

**BEFORE THE HEARING COMMISSIONER**

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**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of an application by Horowhenua District Council to Manawatū-Whanganui Regional Council to discharge stormwater, construct attenuation structures, and undertake earthworks, in an unnamed tributary to the Koputaroa Stream.

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**MEMORANDUM OF COUNSEL ON BEHALF OF MANAWATU-WHANGANUI  
REGIONAL COUNCIL**

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Dated: 20 August 2021



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## MAY IT PLEASE THE HEARINGS COMMISSIONER

- [1] This Memorandum is filed on behalf of reporting officers for Manawatū-Whanganui Regional Council (“**MWRC**”) in relation to matters arising out of Minute 5 of the Independent Hearing Panel dated 1 May 2021.
- [2] The application by Horowhenua District Council (“**HDC**”) at issue involves resource consents for proposed stormwater discharges and associated activities from development within the North East Levin residential area (the “**original application**”).
- [3] In accordance with Minute 5,<sup>1</sup> the parties were to raise any scope issues arising from changes to the original application with the Panel by 21 July 2021.<sup>2</sup> This Memorandum sets out MWRC’s position concerning scope.
- [4] The proposed changes are set out in the table in Attachment A (prepared by Ms Westcott, as reporting planner for MWRC), as well as described in the Memorandum of counsel for HDC filed by Mr Mulholland on 30 April 2021.<sup>3</sup>
- [5] It is well settled that amendments to a proposed activity may be made provided they are within scope of the original application. An amendment is likely to be within scope if it is fairly and reasonably within the ambit and scope of the original consent application and does not result in what is, in substance, a different application;<sup>4</sup> it does not result in a significant difference to the scale, intensity and character of a proposed activity; or the effects of the proposed activity; and it does not prejudice any person.<sup>5</sup>
- [6] Council officers have considered the changes to the original application, alongside additional information provided by HDC, including (but not limited to):

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<sup>1</sup> Minute 5, dated 17 May 2021, at para [4](b).

<sup>2</sup> The reporting date was amended from 16 July 2021 to 21 July 2021 to 18 August.

<sup>3</sup> Memorandum of Counsel for Horowhenua District Council, 30 April 2021, at para 13.

<sup>4</sup> *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112 at [29].

<sup>5</sup> *Director General of Conservation v Taranaki Regional Council* [2021] NZEnvC 27 at [22]; See also, inter alia: *Darroch v Whangarei District Council*, Decision 18/93; *Di Andre Estates Ltd v Rodney District Council* W178/96; *Ayburn Farm Estates Ltd v QLDC* [2011] NZEnvC 98.

- (a) A letter dated 2 July 2021 in response to the information requested by MWRC by email dated 5 May 2021 with appendices.
  - (b) A letter dated from Wildlands Consultants Limited dated 9 August 2021 regarding effects on Powelliphanta Snails;
  - (c) Emails from Ms Sweeney to Ms Westcott dated 18 August 2021 regarding earthworks and updated Erosion and Sediment Control plans (“ESCP”).
  - (d) An email from Waka Kotahi to Brent Maguire of HDC dated 18 August 2021 regarding the no more than minor effects of the proposed works on the culvert on SH57 near Heatherlea East Road.
- [7] The above information was provided to Council’s technical experts, specifically, Dr Elizabeth Daley (ecology), Dr John (Jack) McConchie (hydrology), and Mr Graeme Ridley (earthworks). The position recorded below reflects advice from those experts as to the changes proposed to the original application.
- [8] Applying the legal principles summarised in [5] above, Council officers have reached the view that the changes proposed to the stormwater discharge are within the scope of the original application. In particular:
- (a) The changes fall within the location for which discharge consents have been sought (i.e. as described within the application) without any significant increase in floodable area. To the extent that there is a risk of additional land being impacted by the change to the proposal, the impacts (extent, depth and duration of flooding) are considered to be very small, with Dr McConchie being of the opinion for MWRC that any adverse flooding effects would be similar to the original discharge proposal. Further, it is noted that a number of downstream landowners are already submitters on the application.
  - (b) The changes do not alter the substance of the application in any way (i.e. it does not result in a substantially different activity). The changes are an extension of the same activity initially proposed, and

do not involve any new types of activities that could require resource consent, other than those already sought in the original application. Council officers also advise that no additional rules are triggered under the One Plan by virtue of the changes to the application.

(c) The changes do not significantly alter the scale, intensity or character of the discharge activity. In particular:

(i) While there are increases in stormwater flow which means that the Koputaroa tributary will be flowing higher, and for a longer duration in any stormwater event with the potential to cause erosion and scour, all affected landowners are understood to have provided written approval to the changes to stormwater flow and resultant effects. Those landowners have also provided approval to the construction of larger attenuation areas in order to provide hydraulic neutrality, with updated ESCP ensuring that the effects of the earthworks are managed to a similar level of effect as under the original application. The last landowner approval is understood to have been provided to HDC, with the form to be with MWRC shortly.<sup>6</sup>

(ii) Similarly, Waka Kotahi has recently confirmed it has no concerns with regard to its culvert crossing at SH57 which may be susceptible to additional scour as a result of the changes.<sup>7</sup>

(d) There is no prejudice to any person as a result of the *change* to the application, other than the landowners directly impacted by the increases in stormwater flow and earthworks (see [8](c) above), who have provided written approvals to the amended application.

[9] When considering whether there would be other parties that may have submitted if they had known of the changes to the discharge proposed in the

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<sup>6</sup> Email from Ms Sweeney to Ms Westcott dated 18 August 2021.

<sup>7</sup> By email dated 18 August to Brent Maguire at Horowhenua District Council.

original application, Council officers had regard to owners of downstream land which contain habitat of Powelliphanta Snails.<sup>8</sup> Dr McConchie, in relying on the modelling of HDC's experts, was of the opinion that it was not possible to define the extent of the hydrological change (extent, depth and duration) on land containing the Powelliphanta Snails. The flooding is expected to be similar to that predicted under the original application.

[10] The existence of the habitats of Powelliphanta Snails downstream of the stormwater discharge only recently came to the reporting officers' attention. When considering the changes to the original application, Council officers were unable to determine that they would give rise to effects that were different in character, intensity and scale to those notified as part of the original application. On that basis, no prejudice is considered to have arisen to those landowners from the changes to the original application. Any new information regarding the endangered snail habitat will be a matter for the Commissioner's consideration under s 104 of the Act, both as a matter of jurisdiction<sup>9</sup> and also evidence when having regard to effects of the proposal.

[11] It is noted that the above points are confined to the question of 'scope' and do not represent any view or opinion of MWRC's reporting team on the merits of the application, which will be addressed through s 42A reports to be filed by the technical experts as part of the proposed timetable below.

### **Timetabling**

[12] Counsel understand that a hearing date of 10 and 11 November is available, with technical teams of MWRC and HDC having also confirmed availability.

[13] Having conferred with counsel for HDC, the following timetable is proposed through to a hearing commencing 10 November:

- (a) By 1pm on 1 October 2021, Council officers to file s 42A reports in relation to the applications for resource consent.

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<sup>8</sup> Manawatu-Kukutauaki 3, 2E5 Block; Section 1 SO 36317; Lot 2 DP 307723 and Lot 3 DP 20708; Part Manawatu-Kukutauaki 2 1A10 Block.

<sup>9</sup> Section 104(3)(d), Resource Management Act 1991.

- (b) The Applicant is directed to provide their expert evidence (if any is to be lodged) to MWRC five working days later, being no later than 1pm on Friday, 8 October 2021.
- (c) Submitters who intend to call expert evidence in support of their submissions are directed to provide that evidence to MWRC five working days later, being no later than 1pm on Friday, 15 October 2021.
- (d) If submitters intend to provide written evidence themselves, or have non-expert people appear on their behalf, then they are requested to provide a written statement to MWRC five working days later, being no later than 1pm on Friday, 22 October 2021.
- (e) If the Applicant or any submitter propose to have legal counsel present legal submissions, counsel are requested to provide those submissions to MWRC no later than Wednesday, 27 October 2021.

Dated 20 August 2021



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Shannon Johnston

Counsel for Manawatū-Whanganui Regional Council

## ATTACHMENT A