

IN THE MATTER of the Resource Management Act
1991

AND

IN THE MATTER of the Proposed Natural Resources
Plan for the Wellington Region

MINUTE #57

PANEL DIRECTION IN RESPONSE TO ISSUE RAISED BY COUNSEL FOR MASTERTON DISTRICT COUNCIL AND SOUTH WAIRARAPA DISTRICT COUNCIL

Hearing Stream 4

Introduction

1. On 24 July 2018, we issued Minute #52, which included our request for legal advice on two issues raised in a memorandum by Counsel for Masterton District Council and South Wairarapa District Council, Mr Milne. The two issues in question related to the scope for Policy P71A as recommended in GWRC's Right of Reply, and the process by which that recommendation was made. These two issues are also the subject of this minute.
2. Specifically, the minute:
 - a. summarises the legal advice we received in response to Minute #52;
 - b. records our consideration of the legal advice and Mr Milne's requests, and the reasons for the course of action we propose from here; and
 - c. refers to future directions to the parties.

Legal advice received

3. We received submissions in response to Minute #52 from Ms Anderson for GWRC on 13 August 2018.
4. On the first matter of scope, Ms Anderson advised that:
 - 10 Accordingly, it is submitted that there is scope for Policy P71A and for the deletion of the pH limit. However, we cannot find a submission that sought the DO standard should be more stringent, other than in significant water bodies. This means the change made in Policy P71A(b) is likely to be out of scope, unless it is amended to relate to 7mg/L in the listed Scheduled sites and 5mg/L outside of that.

5. In short, the proposed policy is not entirely within scope.
6. On the second matter – process – Ms Anderson focussed separately on the aspects of Mr Milne’s memorandum relating to:
 - a. Mr Milne’s clients relying upon the substance of the s42A Report, which was subsequently altered in the right of reply; and
 - b. the status of evidence presented by GWRC’s Senior Planner, Ms Arnesen.
7. Addressing these in turn, Ms Anderson firstly submitted that *“there should be no expectation by submitters that the recommendations in a section 42A Report will not be subject to change in the Right of Reply and there is no legal bar to such changes being recommended by the officers.”*¹
8. Ms Anderson noted that Ms Arnesen filed no written evidence, but did present oral evidence at the hearing². Ms Anderson reminded us that it is within the scope of powers delegated to us to receive such evidence³.
9. Ms Anderson also referred to Ms Conland’s right of reply, which expressly cited Ms Arnesen’s oral evidence as justification for the departure from the substantive position expressed in the s42A Report⁴.
10. At the conclusion of her submissions, Ms Anderson observed that:
 - a. Ms Arnesen’s evidence was largely aligned with the evidence of Ms McArthur for the Minister of Conservation; and
 - b. Ms McArthur’s evidence was also referenced in Ms Conland’s right of reply in the discussion leading to her recommendation to amend Policy P71 and add P71A⁵.

Panel response and reasons

11. Addressing the matters of scope first, we note Ms Anderson’s submissions that sufficient scope exists for the Council to recommend the changes to Policies P71 and P71A apart from the amended approach to management of dissolved oxygen levels – which is only partially within scope. We will make a substantive decision on this in due course and remind all parties that the hearing has not been closed.
12. We have received advice from Ms Anderson on scope previously, and we can assure all parties that it is a matter at the front of mind for our consideration of possible amendments to the proposed plan. This applies both to Officer recommendations and to amendments suggested by submitters.
13. Relatedly, we are compelled to amplify Ms Anderson’s useful reminder that s42A Reports and Rights of Reply are recommendations to us and are not binding. There should be no

¹ Supplementary Legal submissions on behalf of Wellington Regional Council, Response to Minute #52 (13 August 2018). p.6, para 16

² Supplementary Legal submissions on behalf of Wellington Regional Council, Response to Minute #52 (13 August 2018). p.7, para 20

³ Supplementary Legal submissions on behalf of Wellington Regional Council, Response to Minute #52 (13 August 2018). p.6-7, para 18-19

⁴ Supplementary Legal submissions on behalf of Wellington Regional Council, Response to Minute #52 (13 August 2018). p.7, para 21-22

⁵ Supplementary Legal submissions on behalf of Wellington Regional Council, Response to Minute #52 (13 August 2018). p.7, para 22-23

expectation from any party that the Panel will unquestionably accept those recommendations (in whole or in part). And to be clear, we have not made any substantive finding on Ms Conland's recommendations on this matter.

14. We also accept Ms Anderson's submission that Officers are entitled to change their view over the course of a given hearing in response to the evidence presented at the hearing by both submitters and reporting officers (including questioning from the panel) and that this practice is common. Indeed, there have been several instances in these proceedings where Officers have changed their s42A recommendations during the hearing, and these have been recorded in the rights of reply and annotated s32AA tables. We do not find any issues of fairness arising where this has occurred.
15. The specific instance identified by Mr Milne is that the two District Councils did not call evidence on P71 because they were content with the recommendations in the s42A report and were unaware that Ms Arnesen was going to present (non-circulated) evidence that eventually lead to the GW officers to reverse/significantly revise their recommendation.
16. For the record, Mr Milne did not convey whether the District Councils also considered calling evidence to counter evidence called by other parties which sought relief on Policy P71 that contrasted with the District Councils' relief. As noted in Ms Anderson's submissions, there were in fact such parties that made clear, valid submissions on Policy P71 and supported those submissions with expert evidence within the scope afforded.
17. The key test of fairness⁶ we have applied in this case is to determine whether the process to date for receiving and hearing evidence on this matter has prevented Mr Milne's clients from fairly participating in the hearing.
18. Had there been no reference to Ms Arnesen's evidence in Ms Conland's reply, and rather had Ms Conland explained that she relied upon the evidence called by submitters, we would find no issue of fairness arising in respect of Ms Conland's proposed change in recommendation. That not being the case, we have some understanding of the concerns of the District Councils on this matter.
19. The determining factor for us here is not the substance of the recommended change or whether there is scope to make it. Instead, it is that the District Councils may well have called additional/different evidence had Ms Arnesen's evidence formed part of the s42A report. To that end, we consider that they should have the opportunity to provide evidence on the matter in the interests of fairness.
20. In relation to Policy P71, we note that we have already received detailed submissions and evidence from a number of parties on this matter. Our expectation is that those parties who have clearly articulated their position do not need to participate further.

⁶ See panels Minute #2 Final Procedures specifically paragraphs 10 and 57

Next Steps/Timeframes

21. If Mr Milne's clients wish to take the opportunity to file submissions and/or evidence then such submissions and/or evidence shall be received by 5pm Thursday, 20 September 2018.
22. Upon receipt of the above we will then make a determination whether or not we require any clarification of the content.



Mark St. Clair

Panel Chair

5 September 2018