**Before the Hearings Panel**
**At Wellington**

**Under** the Resource Management Act 1991

**In the matter of** Proposed Natural Resources Plan for the Wellington Region

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**Supplementary Legal Submissions - Response to Minute #52**

**Date:** 13 August 2018

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**MAY IT PLEASE THE PANEL:**

## Introduction

1 On 24 July 2018, the Panel issued Minute #52. In that Minute the Panel requested legal advice on the following issues:

1.1 Whether there is scope provided by any submission for the recommended Policy P71A.

1.2 Whether there is a matter of fairness and natural justice arising from the process that resulted in the final recommended changes to Policy P71 and Policy P71A.

2 This direction arose out of the memorandum of counsel filed by Mr Milne on 19 June 2018 on behalf of the South Wairarapa and Masterton District Councils (**District Councils**).

3 In that memorandum the District Councils requested that the Panel seek assurances as to whether there was jurisdiction to introduce a new Policy P71A. Mr Milne stated that:

> I accept that the range of submissions <u>may</u> be sufficient to provide jurisdiction for this unequal approach, however this is something that the Panel will require assurance on, and I suggest should accept submissions on.

Memorandum of counsel to the Hearings Panel and requested directions dated 19 June 2018 at [12].

4 Mr Milne also stated that there was a lack of opportunity to the provide evidence on the suggested new Policy P71A. He stated that:

> The Council and other submitters such as WWL have not had an opportunity to comment on proposed additional policy and a significant change from the original recommendation, because that

Above at [21].

recommendation had been introduced via the right of reply.

5 Mr Milne took the position that his clients were happy with the recommendations in the section 42A report and therefore, the District Councils did not specifically address Policy P71 in their evidence. Above at [9].

**Scope for new Policy P71A**

6 It is submitted that there is scope for the new Policy P71A because it has the same effect as Policy P71 as notified, with the deletion of the pH standard and an amendment to the dissolved oxygen concentration (**DO**) from 5mg/L to 7mg/L.

7 This is because:

7.1 Policy P71 as notified set out a list of standards to be met for *all* point source discharges, including wastewater discharges.

7.2 The final recommended version of Policy P71A essentially replicates Policy P71 as notified, except it only applies to discharges of wastewater. Hearing Stream 4 Right of Reply Water Quality dated 4 May 2018 at [128]

7.3 Policy P71A sets out the same list of standards for the discharge of wastewater as Policy P71 did, except for the two changes referred to above to pH and DO.

7.4 Wastewater was already managed in Policy P71 as notified, and subject to the change in the two standards, there is no real change proposed as it applies to wastewater.

8 Given this, the only changes that require scope in Policy P71A are the amendments to the numeric limits for pH and

DO in the standards.

9 Scope is provided for changes by the following submissions:

9.1 The Minister of Conservation (**MoC**) seeks that the pH standard is amended or removed.

9.2 Fish and Game seeks that the dissolved oxygen concentrations are amended so that in certain waters bodies (Schedule A, Schedule F1 and Schedule I) more precautionary DO standards apply (7mg/L).

9.3 MoC seeks for Schedule A and F1 sites, more precautionary DO standards apply (7mg/L).

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.

**Procedure and ability of officer's right of reply to recommend different changes to provisions than included in section 42A report**

11 We understand that Mr Milne expresses two concerns:

11.1 The reliance placed by his clients on the section 42A Report, where a recommendation subsequently changed in right of reply.

11.2 The status of the evidence provided by Ms Arnesen.

12 We respond to these points below.

***Reliance on section 42A Report***

13 Mr Milne claims reliance on the Council section 42A Reports as a reason for not presenting evidence which specifically addressed Policy P71 because the District Councils:

> … understood based on the section 42A Reports, that the recommendation was that the policy should not apply to wastewater discharges and because this and the other changes made to the policy were acceptable to the Councils.

Memorandum of counsel to the Hearings Panel and requested directions dated 19 June 2018 at [9] and at [23]

14 It is submitted that this position is flawed for 2 reasons:

14.1 The section 42A reports are simply recommendations only. The Panel is the body that will determine what the final version of the provisions will be and the statement by Mr Milne seems to suggest that he considers the section 42A reports are binding on the Panel, which they are not.

14.2 This was reflected in Minute #2, where the Panel sets out the status of a section 42A Report:

> The s42A Reports will contain recommendations for the consideration of the Hearing Panel. Such recommendations will not be binding on the Hearing Panel. Furthermore, the s42A Reports carry no greater weight than any other material to be brought forward to the Hearing Panel by, or no behalf of, any submitter.

Above at [18]

14.3 This has also been reflected by the Courts:

> … I have already referred to s42A of the RMA. Such a report comes from a staff member or a

*Nga Puawaitanga (Meremere) Ltd v Waikato District*

> consultant engaged by the local authority. The staff member or consultant does not have any decision making power in relation to the granting or refusal of the application. The report is not dissimilar to the report of a probation officer who makes a recommendation to a sentencing Judge as to a particular sentencing option. The Judge has a discretion as to whether to accept or reject the recommendation. The staff report will simply be one piece of evidence which is before the panel. It can be criticised by the plaintiff.

*Council* (1998) 4 ELRNZ 480; [1998] NZRMA 529 (HC).

14.4 It is quite common for officers' Rights of Reply to recommend something different or new. This reflects the fact that by this point in the hearing the officer has had the benefit of hearing all submitters who presented and their supporting expert evidence. This can lead to officer's changing what was in their original section 42A report and this is a perfectly acceptable procedure. To suggest that Rights of Reply cannot make changes to what is suggested in the original section 42A report would effectively suggest the officers are to ignore the submitters and their evidence. That is clearly not the intention. This was reflected in Minute #3, dated 26 May 2017:

> Council Officers that have provided Section 42A reports for Hearing Stream 1 (and subsequent Hearing Streams) are required to reply in writing to questions posed to them during the course of the hearing. The Panel has not kept a record of such questions but we understand that the Hearing Administrator has done so and has undertaken to provide those questions to the relevant reporting officers for their response as part of the written reply. In addition, officers are entitled to respond to issues raised by other parties during the

At paragraph 15

> course of the hearing. The purpose of the reply is not to reiterate their position but through listening to the evidence heard they may modify their opinion, clarify factual information or plan provisions and state whether any alteration to their original recommendation should be made.

15 In this case, because the submitter choose not to provide evidence in relation to Policy P71 because of what the section 42A report recommended was a choice for that submitter to make. Such a choice does not create an obligation on the section 42A officer to not amend their recommendations between writing their section 42A Report, and their Right of Reply. In any event, the Panel will also be considering the submitters original submissions (and not just the evidence presented at the hearing) and therefore, the concerns raised by the District Councils in their submissions will be considered by the Panel in any event.

16 For the reasons set out above it is 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.

***Status of the Evidence of Ms Arnesen***

17 Mr Milne questions the status of Ms Arnesen's evidence, as she is not a member of the team processing the proposed Plan, but rather an officer who is dealing with the SWDC application for consents for the Featherston Wastewater Treatment Plan. His concern appears to be that the change in recommendations in the officer's Right of Reply arise from the evidence of Ms Arnesen, which was not pre-circulated. At [13] and [14]

18 As the Panel will know, it has wide powers in relation to the hearing to establish a process that is appropriate and fair in

the circumstances (section 39(1) of the RMA). It also has wide powers due to section 41 of the RMA and section 4B of the Commissions of Inquiry Act 1908, which allows it to receive as evidence any information that in its opinion may assist it to deal effectively with the subject matter of the inquiry.

19 At each hearing the Panel has heard from officers who have been implementing the proposed Plan since its notification to aid its understanding of how the provisions have been working in practice. That is what Ms Arnesen was providing evidence in relation to.

20 We understand that Ms Arnesen did not file written evidence prior to the hearing but she did present oral evidence at the hearing:

> … in relation to the use of the standards in Policy P71 when processing and determining resource consent applications for wastewater discharges in the Wairarapa.

Hearing Stream 4 Right of Reply Water Quality at [114]

21 Ms Conland referenced Ms Arnesen's evidence in her Right of Reply, stating that:

> … My concern was that for wastewater discharges the limits [in P71] would be too stringent and potentially not particularly relevant to wastewater discharges given the other policies in the proposed Plan that deal directly with these discharges. <u>However, based on the evidence of Ms Arnesen, I now understand that this is not the case</u>.

Above at [118]

Emphasis added

22 However, although Ms Conland may not have explicitly made this point at her paragraph 118, Ms McArthur also provided evidence (on behalf of MoC) seeking that most of the numeric limits in Policy P71 be retained as notified.

Hearing Stream 4 Supplementary Evidence of Katherine McArthur dated 19 February 2018 at page 3

23 Ms Conland references Ms McArthur's evidence in her Reply Report at a later section. We understand from Ms Conland that Forest and Bird also supported Ms McArthur's position.

Hearing Stream 4 Right of Reply Water Quality dated 4 May 2018 at [124]

24 Accordingly, Ms McArthur also raised the issue that Ms Arnesen did, which is consistent with the submission of MoC.

25 Given this, it is submitted that the Panel (if it so chooses) is entitled to rely on the evidence of Ms McArthur and the scope provided by the notified version of the proposed Plan and the submissions, and accept the recommended Policy P71A (subject to the comment above regarding the DO standard). Ms Conland was entitled to amend her recommendations and Ms McArthur provided evidence to support this change in recommendation.

**Date:** 13 August 2018

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