

**To** Melaina Voss and Paula Hunter, Palmerston North City Council **10 August 2021**

**From** Matt Conway and Oska Rego

**Subject** Three Waters and the Palmerston North Wastewater BPO Project

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## Executive Summary

1. Palmerston North City Council (**Council**) was due to select the best practicable option (**BPO**) for its wastewater treatment and discharge in June 2021, with a consent application to follow in June 2022. This process has been delayed, and a BPO decision (**Decision**) is currently scheduled to be made on 1 September 2021.
2. The Council is due to lodge a complete consent application for all resource consents needed for the BPO (**Application**) with the Manawatu-Wanganui Regional Council (**Horizons**) by 1 June 2022.
3. On 30 June 2021, the Government announced that Cabinet had agreed to details of the Local Government Three Waters Reform Programme (**Three Waters**). There has been some suggestion that the Council should delay its Decision and/or Application, so that a new Three Waters entity can decide, or influence how, Palmerston North's wastewater should be treated and managed into the future.
4. There may be advantages to the Council in waiting to see what Three Waters reform looks like before making a Decision and/or lodging an Application. Three Waters reform could well lead to a new entity taking over the cost and responsibility for Palmerston North's wastewater, which may be advantageous to the Council as well as leading to Palmerston North's wastewater being dealt with on a more regional or multi-regional level.
5. However, in our view any potential advantages to delay are speculative, as there is no certainty on when Three Waters reform will be passed and what form it will take. The possible advantages of delay are, in our view, firmly outweighed by risks outlined below.
6. This memorandum addresses the implications of delaying the Decision or Application on the basis of the Three Waters proposals, including in terms of:
  - (a) the ability to obtain a change in the conditions of the Council's existing wastewater discharge consent (**Consent**) to enable a delayed Decision, and the costs and challenges in doing so;
  - (b) the risk of enforcement action should the existing consent not be complied with;
  - (c) the impact on work already undertaken in order to determine the BPO.
7. Our overall view is that the Council should proceed based on the existing law and its obligations under its wastewater discharge consent. The Three Waters proposals are only proposals and do not override the Council's current obligations.

8. There is no certainty about if or when the proposals will become law and the length of time it would take for a new water entity to take over the relevant functions from the Council.
9. Any delay would require an application to Horizons to change the timeframe in the conditions of the existing Consent. There is no guarantee that such an application would be successful and the Council would be open to enforcement action in the meantime.

### **Three Waters**

10. Some key aspects of Three Waters that have been announced are:<sup>1</sup>
  - (a) four new independent regional water services entities (with indicative boundaries), to be owned by local authorities;
  - (b) some local authority and iwi/Māori influence over the objectives and priorities of these entities;
  - (c) a funding package to ensure no local authority is "*worse off*" from the reform; and
  - (d) future funding to ensure the reform leaves all communities "*better off*".
11. The Government has announced that local authorities have until the end of September 2021 to:<sup>2</sup>
  - (a) consider the impact of the reforms (including the financial support package) on them and their communities;
  - (b) seek clarification; and
  - (c) provide feedback.
12. The Government will then consider next steps, including the process and revised timing for any consultation and decision-making.

### **Obligation to Comply with the Law as it Stands**

13. Local authorities are obliged to comply with relevant legislation while it is in force. The Government is also subject to the laws passed by Parliament, and cannot lawfully compel local authorities to comply with legislation that is not yet in force, or to act in breach of legislation that is still in force.<sup>3</sup>

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<sup>1</sup> See information provided by the Department of Internal Affairs at <https://www.dia.govt.nz/Three-Waters-Reform-Programme>.

<sup>2</sup> Ibid.

<sup>3</sup> *Fitzgerald v Muldoon* [1976] 2 NZLR 615, at 622.

14. In relation to Three Waters, this means that the Council is required to comply with the Resource Management Act 1991 (**RMA**), and all current resource consents held by the Council under the RMA, and cannot avoid compliance in reliance on the Government's proposed reforms.
15. Likewise, Horizons is required, under section 84 of the RMA, to enforce observance of its One Plan, and should not suspend enforcement of the One Plan or consents issued under it on the basis of proposed reforms.

### **Obtaining a Change in Consent Conditions**

16. Condition 23C of the Consent, which was introduced to reflect an agreement reached with Horizons during a 2015 review of the Consent, sets out BPO milestones that the Council must meet:

The final decision on the Best Practical Option for the future wastewater scheme shall be made by the Permit Holder by no later than by June 2021

...

A complete consent application for all necessary resource consents for the future wastewater scheme shall be lodged with the Manawatu-Wanganui Regional Council by no later than 1 June 2022

17. The Council has not met the first of these requirements, but is working towards making a Decision on 1 September 2021. If the Council were to decide to stop working towards complying with this requirement by selecting a BPO, or to make a Decision but not make an Application by June 2022, we would advise that a change in Consent conditions is needed to avoid the risk of enforcement action.

18. Section 127 of the RMA provides that:

(1) The holder of a resource consent may apply to a consent authority for a change or cancellation of a condition of the consent...

(3) Sections 88 to 121 apply, with all necessary modifications, as if—

- (a) the application were an application for a resource consent for a discretionary activity; and
- (b) the references to a resource consent and to the activity were references only to the change or cancellation of a condition and the effects of the change or cancellation respectively.

...

(4) For the purposes of determining who is adversely affected by the change or cancellation, the consent authority must consider, in particular, every person who—

- (a) made a submission on the original application; and
- (b) may be affected by the change or cancellation.

19. To obtain a change of conditions from Horizons would, therefore, involve the equivalent of a resource consent application for a discretionary activity, as was done in 2015.
20. It is important to note that, when considering whether to limited or publicly notify such an application, and whether or not to grant the application, Horizons would be required consider matters such as:<sup>4</sup>
  - (a) whether there are any affected protected customary rights or marine title groups;
  - (b) whether the wastewater discharge is adjacent to, or may affect, any statutory acknowledgements;
  - (c) the actual or likely environment effects of the wastewater discharge; and
  - (d) any relevant provisions of planning instruments, including the Resource Management (National Environmental Standards for Freshwater) Regulations 2020, the National Policy Statement for Freshwater Management 2020 (**NPS-FM 20**), and the One Plan.
21. Horizons is primarily an environmental regulator. Accordingly, its primary concern when considering an application for a change in conditions will be environmental effects.
22. Furthermore, we consider that relevant planning instruments, and in particular the NPS-FM 20 (which was not in force at the time of the last change in conditions) and the One Plan would weigh against allowing the Council additional time.
23. Horizons would not be required to consider the possible effect of the Government's Three Waters proposals. If Horizons did factor in such a proposal when making a decision on consent conditions, we expect that this would make the decision vulnerable to legal challenge on the basis of it being an irrelevant, unlawful, and/or unreasonable consideration.
24. We also expect that such an application would garner significant opposition from iwi, as well as other interested parties. The current BPO process has involved a significant amount of consultation, including with Rangitāne o Manawatū and hapū that are representative of Ngāti Raukawa.
25. We note that getting a final decision such an application could take months, or even over a year, and would involve the preparation of evidence and legal arguments and could well be appealed. In addition to the time and expense, there is no guarantee about the final outcome.

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<sup>4</sup> Resource Management Act 1991 [**RMA**], sections 95A to 95G and 104.

## Risk of Enforcement Action

26. As mentioned above, Horizons is an environmental regulator and is required to enforce the One Plan, and consents issued under it. The longer the Council goes without complying with its consent condition which requires it to select the BPO and then lodge an Application, the greater the risk of Horizons taking enforcement action.
27. Enforcement action could also be taken by iwi groups or others who are opposed to further delays, or such groups could encourage Horizons to take enforcement action.
28. In *New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council*, the High Court held that, while there is a discretion not to prosecute in individual cases, a general policy decision not to enforce a particular law would be unlawful.<sup>5</sup>
29. The High Court in *Royal Forest & Bird Protection Society of NZ v Canterbury Regional Council* held that this principle should not apply with any less rigour to the enforcement of rules in a plan, because:<sup>6</sup>

those rules are made with considerable public input and with the knowledge that application of those rules will have significant consequences for how people undertake the regulated activities.
30. The same can be said for enforcement of rules that give effect to national policy statements, which are made with the input of public submissions,<sup>7</sup> to direct regulation to achieve objectives and policies that are considered to be of national significance.<sup>8</sup>

## Work Already Undertaken

31. In addition to the considerable time, effort and cost that would be involved in seeking a change in conditions, or defending against enforcement action, we note that the Council has already undertaken a very significant amount of work in preparing to make a Decision, including developing and analysing options, consulting with its communities and with iwi, and engaging with Horizons, including by seeking to make discharge to land easier to consent by submitting on Plan Change 2 to the One Plan.
32. Undertaking this work has put the Council in a position where it can make an informed Decision, proceeding with preparing an Application, and thereby comply with its Consent conditions, so we would advise against now electing not to take these steps.
33. This work has included considering how the BPO will fit into a regional wastewater scheme, which should mean that any Decision will be well-placed to integrate into eventual Three Waters reform.

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5 *New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council* [2014] NZHC 2016, at [61].

6 *Royal Forest & Bird Protection Society of New Zealand Inc v Canterbury Regional Council* [2019] NZHC 2223, at [51].

7 RMA, sections 46A(3) and (4), and 48 to 51.

8 RMA, section 45A(1).