharge of human sewage that is untreated, and otherwise only “as informed by an undersanding of tangata whenua values and effects”, being in this case that such a discharge is *unacceptable* to tangata whenua.

¹⁵ *King Salmon*, at 85.

the RMA, whereby it is a matter of national importance that in reaching our decision, we recognise and provide for:

The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu and other taonga.

25. As matters stand, and on the basis of the information currently before us, the applicant should be aware that if we were to make a decision, it could well be that (rather than refusing consent altogether), a very short term or duration consent is granted (provisionally considered, of 5 years¹⁶). This timeframe (5 years) would enable the Council to more fully address the various outstanding matters of concern to us as identified below; achieve greater certainty that the Package *can and in fact will* be implemented over time, and the concession for the new proposed outfall obtained (or some alternative secured with equivalent benefits), before any further renewal beyond the initial (5) year term is contemplated.
26. We struggle to see how the necessary degree of certainty as to implementation of the Package can otherwise be secured, certainly on the basis of the conditions now before us (Version 22), but even if strengthened to include (for example) more stringent and expansive review triggers over the life of a longer-term consent. There are *currently* simply too many unknowns, and factors outside the applicant's realistic ability to control.
27. Against this background however, we nevertheless instead propose that the application be put on hold, with the Panel granting the necessary waivers under s 37A of the RMA, and making directions requesting information pursuant to s 41C of the Act, in order to allow the applicant an opportunity to achieve a greater and more adequate degree of certainty on the outstanding issues and matters of concern recorded below (and if necessary amend its application in light of the same), if it wishes to maintain and support its case that a longer term consent than provisionally indicated above, is warranted.
28. We record that these proposed directions are provisional, pending response from the applicant, including as to whether the applicant:

¹⁶ A shorter timeframe than 5 years might be considered appropriate in relation to the outfall discharges of untreated sewage, particularly from the Kopu Road pump station outfall into the coastal environment which Policy 23(2) of NZCPS 2010 directs, we must "not allow".

- (a) wishes to file reply submissions to address matters raised at the hearing¹⁷ (regardless of the outstanding matters needing to be addressed, as recorded below), including for our consideration of the same, before issuing final directions;
 - (b) would prefer that the Panel complete the deliberative process, and make its decision on the basis of the evidence and information available (subject to the right of reply, and the expert conferencing proposed over the detailed wording of conditions, as also addressed further below); and/or
 - (c) wishes to comment on the timeframes proposed¹⁸ for receipt of the further information requested on the outstanding matters (as now outlined).
29. We will make the final directions after hearing from the applicant in that regard, directing that any such response to the proposed directions in this respect, be received from the applicant by 5.00 pm Monday 21 December 2020.

The outstanding matters of concern

30. Against that background, the Panel proposes to issue directions pursuant to s 41C of the RMA formally requesting the following information on the outstanding matters of concern to it at this stage:
- (a) **The concession application** – advice and confirmation over the anticipated timeframe for a decision on the concession application, as to the establishment and make-up of the Reserves Board considering the application, and as to the Council's intentions including for an alternative (or temporary)¹⁹ outfall or contingency in the event the concession is declined, including to deal with the existing surcharge outfall discharging to the riverbank at the Fitzroy Street pump station.
 - (b) **The extent of capital provision made in the Long Term Plan for key elements of the Package** – noting that this should include as now available to the Council as a result of the \$11M *Three Waters* initial/interim funding already received.

¹⁷ Including as put by the Panel to Mr Lawson at the conclusion of the hearing on 1 December.

¹⁸ Refer paragraph 31 below.

¹⁹ As proposed by Mr Smith and Mr Tiuka.

- (c) **Specific milestones/performance measures regarding the Inflow and Infiltration programme**, including consequent projected implications in terms of reduced wastewater volumes needing to be stored, and discharged to either land or the river over time.
- (d) **A more detailed assessment of potentially suitable and appropriately located land discharge sites** sufficient to accommodate the remaining (better managed though I&I) wastewater volume over time,²⁰ along with the likely capital cost range for acquisition and development of the land to the purpose, and (unless covered under (b) above), the extent of current Long Term Plan funding provision for such already in place.
- (e) **Fixed deadlines or timeframes for progressively increasing adoption of land based discharge**, i.e. the specific deadlines which, *assuming* land acquisition can be effected, the applicant can commit to, whereby increasing volumes of the current discharge *will be* directed to land over the duration of the consent (and failing which, what alternative options would be considered and implemented over time, to the same end).²¹
- (f) **The *Three Waters* reform proposals** - submissions or information on the relevance and implications of these reforms as currently in train, including both structurally (as to wastewater asset ownership and funding over the intended life of the consent/assets concerned) and regarding further “Tranche 2” financial support as signalled by the Government, to potentially address the affordability issues raised by the applicant in implementing the Package.
- (g) **Storage to avoid discharges during periods of river mouth closure** – advice as to the ability to accommodate the amount of storage needed (estimated to be up to 20,000 m³ by Mr Smith), having regard to the likely duration of river mouth closure events (based on the records of such events to date).

²⁰ Noting the areas stated in Table 3.1 of the AEE and Figure 7.1 *Irrigation Suitability* of the report *Wairoa Wastewater Treatment and Discharge Best Practicable Option* (LEI, 2018:B4).

²¹ We note that a proposed conferencing topic is to develop a condition requiring the progressive review of options including emerging technologies, other than land discharge, to reduce and minimise the discharge of wastewater to the river over time, such as presented by submitters at the hearing.

- (h) **Mortuary waste** - a more definitive outline and understanding of the options available to address this concern, (rather than deferring this matter for a report within 12 months of the commencement of consent).²²
 - (i) **Mahinga kai** – an independent assessment of both values and effects in relation to the topic, as addressed in evidence by the submitters at the hearing, prepared by a suitably qualified expert in Mātauranga Māori, as it relates to mahinga kai.
 - (j) **Quantitative Microbial Risk Assessment** - an independent assessment to better determine health effects associated with both recreational use and continued customary fishing practices, at the level of water treatment plant performance able to be achieved through the proposed tertiary management steps (UV treatment and sand filter), with reference to the limits in (proposed) condition 14, and the rates of dilution achievable at the existing and proposed (replacement) outfalls.
 - (k) **An assessment of any “equivalent” situations** - for municipal wastewater discharges into river mouth/estuary environments in New Zealand, having regard to both (western science) ecological considerations, and cultural relationships/values, including any recent Environment Court decisions addressing the type of scenario presented here (minor localised adverse ecological impact, but significant or unacceptable cultural effects).
31. The Panel envisages that given the extensive nature and significance of the range of information to be requested, the applicant may need a period of up to six months from the issuing of the final directions, in order to respond.
32. Once the Panel has heard back from the applicant, as directed above (paragraph 29), final directions will be made accordingly.
33. These points all made, the Panel also wishes to observe that it accepts that the Wairoa District Council has proceeded in good faith, and diligently, in order to both evaluate and understand the biophysical and cultural environment setting for the application to renew its existing discharge permit, and to identify and propose options to respond to the outcomes of that assessment.

²² Proposed condition 40 of version 22.

34. The reality though is that this is a community, and a Council, with a very significant problem. In the Panel's respectful view, Central Government support is required to enable both the community and Council to resolve that problem, through implementation of the Package, and otherwise to meet the new directives of the NPSFM 2020.
35. It may be that within the timeframe proposed for the Council to respond regarding the outstanding matters set out above, the Council will be able to approach Government for the support clearly now required, in order to enable the Council to meet the new NPSFM 2020 directives, in the circumstances currently faced, and include information as to the outcomes of that approach in the response filed.

Conferencing on conditions

36. In this part of the minute we record (with reference to the attached table), those issues and conditions over which the Panel considers expert conferencing should take place, in order to respond to and address issues regarding the conditions as they stand (Version 22), as raised in the evidence and reports of Mr Dempsey and Dr Kelly, as well as that presented by submitters.
37. We should clarify that the Panel considers that expert conferencing on these issues would be of assistance in order to enable the Panel to make a decision on the application, leaving aside the more substantive issues and outstanding matters previously addressed, and regardless of the same.
38. To that end, we hereby direct that expert conferencing regarding the issues and conditions, referred to in the table attached to this minute be completed, as between the relevant experts also recorded in that table, with:
- (a) A final proposed version of conditions reflecting the outputs of that expert conferencing, *identifying all proposed further changes to conditions agreed at that conferencing, along with any remaining areas of disagreement*; and
 - (b) To the extent that wording is not agreed, an outline of the reasons for any areas of disagreement over wording (completed by the expert(s) holding the differing view or opinion)

to be filed by the applicant with the Hearings Administrator by 5.00 pm Friday 26 February 2021.

39. We record that the Panel is of the view that any interim right of reply from the applicant (refer paragraph 28(a) above), should be exercised and filed before expert conferencing takes place. This would need to be filed by 5pm Friday 29 January.
40. Further, we wish to emphasise that a priority focus for expert conferencing should be to ensure more effective integration of Mātauranga Māori and cultural monitoring methods (such as the mauri compass) throughout the conditions of consent, including as to the assessment and reporting of results, with recommendations for review of consent conditions in order to respond to the outcomes and trends of that monitoring over time.
41. We invite the parties to consider whether an independent facilitator to oversee the expert conferencing would be of assistance, with any comments or views on that point (including suggestions as to an appropriate facilitator), to be filed with the Hearings Coordinator by 5.00 pm Friday 21 December 2020.²³

Conclusion

42. In conclusion, for the various reasons here stated, the Hearings Panel directs:
- (a) The responses from the applicant as outlined at **paragraph 28** above, to be received by 5.00 pm Monday 21 December 2020;
 - (b) Comments from relevant parties²⁴ on the issue of the appointment of a facilitator to oversee expert conferencing on conditions, by 5.00 pm Monday 21 December 2020;
 - (c) Any (interim) reply submissions from the applicant to be filed by 5pm Friday 29 January 2021;
 - (d) Expert conferencing as detailed at **paragraph 38** above.
 - (e) That the hearing is otherwise adjourned, pending the applicant's response as directed above, for final directions to be made regarding the provision of information on the outstanding issues recorded in this minute.

²³ That is, comment from the parties which have called the experts named in the attached table as witnesses.

²⁴ Being those parties calling the experts named in the table.

Dated: 11 December 2020



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Martin Williams



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Rauru Kirikiri



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Dr Malcolm Green