

BEFORE THE MANAWATU-WANGANUI REGIONAL COUNCIL

UNDER THE Resource Management Act 1991

IN THE MATTER Of the Proposed One Plan: Consolidated Regional Policy Statement;
Regional Plan and Regional Coastal Plan for the Manawatu-Wanganui
Region

LEGAL SUBMISSIONS ON BEHALF OF PALMERSTON NORTH CITY COUNCIL

Water Quality

Philip Milne
12 February 2010

1. INTRODUCTION

- 1.1** These submissions are made on behalf of Palmerston North City Council, a submitter on the Proposed One Plan: Consolidated Regional Policy Statement, Regional Plan and Regional Coastal Plan for the Manawatu-Wanganui Region.
- 1.2** Palmerston North City Council wishes to thank the Horizons officers for the helpful pre-hearing process. The City Council has found the caucusing and pre-hearing meetings beneficial and has appreciated the opportunity to discuss the matters of concern with Horizons' experts.
- 1.3** Evidence relevant to this hearing has been prepared by:
- (a) Mr Andrew Bashford (planning) – 16 October 2009 statement and 11 February 2010 supplementary statement.
 - (b) Mr Chris Pepper (impact of One Plan on PNCC activities) – undated statement.
 - (c) Mr Keith Hamill (water quality) – October 2009 statement and February 2010 supplementary statement.

- (d) Dr Jack McConchie (flow regime and core allocation for Turitea Stream) – 30 September 2009 statement and 18 November 2009 supplementary statement.

1.4 These legal submissions relate to the following issues:

- (a) The intended nature and effect of the water quality "standards" and targets and how they fit within the statutory framework and relate to the relevant rules.
- (b) The relationship between One Plan Schedule Ba and Schedule D and the RMA Schedule 3 standards.
- (c) The relationship between the "standards" and potential review of existing consents.
- (d) Whether the QMCI standard should be as discussed in caucusing or as suggested subsequently in the supplementary evidence of Mrs Kathryn McArthur, or otherwise.

2. STANDARDS VS GUIDELINES OR TARGETS

2.1 Mr Bashford's 16 October 2009 evidence discusses the City Council's concern that it is unclear whether the water quality standards included in the One Plan are intended to be standards in terms of section 69 of the RMA, or targets, or something else. Our opinion about this issue is set out more fully in the letter attached to Mr Bashford's evidence, and will not be reiterated in full here. Mr Bashford has further amplified his concerns in his supplementary statement dated 11 February 2010. I will now discuss the main points that still require resolution.

Intended nature and effect of the water quality "standards"

2.2 As outlined by Mr Bashford, in their current form there is considerable uncertainty as to how the water quality targets are intended to apply to applications for discharge permits and to existing consents. In my submission it is critical that these uncertainties are resolved. Indeed I would go so far as to say that in their current form the relevant provisions are so uncertain as to be invalid or at least unworkable.

2.3 Section 69 of the RMA is of central importance to this issue, and provides as follows:

"(1) Where a regional council—

- (a) provides in a plan that certain waters are to be managed for any purpose described in respect of any of the classes specified in Schedule 3; **and**
- (b) includes rules in the plan about the quality of water in those waters,—

the rules shall require the observance of the standards specified in that schedule in respect of the appropriate class or classes unless, in the council's opinion, those standards are not adequate or appropriate in respect of those waters in which case the rules may state standards that are more stringent or specific.

(2) Where a regional council provides in a plan that certain waters are to be managed for any purpose for which the classes specified in Schedule 3 are not adequate or appropriate, the council may state in the plan new classes and standards about the quality of water in those waters.

(3) Subject to the need to allow for reasonable mixing of a discharged contaminant or water, a regional council shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters at the time of the public notification of the proposed plan unless it is consistent with the purpose of this Act to do so."

2.4 The effect of section 69 is that if the Plan states that waters are to be managed for particular purposes as set out in schedule 3 **and** if the Plan includes rules about the quality of water, then the rules must require the observance of the standards in the third schedule or some higher standards. The net result seems to be that in order to comply with section 69 the Plan would need to either have a rule **prohibiting** all discharges to waters which would trigger a breach of the standards.

2.5 It is clear that this was not the Regional Council's intention since the rules do not work that way. There are no rules stating the prohibitions that would be required if the rules in the Plan were to be interpreted as triggering section 69.

2.6 In my submission the rules in the plan are not rules about the quality of water (instead they classify different types of discharges) and therefore section 69 does not apply. The concern however is that it could be argued that the One Plan does contain rules about water quality. If that argument was successful, it would place Horizons in breach of section 69 because the rules do not require the observance of the standards in the third schedule or some higher standards.

- 2.7** The City Council is concerned, that the wording of the so called standards and the associated policies does not make it clear that these are not intended to trigger section 69. Firstly it is clearly desirable that all users of the Plan have a clear understanding about how the provisions are intended to work. Secondly the current wording leaves it open for someone to argue that the Plan must now be amended to include the requisite prohibitions. Thirdly it may be argued that the standards and section 69 together, operate to mean that future applications must be declined unless the standards are met. We can debate the merits of such arguments but it would be preferable (and in my submission essential) that the uncertainty be resolved through the current process (or if needs be a variation).
- 2.8** We understand that Horizons officers have indicated that the standards imposed in the One Plan are not intended to be section 69 standards, but rather that they are objectives or targets (in the nature of guidelines). See paragraph 69 of Mr Bashford's 16 October 2009 evidence and paragraph 9 of his supplementary evidence. However, this intent is not clearly reflected in the provisions in the Plan and some policies leave the opposite impression.
- 2.9** The permitted activity rules appear to treat both Schedule Ba and Schedule D as containing water quality standards, despite Schedule Ba containing "management objectives" and not using the word "standards". This discrepancy leaves uncertainty about whether the Schedule Ba management objectives are standards or guidelines or perhaps something else.
- 2.10** The summary below indicates the approach taken by various rules in the 11 November 2009 "pink version" of Chapter 13 of the One Plan.
- (a) Permitted activity Rule 13-9 expressly requires compliance with temperature-related "*quality standards for the Water Management Sub-zone listed in Schedule Ba*". However it does not list Schedule Ba as a standard.
 - (b) Permitted activity Rule 13-24 expressly requires compliance with the "*water quality standards for that water body set out in Schedule D*". Again it does not list Schedule Ba as a standard.
 - (c) Controlled activity Rule 13-21 reserves control over matters including "*maintaining the values and water quality standards set out in Schedule Ba*".

(d) Restricted discretionary activity Rule 13-17 reserves discretion over "*measures required to comply with the water quality standards for the relevant Water Management Subzones*" (ie the Schedule D standards).

2.11 There is an implication in Rule 13-21 that conditions will be imposed to ensure that the standards are met. However, the rule does not specify the standards as being controlled activity standards. Rather they are just a matter over which control is reserved. That is consistent with the so called standards being guidelines or targets. With respect, the wording "*maintaining the values and water quality standards set out in Schedule Ba*" is unclear.

2.12 Similarly Rule 13-17 does not provide for the standards to be standards in the rule. Accordingly non compliance with the standards does not take a discharge outside of the rule. However the rule then reserves control over "*measures **required to comply with the water quality standards for the relevant Water Management Subzones***" (ie the Schedule D standards). That does not make sense since there is no requirement to comply with the standards because they are not specified as standards in the rule.

2.13 It is reasonably apparent that except as applied as a condition of permitted discharges under Rules 13-9 and 13-24, the standards are not in fact standards, rather they are water quality targets or guidelines or assessment criteria. In this context and given the wording of section 69, the use of the term "water quality standards" in the Plan is inaccurate and confusing and may lead to unintended consequences.

2.14 The inclusion of the standards as matters of control and discretion is consistent with the standards being assessment criteria or guidelines (non-compliance with the standards does not change the activity classification but the consent authority will assess the degree of compliance when assessing the application and setting consent conditions). Likewise, the fact that the discretionary activity rules are silent about the standards suggests that at most they will be applied as assessment criteria or guidelines when considering an application. However, the rules and policies do not make that clear.

2.15 To avoid this uncertainty, I submit that:

(a) the policies (in particular policies 6-3 to 6-5 and 13-6) should be amended so that each reference to Schedule Ba and Schedule D *standards* refers instead

to "*water quality targets*" (see also the comments later in these submissions about redrafting these policies);

- (b) the introductory wording in Schedule Ba and Schedule D should be amended to clearly label the schedules' contents as being *targets*;
- (c) an advice note should be added to Schedule Ba and Schedule D stating that the targets are intended to guide the exercise of the consent authority's discretion when considering consent applications, and that where relevant the targets have been incorporated as conditions of permitted activity rules;
- (d) the permitted activity rules that refer to Schedule Ba and Schedule D (currently Rules 13-9 and 13-24) should be amended to refer to the relevant *targets* in those schedules; and
- (e) the controlled and restricted discretionary activity rules that refer to Schedule Ba and Schedule D (currently Rules 13-17 and 13-21) should be amended so that control or discretion is reserved over "*measures to assist in maintaining or achieving the targets*" in the relevant schedule.

2.16 There also need to be clear policies as to how the standards will be applied. With respect, the wording of the relevant policies is deficient in this regard. The policies (and rules) do not make it clear how the "standards" are to be applied when considering new discharges or re-consenting existing discharges, nor whether they apply during the term of existing consents.

2.17 Policy 6-4, about enhancement where water quality standards are not met, is particularly confusing. It applies where water quality standards are not met yet talks about "*maintaining*" and enhancing water quality to meet the standards.

- How can you *maintain* water quality and move to meet a standard which is not currently met?
- How will water quality be *enhanced* towards meeting the standards in question?
- Is it intended that any new discharge which causes some further reduction in quality (no matter how small) be declined?

- What if an existing consent is being renewed but to do so will not improve water quality; is that contrary to the policy or not?
- Does the policy mean that all future consents whether for replacement or new consents must not cause a decline in water quality?
- What if water quality is declining in any event because of non point source discharges?

2.18 Policy 13-6, about point source discharges to land and water, is also confusing. The introductory part of paragraph (a) is poorly drafted and in its current form makes no sense, meaning that it is impossible for a user of the plan to understand how it is intended to apply. The reference to "*the degree to which the activity will adversely affect*" the relevant values supports the view that the values are intended to be guidelines, because the consent authority is directed to consider the values rather than enforce them. Paragraph (b) of the policy allows the consent authority to choose to disregard the first part of the policy, which adds more confusion about what the policy means and casts doubt on the effectiveness of the policy.

2.19 A policy is meaningless if one can not tell whether it will be met in relation to any particular application or rule. The rules in their current form do not reflect these policies so it can be assumed that the policies are to be applied directly via the consent process, yet they are not in a form where it is clear what is intended. In their current form the policies will lead to endless debate and litigation.

Relationship of One Plan values and management objectives to RMA classes, purposes and standards

2.20 The One Plan as notified included "water management zones", "values", "management objectives" and "standards" in Schedule D. Some of these items corresponded to Schedule 3 RMA classes, purposes and standards, while others did not.

2.21 In the 23 November 2009 "pink version", the water management zones, values and management objectives are now contained in Schedule Ba, with Schedule D containing the surface water quality standards.

- 2.22** It is unclear how the water management zones, values and management objectives are intended to relate to the Schedule 3 RMA classes, purposes and standards. In particular, the management objectives appear to have broadly the same function as the Schedule 3 RMA standards, but they use different wording without apparent explanation of whether they are intended to be more or less specific or stringent, and why Horizons deems that to be necessary. See page 8 of our 15 September 2009 opinion for a comparison of the objectives and standards for Contact Recreation, Natural State and Water Supply purposes.
- 2.23** In my submission the One Plan needs to be clearer about how the Schedule Ba water management zones, values and management objectives are intended to relate to the Schedule 3 RMA classes, purposes and standards. If the management objectives are intended to be standards as opposed to targets, the One Plan should make this intention clear and should explain why it is deemed necessary and appropriate to have more specific or more stringent standards than the Schedule 3 RMA standards. If the management objectives are instead targets, they should be renamed as such to help avoid confusion.

The relationship of the "standards" to the review provisions

- 2.24** As outlined earlier, the standards are not in fact standards; they are guidelines or targets, and the labelling of them as standards causes difficulties in terms of section 69. As explained by Mr Bashford it also causes difficulty in terms of the relationship of these standards to section 128(1)(b). This difficulty will be resolved if the standards are re-labelled as targets.
- 2.25** In their evidence Mr Bashford and Mr Pepper describe the City Council's wastewater treatment plants and the difficulty the Council would have if the water quality standards applied to those discharges immediately.
- 2.26** Through discussions with Horizons officers, it had been agreed that it would be appropriate to make it clear in the Plan that existing territorial authority wastewater treatment plant discharges are exempt from the standards until those discharges require re-consenting. Subsequent discussions have focused on the most appropriate way to record that exemption in the Plan.

2.27 The most recent wording of the exemption is as follows (to be added to the penultimate paragraph of Policy 11A-6):

"For the purpose of section 128(1)(b) of the Resource Management Act 1991 in relation to discharges of contaminants to water from territorial authority wastewater treatment plants which are the subject of consents in force at 3 May 2007, the standards in Schedule XX shall only apply to those discharges upon the expiry of the consents or from 2030, whichever occurs earliest."

2.28 Upon reflection this approach is not the preferred option. That is because it does not resolve the other difficulties which arise from the use of the term "standards" in relation to what are in fact targets. Indeed this approach would add to the confusion by treating the targets as standards when that is clearly not what they are.

2.29 In my submission the appropriate way to resolve this issue is to change the references from "standards" to "targets".

3. QMCI STANDARD

3.1 Since notification of the Plan there have been several versions of this standard under discussion. Those versions include (underlining indicates main change at each stage):

- (a) As notified: *"The quantitative macroinvertebrate index shall exceed [...], unless natural physical conditions are beyond the scope of application of the QMCI."*
- (b) s42A report: *"No more than a 20% reduction in Quantitative Macroinvertebrate Community Index (QMCI) score between upstream and downstream of discharges to water[^]."*
- (c) Palmerston North City Council's evidence: *"Discharges to water to cause no more than a 20% reduction in Quantitative Macroinvertebrate Community Index (QMCI) score between upstream and downstream of discharges to water[^]."*
- (d) Discussed at caucusing (including Keith Hamill, Paul Kennedy, Kathryn McArthur, John Quinn, Jon Roygard, Robert Wilcock): *"No more than a 20% reduction in Quantitative Macroinvertebrate Community Index (QMCI) between*

appropriately matched habitats upstream and downstream of discharges to water[^]."

3.2 Following her review of Dr Russell Death's evidence for the Wellington Fish & Game Council and the Forest and Bird Society, Mrs McArthur's supplementary evidence now recommends that the standard be amended to read: "*No statistically significant reduction in Quantitative Macroinvertebrate Community Index (QMCI) score between appropriately matched habitats upstream and downstream of discharges to water."*

3.3 The City Council was surprised to read this recommendation given that Mrs McArthur was present at the caucusing where the wording stated above at paragraph 3.1(d) was discussed.

3.4 The City Council seeks that a modified version of the caucusing wording be adopted, specifically:

"Discharges to water to cause no more than a 20% reduction in Quantitative Macroinvertebrate Community Index (QMCI) score between appropriately matched habitats upstream and downstream of the discharge."

3.5 The key differences between this wording and Mrs McArthur's wording are that the City Council's wording:

- (a) Requires there to be a causative link between the discharge and the reduction in QMCI before enforcement action could be taken; and
- (b) Allows up to a 20% reduction in QMCI downstream of a discharge, instead of "no statistically significant reduction".

Should the standard refer to the cause of any reduction in QMCI score?

3.6 Mrs McArthur's supplementary evidence opposes the standard referring to causation on the basis that (page 9) "*If "cause" were added it may create opportunity for arguments about causality that would be difficult to resolve in some circumstances.*" The City Council accepts that it is not always easy to determine the cause of a particular environmental effect, but it is essential to establish the cause of an environmental effect before deciding what response is appropriate. If it cannot be proved that a particular

person caused a reduction in QMCI, that person should not be held responsible for the reduction.

- 3.7** Mr Hamill's evidence is that there is a certain amount of natural variability in QMCI scores within a water body. He notes that in paired control samples he has taken, the QMCI scores have varied up to 27% (median 17%) between the samples. A standard that applied regardless of the cause of any change would mean that a discharger could be held responsible for natural variation within a water body.

Should the standard allow a reduction in QMCI score?

- 3.8** A related question is whether the standard should allow "no statistically significant reduction" in QMCI score (as suggested by Mrs McArthur) or a 20% reduction (as sought by the City Council and as discussed in caucusing), or something else.

- 3.9** Mr Hamill's evidence is that a standard that requires no change is not realistic because of the natural variability in QMCI scores as noted above. In light of his evidence that almost any difference can be statistically significant if enough samples are taken, a standard that allowed no statistically significant reduction in scores could penalise a discharger for this natural variation even if the discharge was having no effect at all.

- 3.10** The City Council seeks a standard that is certain and meaningful. A standard based on a percentage reduction in QMCI score may not be perfect but it will provide plan users with more certainty about what is required of them.

- 3.11** In terms of what is meaningful, given the range of natural variation noted above, it is difficult to see how a change in QMCI score at the lower end of the range of natural variation (eg 10%) could be said to be meaningful. That is, a change of that order could occur regardless of any discharge so it is difficult to see what the standard would achieve. I submit allowing a 20% reduction in QMCI score will lead to a more reasonable outcome than allowing no statistically significant change.

4. CONCLUSION

- 4.1** Palmerston North City Council's submission about the One Plan's so called water quality standards has focused on their impact on its own operations, in particular the City's waste water treatment plants and associated discharges. In the course of considering that impact it has become apparent that there are fundamental drafting

issues in the way the standards are presented and implemented in the Plan. Those drafting issues will have a much wider impact than just on waste water discharges.

- 4.2** The City Council is happy to work further with Horizons to try and rectify the deficiencies in the current approach. Whether that can be done within the scope of existing submissions or will require a variation is not entirely clear. In my submission however, the current and proposed amended wording of these provisions will not stand up to the appeal process or if not fixed will cause huge confusion at consent hearings and inevitable litigation. The way these so called standards are intended to work must be clear and this should preferably be addressed through decisions on submissions. Any changes must of course be within the scope of submissions, and if the Panel is not satisfied that there is sufficient scope, a variation will be needed.
- 4.3** Where possible the City Council has suggested amendments to wording. However in the case of some of the policies the current wording is so confusing that the policy will need to be completely redrafted. Obviously the City Council and affected submitters will need to be provided with an opportunity to comment on any redrafts.

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