IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER OF	applications for resource consents (APP-200511178.01) to Horizons Regional Council associated with the operation of the Eketahuna Wastewater Treatment Plant, including a discharge into the Makakahi River, a discharge to air (principally odour), and a discharge to land via pond seepage, Bridge Street, Eketahuna
BY	**TARARUA DISTRICT COUNCIL** **Applicant**

MEMORANDUM OF COUNSEL ON BEHALF OF THE APPLICANT RESPONDING TO MEMORANDUM 3 DATED 13 APRIL 2017

17 May 2017

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MAY IT PLEASE THE HEARING PANEL:

1. INTRODUCTION

1.1 This memorandum is filed on behalf of Tararua District Council ("**TDC**") as the Applicant ("**Applicant**").

1.2 On 5 April 2017 the hearing in respect of the Applicant's application to discharge treated wastewater from the Eketahuna Wastewater Treatment Plant ("**the WWTP**") commenced before the Hearing Panel ("**the Panel**"). The hearing was adjourned on 7 April 2017. On 13 April 2017, the Panel issued a memorandum to the participants giving directions ("**Memorandum 3**").

1.3 The Panel directed the Applicant to consider and respond to the following matters when the hearing is reconvened on 23 May 2017:[1]

(a) *"*[Does the Applicant] *still wish to proceed with the proposal that was presented at the 5-7 April hearing to provide additional wastewater treatment with a discharge to the Makakahi River?*

(b) *If the applicant does wish to proceed with that proposal, whether they can provide more definitive information on the exact location of the proposed discharge, and whether or not wetland treatment will be provided?*

(c) *Alternatively, whether the Applicant seeks a further adjournment of the hearing for a period of up to six months pursuant to section 41C(3) of the RMA to allow land-based treatment options to be investigated further and to discuss the design of feasible options with submitters and Horizons Regional Council. … ."*

1.4 The Panel's directions to the Applicant appear to follow from its statement in Memorandum 3 that *"The existing discharge contributes to a significant adverse effect on aquatic life."*[2] This memorandum:

(a) responds to that overall concern, in particular by emphasising that that premise is not supported by the evidence;

(b) in light of that background, then responds to each of the Panel's directions; and

(c) addresses several other matters (discussed in more detail below).

1.5 Further detail will be provided in the Applicant's submissions at the reconvened hearing.

2. ADVERSE EFFECTS OF EXISTING DISCHARGE

2.1 At paragraph 4 of Memorandum 3 the Panel stated that

[1] Paragraph 8 of Memorandum 3.
[2] Paragraph 4 of Memorandum 3.

"The existing discharge contributes to significant adverse effects on aquatic life".[3]

The Panel did not provide its reasons for making that statement. The Applicant does not accept this statement is accurate, particularly as this statement was used by the Panel to make inferences as to the potential non-compliance with section 107 of the RMA.

2.2 In terms of section 107 of the RMA:

(a) with regard to nitrogen, the discharge is a minority contributor to the nitrogen inputs between the two monitoring sites, meaning that any additional treatment upgrades aimed at nitrogen removal would only achieve a minor reduction in in-river concentrations;

(b) there is no probative evidence that section 107(1)(g) is breached, based on the evidence of Dr Ausseil;

(c) even if section 107(1)(g) was breached, exceptional circumstances apply (under section 107(2)(a)) due to:

(i) the uncertainty of effects posed by the respective locations of the plant and the Ngatahaka Creek tributary, leading to a novel set of circumstances whereby the Applicant is essentially being asked to answer for the effects of all land use in the Ngatahaka Creek, in addition to those of its own discharge;

(ii) the short term of seven years now sought which will be used to develop a robust, sustainable, wastewater management regime; and

(iii) the fact that the infrastructure is of regional importance under Chapter 3 of the One Plan and the use and discharge from the Eketahuna WWTP is required to provide for the health and safety, and economic and social wellbeing, of Eketahuna;

(d) a seven year consent term is of a temporary nature (in accordance with section 107(2)(b)), in that it is the shortest time practically available (as recommended in the evidence of Dr Ausseil) to:

(i) collect further information (1 year);

(ii) design, build and optimise the proposed treatment plant (3 years); and

(iii) monitor (3 years), in order to provide robust information as to the effects of the discharge on the Makakahi River and to respond to any breaches of section 107;

(e) any ongoing adverse effects after the upgrades are complete will be substantially less than they currently are, and residual in nature. As found by the Environment Court in the Feilding WWTP decision, the uncertainty in

[3] Paragraph 4 of Memorandum 3.

relation to the degree in residual effects following a plant upgrade or change in discharge regime is always present and will only be able to be lifted by future monitoring.[4]

(f) the proposed timeline and the consent conditions proposed in the supplementary evidence of Ms Manderson is appropriate; and

(g) any inference in Ms Morton's evidence that a consideration of exceptional circumstances is limited to a term of three years is legally incorrect.

3. RESPONSE TO THE PANEL'S DIRECTIONS

3.1 Having addressed the Panel's concern as to the existing discharge, and recording the improvement that the WWTP as proposed will achieve, the Applicant's responses to each of the Panel's directions are set out in turn below. Those responses follow from the Applicant's position that the proposal is appropriate, and will not have unacceptable adverse effects.

Does the Applicant wish to proceed with its proposal?

3.2 The Applicant wishes to proceed with the proposal that was presented to the Panel, which is to provide additional wastewater treatment with a discharge to the Makakahi River.

3.3 The Applicant presented two discharge options to the Panel. These were:

(a) Option 1: An overland wetland passage immediately to the North East of the WWTP.

(b) Option 2: A larger constructed wetland on a lower river terrace on land owned by the Eketahuna Golf Club.

3.4 The Applicant confirms its intention to proceed with Option 2, as discussed in more detail below.

Term

3.5 Memorandum 3 makes a number of comments in relation to the term of consent.

3.6 The Applicant maintains the granting of a seven year term (significantly less than the initially sought 20 years) for the consents (1 + 3 + 3) is required. As recognised by the Panel in paragraph 2 of Memorandum 3, that is the minimum term that will allow any meaningful information to be gathered and included in future consent applications. The Panel has indicated it has "*strong reservations*" about granting consent "*for anything but a short term*". The Applicant submits that the Panel must be mindful of:

(a) the scale and significance of the effects of the proposal;

[4] *Manawatu District Council v Manawatu District Council* [2016] NZEnvC 53, at [116]-[119].

(b) the absolute need, in public health terms, for an operational reticulated wastewater system (including a discharge), and regional importance of the WWTP under the One Plan;

(c) the Applicant's social and economic obligations under the Local Government Act 2002;

(d) the absence of evidence from submitters that the project is not the best practicable option for providing that system;

(e) the long-term affordability and resilience of land based treatment compared to the project as proposed by the Applicant (noting that this is a small plant servicing 441 people);

(f) the fact that a shorter term for the consents would result in a repeat of the current predicament, in that the next application would be developed based on less information than is ideal; and

(g) the need to promote sustainable management.

3.7 As set out in the evidence of Mr King, the Applicant has, as a signatory to the Manawatu River Leaders Accord, proactively upgraded wastewater treatment plants across the district, and continues to face significant challenges in relation to its infrastructure demands, including following the 2014 earthquake and in light of its small, static, population.

3.8 We understand the Panel bases its reservations about granting "*anything but a short term"* consent on:

(a) uncertainties as to the potential effects of any pond leakage, and of the ability of the WWTP to meet *"the receiving environment standards of the One Plan after reasonable mixing"*. Section 107(1)(g) provides that *"Except as provided in subsection (2), a consent authority shall not grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A allowing…any significant adverse effects on aquatic life"*;

(b) the premise that the existing discharge contributes to the significant adverse effects on aquatic life such that it does not meet the requirements of s107(1)(g); and

(c) the "*direct*" conflict of the proposal with several policies in Chapter 2 of the One Plan, and with Policy 5.11.

3.9 These matters are addressed in this memorandum. In considering term, the Applicant submits that the Panel must recognise and provide for the ongoing operation, maintenance and upgrading of the Eketahuna WWTP in accordance with Policy 3-3 of the One Plan.

3.10 If consent is granted for a shorter term than is sought by the Applicant, one of the results will be that the next consent application will have to be developed without robust information, thereby repeating the issue that faces the current application.

3.11 That would in turn impose significant costs on the Applicant and the community for no benefit, and would likely lead to a rerun of the adversarial nature of the current hearing. In seeking a seven year term, the Applicant is seeking sufficient time to acquire robust information as to the effects of the WWTP, to undertake meaningful consultation with its community and to develop a long-term sustainable option. This is consistent with the Panel's comment at the end of paragraph 8(c) in Memorandum 3.

Uncertainty

3.12 In relation to pond leakage, the evidence (of Mr Baker) is that:

(a) any leakage is likely to discharge into the River; and

(b) given the location of the ponds on a river terrace adjacent to the River, that is an appropriate outcome (especially for such a small plant).

3.13 In respect of discharges to land, those discharges will ultimately also be received (in attenuated form) by the River. Therefore, the ultimate receiving environment for the application is the River.

3.14 In relation to the Panel's reference in paragraph 4 *to "receiving environment standards"* in the One Plan, it is important to remember that they are 'targets', not 'standards'. Their correct application is discussed in detail in the evidence and supplementary evidence of Dr Ausseil.

3.15 The Applicant's approach and proposed seven year term has been addressed above and is entirely consistent with the Panel's comment (related to a shorter term) at paragraph 5 that a short-term consent *"can only be justified if it is for the purpose of installing a new treatment and/or wastewater management system that is more consistent with One Plan objectives and policies than the current proposal."* This is exactly what the Applicant wants to do. Section 107(2)(b) allows a consent authority to grant a discharge permit to do anything that would otherwise contravene sections 15 or 15A that may allow any of the effects described in subsection (1) (including significant adverse effects on aquatic life), if it is satisfied the discharge is of a temporary nature. The Applicant simply seeks the time to do things properly - that time is seven years.

3.16 As set out in the supplementary evidence of Ms Manderson, the Applicant has agreed that a term shorter than that originally applied for is appropriate. A timeframe of seven years enables procurement of design and build, an appropriate commissioning period and then an appropriate monitoring period. To ensure timeframes are met this approach has been conditioned, and these conditions include reporting requirements to provide testing results and a forum

for Horizons and the community to stay informed and involved in what is happening, what is planned to happen and what has occurred.

Chapter 2 and Policy 5-11 of the One Plan

3.17 The Panel found at paragraph 5 of Memorandum 3, again without giving reasons, that the *"proposal is in direct conflict with several policies in Chapter 2, and with Policy 5-11"* of the One Plan. The Panel then considered this drove a shorter term.

3.18 Without limiting future arguments (including closing submissions), the Applicant's position is that the Panel's finding:

(a) is contrary to the evidence of Ms Manderson;

(b) applied to term is contrary to the submission on behalf of Rangitāne that a 10 year consent be granted (although Mr Percy's evidence recommends five years) and the submission on behalf of Ngāti Kahungunu (Mr Carlyon's evidence at paragraph 20 seems to infer seven years);

(c) has not been undertaken against, and is inconsistent with, the objectives and policies of the One Plan as a whole; and

(d) fails to reflect the choice of Option 2 and the time necessary to develop that option (see Section 3 below).

3.19 The Applicant's position is also that, for the reasons discussed below, land-based irrigation systems may not be achievable (in terms of design and/or cost) and may cause greater environmental effects than discharges to surface water (or high rate land passage discharges).

Location of proposed discharge and consideration of wetland treatment

3.20 As set out above, the Applicant's proposed approach is Option 2 (a wetland constructed on land owned by the Eketahuna Golf Club).

3.21 The Applicant has had productive discussions with the Golf Club such that it can now prefer Option 2, confident that it will be able to acquire this land.

3.22 Option 2 will meet the criteria of Policy 5-11 insofar as it will allow discharge to flow overland before entering water.

3.23 Further, this option will provide for adequate monitoring of the effects of the discharge, in a way that is consistent with other discharges in the region.

Adjournment to allow further investigation of land-based treatment options

3.24 The Applicant does not wish to have the hearing adjourned to allow land-based treatment options to be further investigated.

3.25 No land-based treatment options have been put before the Panel for consideration, as pointed out at paragraph 7 of Memorandum 3. There is no evidence before the Panel as to the feasibility, costs or risks of land application.

3.26 The Panel is limited to a consideration of the application before it, to the exclusion of any alternative proposals. In order for any alternative options to be progressed, re-notification of an entirely different project and consultation with iwi and the community would be required.

3.27 In any event, the Applicant does not consider a six month adjournment would enable *a "genuine consideration of alternatives"* to be developed (as sought in paragraph 8(c) of Memorandum 3). Consideration of land-based treatment systems for other community wastewater discharges in the Manawatu catchment have taken many years (Feilding, Palmerston North, Shannon and Foxton for example).

3.28 As recognised in paragraph 7 of Memorandum 3, the Applicant has considered land-based options and has come to the view that pursuing such options would require significant financial resources and time.

3.29 Further, land-based options would:

(a) take years to design, consent and construct;

(b) with associated pipeline and pumping costs, be very expensive to install (and likely well beyond the resources of such a small community and for such a small plant);

(c) require a very large amount of land (given the high local rainfall, shallow groundwater depths, and poor local soil types for land based irrigation) and may well result in greater environmental effects than the proposed discharge; and

(d) have significant topographical and geographical constraints.

3.30 Land-based treatment options do not provide a 'magic bullet'. Assuming, given the rainfall and soil types, that land-based irrigation could occur in a manner that sustainably manages the soils, detailed groundwater investigations are required to determine the groundwater environment, and what the groundwater effects would be.

3.31 The Applicant is not clear as to what the Panel considers the "*conflicting outcomes about the extent to which a land based treatment system is essential to meet the One Plan requirements*" between the Environment Court's Shannon and Feilding decisions are. To the degree the Panel "*takes into account*" the respective Environment Court decisions, it must ensure it does so accurately. In this regard, the Court was consistent with its approach to the One Plan requirements in both cases (remembering each case turns on its own factual background).

4. OTHER MATTERS

Making findings in a Memorandum

4.1 A number of the comments made by the Panel in the memorandum (including in particular in respect of the effects of the existing discharge, and as to term) appear to be framed as findings.

4.2 It is highly unusual for a hearing panel to make findings in a memorandum, before the hearing is closed. Such an approach, especially where reasons are not provided,[5] tends to demonstrate predetermination, and is on its face a breach of natural justice. Given these proceedings are still ongoing, the Applicant submits that it is imperative that the Panel keeps an open mind as to the matters before it until the hearing is closed, then deliberates and makes a robust and reasoned decision based on all available information.

Provision of supplementary evidence once all parties have presented their evidence

4.3 On behalf of Kahungunu ki Tamaki nui-a-rua Trust, Ms McArthur and Mr Carlyon filed, respectively, on 7 and 12 April 2017, supplementary evidence. As the Panel notes at paragraph 1 of Memorandum 3, the hearing was adjourned on Friday 7 April following all parties being heard.

4.4 Ms McArthur's supplementary evidence in particular is significantly more substantial, and covers many more issues, than her original evidence.

4.5 The Applicant seeks a specific assurance from the Panel that it will not accept or consider such late evidence. If the Panel is minded to accept the evidence and consider it then the Applicant's position is:

(a) that the evidence is provided so late in the process as to create significant prejudice to the Applicant and to the fair conduct of the hearing;

(b) that the Applicant must be provided with appropriate time to fully respond to the late evidence; and

(c) that the hearing should be reconvened to consider the late evidence (at no administrative cost to the Applicant).

Work to clarify effluent quality

4.6 In response to paragraph 11 of Memorandum 3, the Applicant has proceeded with characterising the quantity and quality of inflows and outflows from the Eketahuna WWTP. Sampling commenced on 18 April 2017, with two to three samples per week having been collected to date.

Process going forward

4.7 Paragraph 8 of Memorandum 3 states that the above matters will all be addressed when the hearing is reconvened on 23 May 2017. The Applicant's understanding is that a separate hearing (albeit with similar parties and the same Panel) for the Pahiatua wastewater treatment plant discharges commences that day.

[5] Noting that section 113 of the RMA requires decision makers to provide reasons.

4.8 In order to enable the parties to focus on the Pahiatua hearing, and to avoid confusion as to which hearing is being undertaken, the Applicant requests that the Panel reconvenes the Eketahuna WWTP hearing at the conclusion of the Pahiatua hearing. That approach would also provide the Panel with the benefit of having heard the Pahiatua evidence – as had always been anticipated (as many of the Eketahuna WWTP upgrades are related to the outcome of the Pahiatua process). No party will be prejudiced by this as the parties, apart from the Golf Club, are the same.

4.9 At paragraph 10 of Memorandum 3 the Panel stated that it would like to hear from other parties as to the above matters and "*as to how they think the process of further information and caucusing can best occur to progress the decision making for this application*." Any further information/caucusing now should relate to Option 2. However, The Applicant's initial view is that any caucusing in particular is unnecessary. The Applicant emphasises that caucusing should not be used as an opportunity to re-litigate matters already heard.

DATED this **17th** day of **May** 2017

David Allen / Esther Bennett

Counsel for Tararua District Council