Before the Hearings Panel
At Wellington

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 Wellington Regional Council

Date: 13 May 2019

DLA PIPER

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MAY IT PLEASE THE PANEL:

Introduction

1 In Minute #5 the Hearings Panel asked for a response from the applicant on the issue of whether re-notification of the application is required considering information now available regarding shallow bore holders and the offered condition 17.

2 Mr Milne responded on behalf of the applicant in a memorandum dated 7 May 2019 and stated that the question is whether the proposal remains within scope of the application as notified. In his view it is within scope because:

2.1 The activity of discharge to water has not changed.

2.2 The issue of potential contamination of groundwater and potential health risk has been a live issue and has been raised directly by some submitters, including Mr Emms.

2.3 While the assessment of potential health risks has changed as a result of further investigations that does not change the activity. Changes to the assessment of effects between lodgement and close of hearing are common.

3 The Panel directed a response from Greater Wellington Regional Council (**Regional Council**) by Monday 13 May 2019.

Amendment to the Application

4 The application, as filed on 28 February 2017 stated:[1]

> Pathogen contamination of groundwater can adversely affect human and animal health. As the wastewater will be UV disinfected and most applied pathogens perish

[1] FWWTP - Resource Consent and AEE(28 February 2017) at 6.3.3.3 (page 150).

> within 10mm of the soil surface, the likelihood of pathogens entering the groundwater resource is low. The effect of pathogens on groundwater as a result of the proposed land irrigation is expected to be negligible (LEI, 2017).
>
> [our emphasis]

5 The public notice (dated 8 May 2019) stated:[2]

> **Proposal:**
>
> To discharge contaminants to water, land and air associated with the proposed long term upgrade and operation of the Featherston Wastewater Treatment Plant
>
> **Consent applied for:**
>
> [34616] Discharge permit – to discharge treated effluent to land adjacent to the plant at Site A adjacent to the plant (Stage 1A), and Site B the Hodder Farm (Stage 1B, 2A and 2B)
>
> [34617] Discharge permit - to discharge contaminants to land and water via seepage from the ponds and channel
>
> [34618] Discharge permit - to discharge contaminants to air (odour from the ponds, channel and treatment process and effluent associated with land application)
>
> [34619] Discharge permit – to discharge contaminants from treated effluent into Donalds Creek

6 The subsequent evidence of Mr Exeter for the applicant (dated 2 April 2019) states:[3]

> In terms of the effects of pathogens, the levels of bacteria (measured as E.coli) discharged to land and the resulting effects on land and groundwater and sensitive receptors (see Mr Simpson's and Mr McBride's evidence) are likely to be no more than minor. The exception to the ambit of effects and pathogens being that there may be viruses in the wastewater leached to groundwater and this poses a risk to downgradient groundwater receptors for potable use for humans (Mr Simpson and Mr McBride have dealt with this issue).
> …
>
> Mr Simpson (refer to evidence) has estimated that seventeen bores are at risk from viral infection for the proposed discharge to land (refer to Figure 10 of his evidence). However, the risk from infection to groundwater receptors from viruses (based on norovirus as an indicator) within the treated wastewater migrates to groundwater from the discharge to land, is considered

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[2] http://www.gw.govt.nz/Featherston-WWTP/ accessed 12 May 2019.

[3] Evidence of Sven Exeter (Planning) dated 2 April 2019 at [134] and [149].

> more than minor and the adverse effects on groundwater receptors are more than minor and unacceptable. As discussed above, condition 17 of Schedule 4 has been proffered as an avoidance measure which I consider necessary.
>
> [our emphasis]

7 Condition 17 proposed by the applicant is as follows:

> **Alternative Potable Water Supply**
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> 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:

8 Accordingly, there is a clear change from the application, where pathogen risk is characterised as negligible, to the application evidence, which is identified as 'more than minor and unacceptable'.

Law

9 I agree the question is one of scope and whether what is now proposed is within scope of the original application.

10 The caselaw on this issue is clear:

10.1 The original application, together with any documents incorporated in it by reference, define the scope of the consent authority's jurisdiction.

10.2 Amendments to design and other details of an application may be made until the close of hearing, but only if they are within the scope defined by the original application.

10.3 If the amendments go beyond that scope, a fresh application is required.

10.4 Information provided in response to further information requests cannot enlarge the scope of the application (but it can limit it). [4]

11 In particular, we consider the leading authority is *Atkins v Napier City Council* where Wild J held:[5]

> [20] I consider the test, as developed by the Environment Court and Court of Appeal through a series of cases, is whether the activity for which resource consent is sought, as ultimately proposed to the consent authority, is significantly different in its scope or ambit from that originally applied for and notified (if notification was required) in terms of:
>
> > The scale or intensity of the proposed activity, or
> >
> > The altered character or effects/impacts of the proposal.
>
> [21] Whether there might have been other submitters, had the activity as ultimately proposed to the consent authority been that applied for and notified, is a means of applying or answering the test. But it is not the test itself.

12 In *Mead v Queenstown Lakes District Council*[6] the Court stated:

> Respectfully applying those principles, we consider that useful indications as to whether an application is reasonably and fairly within scope include:
>
> > whether the intensity and scale of any adverse effects would be greater (or lesser) as a result of the change in the proposal: *Darroch v Whangarei District Council; and Coull v Christchurch City Council*;
> >
> > whether it is fairly and reasonably contemplatable or plausible that other informed and reasonable persons not before the court but interested in the area would have still stayed out of the proceeding if they knew of the change to the proposal: *Shell New Zealand Ltd v Porirua City Council; Haslam v Selwyn District Council.*

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[4] *Clevedon Protection Society v Warren Fowler Ltd & Manukau CC* 3 ELRNZ 169, at 186.

[5] [2009] NZRMA 429 (HC) at [20]-[21].

[6] [2010] NZEnvC 207, at 25.

13 The test was informed by the authoritative statement by the Court of Appeal in *Shell New Zealand Ltd v Porirua City Council*, where Anderson P, giving the judgment of the Court refusing special leave, stated:[7]

> We think it plain that jurisdiction to consider an amendment to an application is reasonably constrained by the ambit of an application in the sense that there will be permissible amendments to detail which are reasonably and fairly contemplatable as being within the ambit, but there may be proposed amendments which go beyond such scope. Whether details of an amendment fall within the ambit or outside it will depend on the facts of any particular case, including such environmental impacts as may by rationally perceived by an authority.

14 The Court recently (in 2018) in *Glencoe Land Limited v Queenstown Lakes District Council*[8] referred to the decision of the Environment Court in *Haslam v Selwyn District Council*.[9] In *Haslam,* (which addressed the relocation of a mushroom composting plant to a different location on the same site) the Court stated:[10]

> ... the basis for the test that I should apply in this case is whether the amendment made after the period for lodging submissions had commenced is such that any person who did not lodge a submission would have done so if the application information available for examination had incorporated the amendment.
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> …
>
> ... The application of the test is underlain by the notion of fairness. I therefore ask myself whether it is plausible that any person who did not lodge a submission to either of the subject applications would have done so if the applications had shown the composting site at Site 3 instead of Site 1.

15 The Court also referenced the decision *Coull v Christchurch City Council* where the Court also identified as material the questions:[11]

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[7] *Shell New Zealand Ltd v Porirua City Council* CA57/05, 19 May 2005 at [7].

[8] [2018] NZEnvC 85.

[9] (1993) 2 NZRMA 628.

[10] Above at p 9 and 10.

[11] *Coull v Christchurch City Council* Environment Court, Christchurch, 14/6/2006, C77/06, at [11].

> …
>
> (c) would parties who have not made submissions have done so if they were aware of the change

16 The Court went on to refer to the need to apply an overall fairness and reasonableness test, rather than complete reliance on any other test, as stated by the Court in *Countdown Properties (Northlands) Ltd v Dunedin Council.* [12]

Analysis

17 There is a clear issue as to whether the amended description of pathogen risk represented a change or amendment to the activity.

18 Mr Milne's view is that the activity for which consent is sought has not changed. His argument is that the negative effects arising from the groundwater was always a live issue, and all that has changed is the assessment of health risks, which is common between lodgement and the close of a hearing.

19 Accordingly, Mr Milne must consider that it is acceptable to require submitters to determine that the pathogen risk would exist, rather than being required to identify the envelope of effects for potential submitters to help them determine whether they are affected. It is not clear how lay submitters would have the requisite expertise to determine that such a risk exists or assess the scale and seriousness of such risk. It is also not clear why Mr Milne considers that a submitter has an obligation to look behind a very clear statement (which we now understand to be incorrect) made by the applicant that the risk of pathogens was 'negligible'.

20 It is accepted that the case law on scope focuses on when there has been a change to the proposal (e.g., the location if discharge changes, or the volume or the quality). However, in our submission, it also captures a change in effects from what was identified in the application because

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[12] *Countdown Properties (Northlands) Ltd v Dunedin Council* [1994] NZRMA 145 (FC) at 167.

that is the very reason one of the relevant questions is whether someone new may now submit, had they known of the change in effects.

21 We acknowledge that this is not a change to the location, volume or concentration of discharge. Rather the change is from a statement that there is no pathogen risk, to a statement that there is an unacceptable risk and specific persons are affected by that. Whilst whether other submitters might submit on the amended application is not the test, it is a relevant factor in determining if there has been a change in the application. We consider that it is clear and obvious that there might be other submitters if it were clear to those potential submitters that there was a pathogen risk arising from the operation of the WWTP.

22 It is also clear that the effects are different and more significant than those identified in the application. Previously the application stated that pathogens provided a negligible risk, as they would perish within 10mm of the soil surface. However, the applicants evidence now identifies risk that pathogens could move beyond the property boundary and enter surface waters and the wider groundwater system, particularly for the outbreak of a more persistence virus,[13] with 17 bores identified by the applicant as being potentially at risk.[14]

23 Further, applying the reasonable and fairness test set out in *Countdown Properties (Northlands) Ltd v Dunedin Council*[15] we consider that it would be a fair outcome that members of the community correctly understood the risks of a proposal, and were provided with an opportunity to comment on those risks.

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[13] Evidence of Chris Simpson at [38] - [44]

[14] Above at [42]

[15] *Countdown Properties (Northlands) Ltd v Dunedin Council* [1994] NZRMA 145 (FC) at 167.

24 Accordingly, we consider that the risk from pathogens is an issue which is outside the scope of the application.

Date: 13 May 2019

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Kerry Anderson/Kate Rogers
Counsel for Greater Wellington Regional Council