

REF APP-123774

IN THE MATTER

of the Resource Management Act
1991

AND

IN THE MATTER OF

discharge and land use resource
consents for the operation and
maintenance of the Wairoa
wastewater treatment plant and
sewer pump station overflows

BY

Wairoa District Council

Applicant

**CLOSING SUBMISSIONS ON BEHALF OF WAIROA DISTRICT
COUNCIL**

3 September 2021



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May it please the Commissioners

1. This suite of applications relates to the operation and regulation of how Wairoa District Council as Applicant proposes to provide for a municipal wastewater system servicing the Wairoa Township.
2. The consents sought are detailed in Table 1 of the reporting officer's report dated 6 November 2020 and comprises two replacement consents relating to discharges of a treated wastewater into the Wairoa River¹ and an air discharge from the wastewater storage and treatment facilities associated with Council's municipal wastewater system².
3. In the suite of applications, new consents are sought in relation to the replacement of the main outfall structure and associated earthworks³, the maintenance and potential re-establishment of the main outfall structure⁴, earthworks, construction and rehabilitation activities related to the relocation and maintenance of the main outfall structure⁵, vegetation clearance and soil disturbance within the coastal marine area⁶, the occupation of the riverbed for the main outfall structure⁷ and the discharge of treated wastewater from an overflow outlet pipe from the Wairoa wastewater treatment plant.⁸
4. In addition, there are two consents sought for the potential discharge of untreated wastewater arising from overflows from the Alexandra

1 AUTH-123608-01
2 AUTH-123614-01
3 AUTH-123625-01
4 AUTH-123626-01
5 AUTH-123628-01
6 AUTH-123630-01
7 AUTH-123631-01
8 AUTH-124095-01

Park and North Clyde pump stations⁹,and the Kopu Road pump station¹⁰ together with an associated consent to allow for the relocation, maintenance and operation of the overflow outlets from these pump stations.¹¹

5. These consents are required for the maintenance, operation and better regulation of a municipal wastewater system servicing the township of Wairoa.
6. On 1 December 2020 the hearing of this matter was adjourned to allow for further conferencing of expert witnesses which has resulted in substantial agreement on the conditions of consent to be imposed. Those consent conditions have been provided to Council following the expert conferencing and provide a sound basis for the granting of consent. It is submitted from the outset that consent should be granted.
7. Following the conclusion of the hearing of evidence the Commissioners issued a minute¹² which helpfully set out issues that they considered needed to be addressed in closing submissions. Those matters are addressed later in these closing submissions and these closing submissions should be read in conjunction with the opening submissions for the applicant. It should be noted that the issues raised by the Commissioners and by submitters are a very small portion of the much wider suite of issues traversed. Similarly, it is worth remembering outstanding matters are the thin end of a much wider wedge that has been robustly discussed over a period of some eight years and more.

⁹ AUTH-123624-01
¹⁰ AUTH-124094-01
¹¹ AUTH-123627-01's
¹² Dated 11 December 2020

8. Primarily, the issues raised in the panel's minute focused on matters arising from the National Policy Statement for Freshwater Management 2020 and the New Zealand Coastal Policy Statement 2010, with the former coming into force on 3 October 2020 just prior to the hearing of this matter. These applications were made in 2018 and as a result, could not take into account matters arising from the NPSFM 2020.

The Applicant's Local Government Act responsibilities

9. In opening submissions it was submitted that three fundamental principles must be acknowledged.
10. Firstly, the Wairoa Township with a population of approximately 4600¹³ is currently serviced by, and requires, a reticulated wastewater system. On-site wastewater disposal for individual household properties within the township is not an option.
11. Secondly, given that there is currently a reticulated wastewater system and an ongoing requirement for a reticulated wastewater system, there is a corresponding need for a treated wastewater discharge of some sort.
12. Thirdly, there is widespread, if not unanimous, support for the proposition that if there was an economically viable and affordable alternative to a Wairoa River based discharge of treated wastewater then that would be preferable. If Council as the Applicant had a viable and affordable alternative option then it would not be seeking to discharge treated wastewater to the river and for the term as proposed.

¹³ 2018 Census figures put the population of Wairoa at 4527

13. These principles must be viewed not only in the context of the consenting requirements faced by the Applicant in making these applications but also in the context of the Wairoa District Council's other statutory obligations and functions.
14. It is submitted that these applications bring into sharp focus the principles underpinning the RMA and in particular the purpose of sustainable management of natural and physical resources including managing the use, development and protection of natural and physical resources in a way that enables people and communities to provide for their social, economic and cultural well-being and for their health and safety.
15. As a territorial authority Wairoa District Council provides a reticulated wastewater service to the community of Wairoa Township. Wastewater services is one of the water services as defined in section 124 of the Local Government Act 2002.
16. Pursuant to section 125 of the Local Government Act 2002, the applicant is required to undertake an assessment of its water services including reticulated wastewater services. Section 126 sets out the purpose of such an assessment. Those sections provide:

125 Requirement to assess water and other sanitary services

- (1) A territorial authority must, from time to time, ... assess the provision within its district of—
 - (a) water services; and
 - (b) other sanitary services.
- (2) One type of service may be assessed in conjunction with another type of service.
- (3) Repealed.

126 Purpose of assessments

The purpose of an assessment under section 125 is to assess, from a public health perspective, the adequacy of water and other sanitary services available to communities within a territorial authority's district, in light of—

- (a) the health risks to communities arising from any absence of, or deficiency in, water or other sanitary services; and
- (b) the quality of services currently available to communities within the district; and
- (c) the current and estimated future demands for such services; and
- (d) the extent to which drinking water provided by water supply services meets applicable regulatory standards; and
- (e) the actual or potential consequences of stormwater and sewage discharges within the district.

17. In exercising those functions, the applicant is required¹⁴ to (inter alia) give effect to the purpose of local government as provided in section 10 of the Local Government Act 2002 which provides:

10 Purpose of local government

(1) The purpose of local government is—

- (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
- (b) to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future.

18. Council must meet these obligations while at the same time meet the financial imperatives of ensuring that each year's projected operating revenues are set at a level sufficient to meet that year's projected

¹⁴ as the section 11 of the Local Government Act 2002

operating expenses¹⁵ and the imperative of prudent financial management.¹⁶

19. The applicant funds its activities including the provision of wastewater infrastructure via rates levied under the Local Government (Rating) Act 2002. Under that act the applicant has the power to set, assess and collect rates provided that it is done in an open and transparent manner.¹⁷
20. All of which is to state the obvious, but it is submitted that the obvious needs to be stated. In the course of the hearing there were a number of references or suggestions that the affordability to the community was not an issue and that “Council should be required to pay” for a full land based wastewater discharge system.
21. The reality is that if “Council is to pay” then it is the community that pays by the rates levied on properties that receive the benefit of the service. That is part of the requirement of producing a balanced budget as required by section 100 of the Local Government Act 2002. The added issue arises from the inability of ratepayers to afford dramatic increases in rates such that Council would be unable to collect rates from defaulting ratepayers. That is the function of, and an issue for, the prudent financial management as required by section 101 of the Local Government Act 2002.
22. It is these local government imperatives that lie behind the submission that the desire for upgraded and ultimately land-based wastewater discharge must be matched by the rate paying community’s willingness and ability to fund those works. This specific issue is particularly relevant with Wairoa having a limited ratepayer base and

¹⁵ see section 100 of the Local Government Act 2002

¹⁶ section 101 of the Local Government Act 2002

¹⁷ section 3 of the local government (rating act 2002)

many of those ratepayers earning less than the national median income.

23. Council does not have the ability to commit to funding operations and expansion of infrastructure that it cannot afford as a matter of prudent long-term financial planning. It would be unethical and illegal for Council to knowingly impose a financial burden on a community, which is well known to be struggling with other financial pressures and priorities; and it would be questionable if such commitment to such significant expenditure would pass Local Government audit scrutiny.
24. It would also be unethical for Council not to identify these constraints in the context of these applications and/or to agree to the imposition of consent requirements and conditions that it knows it does not have the ability to fund on behalf of its community.
25. The suite of applications represents how the Applicant considers it can achieve the purpose of the Resource Management Act while achieving the balanced-budget and prudent financial management imperatives of the Local Government Act 2002.
26. While the focus of the discussion above is financially based, the practical reality of discharge to land alternatives cannot be overlooked. As has been raised in the evidence of Mr Lowe¹⁸ and the further information provided to the Commissioners¹⁹, even if affordable, there are serious technical limitations which would need to be overcome to make land discharge, certainly 100 %, a reality.
27. It is also worthy of note that the proposal represents the culmination of a public consultation process that commenced in 2013 and which involved stakeholder participation. A particular feature of engagement

¹⁸ Evidence in chief of Mr Lowe, paras 50-63

¹⁹ Responses from Wairoa District Council to the Panel's Questions Raised in the First Minute Dated 11 December 2020, 30 July 2021, paras 31-46

for this activity started with guidance from Maori. The ensuing approach adopted represents the outcome of that early engagement process which had substantial support from the stakeholders involved in that participation process. It is acknowledged that the outcomes of the approach were not endorsed by everyone who participated in that stakeholder process and there remained a group, now substantially represented in the submissions in opposition to these applications, which steadfastly opposed the continuation of a discharge to the river while at the same time opposing any increase in rates. It should be noted that those in opposition remain participants of the process which highlights the opposition was clearly with not having the outcome they sought rather than a dissatisfaction with the engagement process.

28. It is submitted that the (relatively) few submissions made in opposition to this application are not representative of the views expressed in the course of the wider community consultation which resulted in the form of application now being considered. This consultation now includes two LTP rounds, hui, community meetings and print and social media. The reality is that there was substantial community and stakeholder buy in to the final form of this application, and in fact it was the community engagement that provided the architecture of the application and particularly the condition framework. It is particularly notable that opposition to Council's wastewater planning, as guided by the consultation and now the application, has not featured at all in recent long-term plan and annual plan processes.

The Commissioners minute of 11 December 2020

In the commissioners' minute of 11 December 2020 the commissioners signalled that they considered that further expert conferencing should be undertaken. As noted previously, the issues traversed are a very minor component of much wider issues. That

conferencing has occurred and has resulted in substantial agreement as to the conditions to be imposed, with wording changes being the predominant focus rather than the intent of the conditions.

29. As also acknowledged in the hearings panel minute, the applicant's essential case is that from a western science point of view, the effects of the proposed discharge to the river are minor²⁰ and that this position was not contested by other experts.²¹
30. It is submitted that the issues for the panel centre on the cultural offence that is taken from any discharge of wastewater to the river and how that discharge is to be assessed in terms of the National Policy Statement for Freshwater Management 2020 (NPSFM) and/or the New Zealand Coastal Policy Statement 2010.

The discharge from the outfall structure.

31. As detailed in the assessment of environmental effects, the discharge from the outfall occurs within the coastal marine area and falls to be considered under the Regional Coastal Environment Plan and the New Zealand Coastal Policy Statement 2010 (NZCPS).
32. The preamble to the NZCPS gives some insight into its application and provides:

The New Zealand Coastal Policy Statement (NZCPS) is a national policy statement under the Act. The purpose of the NZCPS is to state policies in order to achieve the purpose of the Act in relation to the coastal environment of New Zealand.

33. With regard to the ambit of the NZCPS it states:

This NZCPS is to be applied as required by the Resource Management Act 1991 ("the Act") by persons exercising functions and powers under the Act. The Act itself should be consulted, but

²⁰ See minute of 11 December 2020 at paragraph 17

²¹ See minute of 11 December 2020 at paragraph 20

at the time of gazettal of this statement, its requirements in relation to this NZCPS are, in summary, that:

- regional policy statements, regional plans and district plans must give effect to this NZCPS (sections 62(3), 67(3)(b), 75(3)(b) refer);
- local authorities must amend regional policy statements, proposed regional policy statements, plans, proposed plans, and variations to **give effect to** NZCPS provisions that affect these documents as soon as practicable, using the process set out in Schedule 1 of the Act except where this NZCPS directs otherwise (section 55 refers);
- a consent authority, when considering an application for a resource consent and any submissions received, must, subject to Part 2 of the Act, **have regard to**, amongst other things, any relevant provisions of this NZCPS (section 104(1)(b)(iv) refers);
- ...

(Emphasis added)

34. The purpose of the added emphasis above is to emphasise an important distinction and to avoid the risk of the hearings panel misdirecting itself in terms of the application of the NZCPS. In the panel's minute of 11 December 2020 it is stated²² that the obligation in respect of the NPSFM is to "give effect to" the National Policy Statement, and reference is made to the Supreme Court decision in *The Environmental Defence Society v New Zealand King Salmon Company Ltd*²³.
35. With respect, it is incumbent upon the Regional Council in formulating its Regional Policy Statement and plans to give effect to the NZCPS. This is done that through (inter alia) the Regional Policy Statement, the Hawke's Bay Regional Coastal Environment Plan and the Hawke's Bay Regional Resource Management Plan. The AEE and Mr Drury's evidence provides a comprehensive analysis of the application against those planning documents.

²² at paragraph 23 of the minute

²³ [2014] 17 ELRNZ 442

36. The obligation with applications for resource consent such as those currently under consideration is “to have regard to” the NZCPS²⁴.
37. Policy 23 of the NZCPS is of particular relevance to the discharge and the works relating to the discharge. That policy provides:
1. In managing discharges to water in the coastal environment, have particular regard to:
 - a) the sensitivity of the receiving environment;
 - b) the nature of the contaminants to be discharged, the particular concentration of contaminants needed to achieve the required water quality in the receiving environment, and the risks if that concentration of contaminants is exceeded; and
 - c) the capacity of the receiving environment to assimilate the contaminants; and
 - d) avoid significant adverse effects on ecosystems and habitats after reasonable mixing;
 - e) use the smallest mixing zone necessary to achieve the required water quality in the receiving environment; and
 - f) minimise adverse effects on the life-supporting capacity of water within a mixing zone.
 2. In managing discharge of human sewage, do not allow:
 - a) discharge of human sewage directly to water in the coastal environment without treatment; and
 - b) the discharge of treated human sewage to water in the coastal environment, unless:
 - i. there has been adequate consideration of alternative methods, sites and routes for undertaking the discharge; and
 - ii. informed by an understanding of tangata whenua values and the effects on them.
 3. Objectives, policies and rules in plans which provide for the discharge of treated human sewage into waters of the coastal environment must have been subject to early and meaningful consultation with tangata whenua.
 4. ...
38. The proposal is for the continued discharge of secondary treated wastewater, moving to tertiary treated wastewater which is, as noted in the assessment of environmental effects and in the evidence of Cameron Drury in support of the application, consistent with the policy

framework within the NZCPS. Further, as noted in the officer's section 42A report²⁵,

'In regard to the proposal's consistency with the RPS, I agree with the commentary provided by the applicant and their assessment⁵⁸. The applicant explains that the proposal can be considered to be consistent with the objectives and policies of the Regional Policy Statement. The investment and ongoing maintenance/reporting/monitoring proposed is in line with this regional policy.'

39. It is submitted that in terms of the NZCPS, that part of the application which falls within the coastal marine area is consistent with the NZCPS and in particular is consistent with policy 23 of the NZCPS.
40. For completeness, it is submitted that the discharge at the outfall is not a discharge that falls within the ambit of the NPSFM. That National Policy Statement provides policy in respect of discharges of contaminants to freshwater. The discharge is not to freshwater but is to the coastal marine area and is therefore governed by the NZCPS and the Regional Coastal Plan.
41. In making that submission the provisions of section 1.5 of the NPSFM are noted. That section of the policy statement provides:

1.5 Application
(1) This National Policy Statement applies to all freshwater (including groundwater) and, to the extent they are affected by freshwater, to receiving environments (which may include estuaries and the wider coastal marine area).
42. It is submitted that this only extends the application of the policy statement to situations where discharges are made to freshwater which then have effects on a downstream receiving environment such

²⁵ At para 188 of the Officer's s42A report

as the coastal marine area. That is not the situation with this application. As the discharge is into the coastal marine area, there are no effects on the freshwater receiving environment, so the ambit of the National Policy Statement is not able to be extended to the coastal marine area. Instead, only the NZCPS applies to the discharge from the outfall.

The discharges from the Kopu Road pump station

43. The position of the pump stations for which consents are sought have been marked on RCEP Map 107 below.



44. The question has arisen as to whether or not the Kopu Road pump station is within the coastal environment as referred to in Policy 23(2).
45. Policy 1 of the NZCPS helps define the coastal environment. That policy provides:

Recognise that the extent and characteristics of the coastal environment vary from region to region and locality to locality; and the issues that arise may have different effects in different localities.

Recognise that the coastal environment includes:

- a) the coastal marine area;
- b) islands within the coastal marine area;
- c) areas where coastal processes, influences or qualities are significant, including coastal lakes, lagoons, tidal estuaries, saltmarshes, coastal wetlands, and the margins of these;
- d) areas at risk from coastal hazards;
- e) coastal vegetation and the habitat of indigenous coastal species including migratory birds;
- f) elements and features that contribute to the natural character, landscape, visual qualities or amenity values;
- g) items of cultural and historic heritage in the coastal marine area or on the coast;
- h) inter-related coastal marine and terrestrial systems, including the intertidal zone; and
- i) physical resources and built facilities, including infrastructure, that have modified the coastal environment.

46. Firstly, and in regard to (a), the Kopu Road pump station is landward of the coastal marine area as defined by the dotted blue line in the diagram above.
47. Secondly, it is submitted that the only criteria in Policy 1 that would bring the Kopu Road pump station into the coastal environment is the fact that it falls within CHZ3 inundation hazard.

48. The CHZ3 inundation hazard can extend far inland through Hawkes Bay, and it is submitted that this in itself is not a reflection of the extent of the coastal environment.
49. It is further submitted that the area of the river within which the Kopu Road pump station sits has the same objectives and policies applying to the river between the coastal margin line and the coastal marine area as section 5.4 of the Regional Resource Management Plan relating to the river immediately upstream of the coastal margin line.
50. That is, there is no difference in the objectives and policy approach under the Regional Coastal Environment Plan and the Regional Resource Management Plan for the river upstream and downstream of the coastal margin line (to the CMA) – meaning in giving effect to the NZCPS, there is no difference in the policy approach at the Regional Plan level.
51. It is further submitted that if Kopu Road is considered to be within the coastal environment that any discharge arising from an overflow of the pump station due to infiltration of stormwater would be for a limited duration, on rare occasions of heavy rainfall, and would be a discharge of a highly diluted albeit untreated effluent into a river that is likely to be at a high flow due to the high rainfall. Those circumstances, while comprising a discharge that is not consistent with policy twenty-three of the NZCPS, the effect of that non-compliance is considered to be de minimus.
52. In this regard and noting that the Regional Coastal Environment Plan “gives effect to the NZCPS, the Coastal Environment Plan
53. It should also be noted that these noncompliances occur in a scenario where the applicant is actively working with the Hawke’s Bay Regional Council and attempting to minimise the occurrence of such discharges. Should also be seen in the context of the advice received

from the regional Council that these discharges would be better considered under the emergency provisions of section 330 and do not require resource consent.

54. Further, The Regional Coastal Environment Plan gives effect to the NZCPS. That Plan includes a policy to “manage the discharge of contaminants in the coastal marine area in accordance with environmental guidelines set out in table 16-1”²⁶ for the discharge of sewage in the CMA which include:

3. Sewage discharges

(a) The discharge of sewage from land which does not pass through soil or wetland, directly into water in the coastal marine area is inappropriate, unless:

(i) the disposal of sewage directly into the coastal marine area is the best practicable option and

(ii) significant adverse effects on ecosystems, natural character of the coastal environment and on water quality classified for contact recreation purposes are avoided, or remedied or mitigated where avoidance is not practicable.

(iii) there has been consultation with:

tangata whenua in accordance with tikanga Maori and due weight has been given to s6, s7 and s8 of the RMA and

the affected community in determining the suitability of the treatment and disposal system.

(b) The location and extent of any mixing zone for discharge of sewage shall ensure that there are no significant adverse effects on:

(i) any Significant Conservation Area or

(ii) the use of receiving waters for recreation or

(iii) the use of receiving waters for collection of seafood for human consumption.

(c) the adverse effects of sewage discharges on the present and reasonably foreseeable use of the receiving waters have been avoided where practicable, remedied or mitigated, particularly in:

(i) areas where there is high recreational use or

(ii) areas of maintenance dredging or

(iii) areas adjacent to commercial or residential development.

55. The discharge is consistent with this policy direction and the relevant guidelines aimed at giving effect to the RCEP.
56. If the policy is to be applied to the Kopu Road pump station then it is submitted that for the above reasons little weight should be placed on policy 23(2) in this instance.

The National Policy Statement for Freshwater Management 2020

57. The NPSFM does apply to the discharges arising from the potential for pump station overflows giving rise to the discharge of untreated wastewater from the Alexandra Park and North Clyde pump stations, and the Kopu Road pump station. These discharges would be to freshwater that is outside (upstream) of the coastal marine area.
58. As a result, the panel is required to have regard to (as opposed to give effect to) the NPS.
59. The first thing that should be noted is that these discharges are infrequent and occur when council's wastewater infrastructure is overwhelmed by inflows of stormwater during heavy rainfall events. Council has already undertaken significant work to reduce stormwater infiltration and further work is both budgeted and included in Council's work programme as detailed in the long-term plan and responses already provided to the Hawke's Bay Regional Council.
60. The infrequent nature of these occurrences and the manner in which they have occurred have been the subject of discussions with Hawke's Bay Regional Council staff in the context of enforcement action taken by Hawke's Bay Regional Council which, in turn, is subject to an outstanding appeal by the Applicant. In the course of discussing those proceedings the Applicant has been advised by

Council staff that these overflows from pump stations do not require resource consent and instead should be dealt with as emergency discharges under section 330 of the RMA. This is consistent with guidance provided by the council reporting officer²⁷.

61. It should be noted that the advice referred to above is inconsistent with earlier discussions and advice that the Applicant had with Hawke's Bay Regional Council compliance and consenting staff which have resulted in these applications being made. All of which provides a background to the fact that these discharges are infrequent and of less than minor effect.
62. The obligation to give effect to the NPS-FM lies with the Regional Council. Some of the steps required to undertaken by the Regional Council are set out in the table below.

²⁷

S42A, para 132

Provision	NPSFM requirement	progress
Every regional council must engage with communities and tangata whenua to determine how Te Mana o te Wai applies to water bodies and freshwater ecosystems in the region	3.2(1)	Hasn't happened
Every regional council must give effect to Te Mana o te Wai, and in doing so must: (a) actively involve tangata whenua (b) engage with communities and tangata whenua and (c) apply the hierarchy of obligations (i) when developing long-term visions (ii) when implementing the NOF and (iii) when developing objectives, policies, methods, and criteria for any purpose under subpart 3 relating to ...rivers...; and (d) enable the application of a diversity of systems of values and knowledge, such as mātauranga Māori, and (e) adopt an integrated approach, ki uta ki tai, to the management of freshwater	3.2(2)	Hasn't happened
Every regional council must include an objective in its regional policy statement that describes how the management of freshwater in the region will give effect to Te Mana o te Wai.	3.2(3)	Hasn't happened
Every regional council must develop long-term visions for freshwater in its region and include those long-term visions as objectives in its regional policy statement which must be a) developed through engagement with communities and tangata whenua about their long-term wishes for the water bodies and freshwater ecosystems in the region; and (b) be informed by an understanding of the history of, and environmental pressures on, the FMU, part of the FMU, or catchment; and (c) express what communities and tangata whenua want the FMU, part of	3.3(1) and (3)	Hasn't happened

the FMU, or catchment to be like in the future		
Every regional council must assess whether each FMU, part of an FMU, or catchment (as relevant) can provide for its long-term vision, or whether improvement to the health and well-being of water bodies and freshwater ecosystems is required to achieve the vision.	3.3(4)	Hasn't happened
Every regional council must make or change its regional policy statement to the extent needed to provide for the integrated management of the effects of: (a) the use and development of land on freshwater; and (b) the use and development of land and freshwater on receiving environments.	3.5(2)	Hasn't happened
At each step of the NOF process, every regional council must: (a) engage with communities and tangata whenua; and (b) apply the hierarchy of obligations set out in clause 1.3(5), as required by clause 3.2(2)(c).	3.7(1)	No engagement with the Wairoa District community
The NOF process requires regional councils to undertake the following steps: (a) identify FMUs in the region (clause 3.8) (b) identify values for each FMU (clause 3.9) (c) set environmental outcomes for each value and include them as objectives in regional plans (clause 3.9) (d) identify attributes for each value and set baseline states for those attributes (clause 3.10) (e) set target attribute states, environmental flows and levels, and other criteria to support the achievement of environmental outcomes (clauses 3.11, 3.13, 3.16) (f) set limits as rules and prepare action plans (as appropriate) to achieve environmental outcomes (clauses 3.12, 3.15, 3.17)	3.7(2)	Hasn't happened

Every regional council must identify FMUs for its region.	3.8(1)	Hasn't happened
Every regional council must also identify the following (if present) within each FMU: (a) sites to be used for monitoring (b) primary contact sites (c) the location of habitats of threatened species (d) outstanding water bodies (e) natural inland wetlands.	3.8(3)	Hasn't happened in respect of the Wairoa River

63. The purpose of outlining some of the provisions of the NPS-FM, with which there is yet to be compliance by the Regional Council, is not to be critical of the Regional Council but to emphasise that the regime envisaged by the National Policy Statement was rolled out in 2020 and is in its infancy in terms of the Regional Council's consultation on and implementation of its requirements. Primarily, public input is required which flows onto the objectives, policies and rules for inclusion in a regional Plan. It is also to be noted that the NPSFM does not envisage an absolute prohibition on discharges of contaminants to freshwater.

64. Indeed, one of the policies required by the NPS-FM to be included in the Regional Policy Statement²⁸ provides:

"The loss of river extent and values is avoided, unless the council is satisfied:

(a) that there is a functional need for the activity in that location;

and

(b) the effects of the activity are managed by applying the effects management hierarchy."

²⁸ NPSFM 3.24 the inclusion of this policy and the E plan version of the regional resource Management plan does not appear to have occurred despite the changes been referred to in the schedule of changes contained on Council's website.

65. It is submitted that in terms of this NPS-FM policy there is a functional need for the pump stations to be located where they are. They were originally installed in the 1940's and 50's to serve their urban catchment areas. When constructing the WWTP in 1980-81, these pump stations were converted from daily discharges of raw wastewater into the river to emergency overflow discharges when the reticulation to the WWTP was overwhelmed with storm flows. It is an engineering requirement to maintain these as emergency relief systems in order to protect the wider reticulation system from damage and overflows at manholes and residences.

66. In terms of the management of the effects of the discharges from pump stations, the definition of effects management hierarchy provides:

effects management hierarchy, in relation to natural inland wetlands and rivers, means an approach to managing the adverse effects of an activity on the extent or values of a wetland or river (including cumulative effects and loss of potential value) that requires that:

(a) adverse effects are avoided where practicable; and

(b) where adverse effects cannot be avoided, they are minimised where practicable; and

(c) where adverse effects cannot be minimised, they are remedied where practicable; and

(d) where more than minor residual adverse effects cannot be avoided, minimised, or remedied, aquatic offsetting is provided where possible; and

(e) if aquatic offsetting of more than minor residual adverse effects is not possible, aquatic compensation is provided; and

(f) if aquatic compensation is not appropriate, the activity itself is avoided.

67. It is submitted that applying the effects of a management hierarchy as required by the NPS-FM to the discharges arising from overflows from

the pump stations, the occasional discharges are unavoidable during periods of high rainfall but they are limited and minimised by the works that are being undertaken on council's infrastructure and on future works aimed at minimising and avoiding the need for future discharges. In those circumstances, it is submitted that the discharge is consistent with the policy of managing effects as required by the NPS-FM.

68. It is also to be noted that the whole purpose of the upgrades that are proposed to the infrastructure and to the storage capacity of the wastewater treatment plant is to further minimise the chance of these currently unauthorised discharges occurring.

The term of consent

69. Mr Drury's original views around consent duration are outlined in Section 8 of the Planning Assessment²⁹, in which he identified that the proposal qualified in terms of the criteria in Section 8.2.4 of the Regional Coastal Environment Plan³⁰ to be granted for a period of 20 to 35 years. Although the Reporting Officer does not specifically acknowledge this, her recommendation that consent be approved for 20 years confirms agreement with this approach.
70. In terms of where between 20 and 35 years the term of this consent should fall, it is a matter of determining any reasons why a consent duration of 20-25 years would be more appropriate than 30-35 years. The Applicant's arguments in support of a 35-year term are outlined below.
71. There are three key aspects of the condition structure that are relevant:

²⁹ Planning Assessment (Stradegey, 2018:C9)

³⁰ Section 29.2.3 of the Regional Coastal Environment Plan contains the same criteria plus (g), being 'at the time of granting consent, the effects of the activity are/were unknown or little understood and a precautionary approach is adopted'

- a) Firstly, the proposed conditions of consent set down a series of initial actions that have been committed to along with a timeframe (for example conditions 38, 40, 44, 45 and 46 pertaining to the UV treatment, storage, Wastewater Education Plan, Catchment Enhancement Plan, and mortuary waste).
- b) Secondly, these initial actions are followed by a framework of reviews and follow-up actions (refer Conditions 51, 52 and 53) involving three sets of System Review and Improvement Plans spanning a 25 year period. The last review sets up the series of actions to be undertaken during the final 10 year period of a 35-year consent term.
- c) Thirdly, the very purpose of these reviews is to work towards the common goal expressed by all parties of reducing and ultimately ceasing discharges of Wairoa's treated wastewater to the Wairoa River by way of:
 - i. Reducing and ultimately ceasing discharge volumes to the Wairoa River during low flows (below ½ median initially, and then below median river flows); and
 - ii. The expansion and on-going investigation of land-based discharge options including actively seeking funding from other sources; and
 - iii. Increased storage commensurate with land discharge expansion.

72. It is notable that the overall structure and review timing of the consent conditions have remained largely as originally proposed by the Applicant when lodging the consent application. Further, the structure and requirements are consistent with and developed from initial iwi

and community engagement. There have been multiple amendments on details and a number of opportunities for all parties to propose amendments to these conditions during the consenting process, including during and following the pre-hearings and expert conferencing. Changes have been relatively minor and focussed on particular details or topics.

73. The Reporting Officer and subsequent expert witness conferencing outcomes have agreed to the timing and sequence of the system review and implementation cycles outlined in the consent conditions. Further, engagement with the community resulted in the conditions before us, indicating a preference and balance of requirements versus term.
74. In addition, as noted above the necessary policy and regulatory framework surrounding the implementation of the NPS-FM is yet to be determined. Should that process of community engagement result in the implementation of rules or regulations that require further action, and that is a matter that can be reviewed as part of a section 128 review in order to achieve compliance with the amended plan provisions. The current absence of those regulatory provisions is not a basis for providing a short-term consent to await potential further regulation flowing from the NPSFM. As noted by the Environment Court in *Rangitane o Tamaki Nui-a-rua incorporated & Ors v Manawatu-Wanganui Regional Council*³¹

[10] It is the responsibility of the Regional Council to give effect to the NPS-FM and it would be inappropriate for the court to seek to predetermine or second-guess how, to what extent or over what implementation timeframe the Council will require controls on nitrogen discharges into the two river catchments to be in place...

³¹ [2021] NZEnvC 084 at [10]

75. In that case involving the discharge of wastewater from the Eketahuna wastewater treatment plant into the Makakahi River, the Court went on to impose resource consent limits on nitrogen that applied in advance of the Regional Council limit setting processes being completed. In doing so, the court noted³² that any conditions must be set based on the circumstances applying to the particular discharge being consented by the application. In this case, the circumstances applying to the particular discharges under consideration are that they are discharges that have, from a Western science perspective, no adverse effects that are more than minor and that are not otherwise controlled by conditions of consent. In short, the uncertainty arising out of what the limits (if any) on such discharges may be in the future as a result of implementing the NPS-FM do not justify a consent of shorter duration.
76. The Applicant's commitment to specific actions within the first 10 years and regular review and implementation cycles with specific goals makes these consent conditions real, not merely aspirational. The conditions ensure that the Consent Holder can be held accountable at specific dates for their progress (or lack thereof) and their forward planning for the next stages of works.
77. It is crucial for the greatest chance of successful implementation of the proposed consent conditions for the consent duration to be at least 30 years and as close to 35 years as possible. This would enable the Applicant to commit and commence the implementation of the actions that were agreed at the 25-year review. This is particularly so when significant funding allocation is required through the 10 year Long Term Planning process, in that forward certainty is needed.
78. The design, construction, installation, and commissioning process for each aspect of irrigation and storage development will inevitably take time. Allowance is needed for design, procurement, land purchase

³² Ibid at [11]

and further consenting, all of which takes time. It is therefore imperative that sufficient time is allowed by this consent without an opportunity for pausing actions or imposing a need to seek fresh authorisations to continue the work programme.

79. A shorter duration consent would derail implementation of the actions which have been endorsed by the Reporting Officer and the expert conferencing. Based on the agreed sequence, it is likely that it will not be until at least year 25 that a full and proper replacement application could be prepared to really assess the effects of the activity to be replaced.
80. Furthermore, and as with this 2018 consent application, time would be required for public engagement and the preparation of technical inputs to inform the replacement application. Significant time delays and costs are likely to be incurred. It also seems unlikely that a further consent renewal process would provide a change of direction from that already locked into this consent's conditions, begging the obvious question of why go through another process at great expense to do the same thing. It also serves to disengage the community (as a whole) who can get frustrated with having to revisit the issues – an issue currently being experienced.
81. A consent renewal process would have a negative impact on implementation of further initiatives to reduce discharges to the river. It is likely that no further improvements or development of storage and land-based discharges would occur while a fresh consent application is being compiled and processed, as the uncertainty of the consenting outcome would present on-going risks to Council of making changes that would not be compatible with the new consent. Also, typically Councils will not commit to investing into major infrastructure if there is uncertainty of resource consents or other authorisations to enable those works. This is especially so when there are to be significant funding investments.

82. It should be kept in mind that the Consent Authority has the ability to review the conditions of consent. The level of reporting and defined stages of the consent present ample and sensible opportunities to justify this exercise if needed, and there is little reason to opt for a shorter consent duration as a preferred alternative to the ability to review conditions for a long-term consent.
83. On balance, the Section 42A report and evidence from the interested parties contain no compelling reasons not to grant consent for a duration of 35 years. Reference to Section 8 of the Planning Assessment remains relevant.

The Concession

84. At paragraph 14 of the panel's minute, particular concern is expressed upon the fact that the proposed new outfall structure is reliant on concession being granted under the Conservation Act 1987, and at paragraph 15 references made to evidence provided to the panel which gave cause for "considerable doubt" as to whether that concession application would be approved.
85. We reiterate our submissions at the hearing that the process of obtaining a concession under the Conservation Act 1987 is a completely separate and discrete process from this resource consent process. It is subject to its own statutory process, right of review and ultimately judicial review should that be required. In short, the panel does not have any jurisdiction in respect of that concession. It is submitted to be analogous to ownership or property rights which have no part to play in the RMA.
86. Ownership of resources is not of itself relevant under the RMA. In *Haddon v Auckland Regional Council*³³ the Environment Court held that it was not the appropriate forum to deal with ownership issues.

With respect, the panel is not the appropriate forum in which to consider the grant of a concession and/or the review of that grant or failure to grant under the conservation act.

87. Having said that, these submissions provide a useful opportunity to update the panel on progress in respect of the concession.
88. A concession application has been made under section 17S of the Conservation Act 1987. That concession application is to the Te Rohe o Te Wairoa Reserves Board – Matangirau due to the reserve being listed as Te Rohe o Te Wairoa Reserve in Schedule Four of the Iwi and Hapu of Te Wairoa Claims Settlement Act 2018. Section 62 of that Act provides for a joint board called to be established as the administering body of a total of five reserves - including the Whakamahi Lagoon Government Purpose (Wildlife Management) Reserve. The joint board comprises three representatives appointed by the Wairoa District Council and three representatives appointed by Tatau Tatau o te Wairoa.
89. Pursuant to Section 63 of that Act, the joint board is delegated the powers or functions of the Minister of Conservation under Section 10 of the Reserves Act 1977, which includes the function of granting or refusing applications for Concessions.
90. The board of Te Rohe o Te Wairoa Reserves Board – Matangirau meets infrequently however, since the making of this concession application the applicant has sought and facilitated additional meetings, workshops and forums for discussion of the proposed concession. These discussions have progressed to the point where conditional support from the Tatau representatives has been provided for a concession to be granted.
91. However, at the time of making these submissions, the Reserves Board have not met to consider the Tatau Tatau recommendation and

the final form of any concession and/or the conditions under which a concession might be granted. Suffice to say that the position that has been represented to Council is not consistent with the “evidence” referred to in paragraph 15 of the panel’s minute which led to the considerable doubt that a concession would ultimately be approved.

92. As an indication of how that matter is proceeding, the indication of support from Tatau Tatau is conditional, including a condition that resource consent is granted by the Hawke’s Bay Regional Council. As you will appreciate, this creates a chicken and egg situation.
93. At this point it would be inappropriate to impinge on the separate statutory process for considering concessions further than to say that the Applicant is confident that a concession will be granted, that conditional support has been indicated by organisations that make up the Reserves Board and that if for some reason concession was not forthcoming from the Reserves Board, the ability to review that concession decision would be pursued by the Applicant.
94. In short, we do not share the panel’s doubt as to whether or not a concession application will ultimately be granted but even if it is not, then that simply means that the resource consent, being permissive in nature, cannot be implemented in the absence of the concession.
95. The Concession process under the Conservation Act 1987 is a separate legislative process to a Resource Consent process under the Resource Management Act 1991, and therefore the Applicant does not consider this to be a relevant consideration.

Conclusion

96. It is submitted that these applications have been the subject of a comprehensive consultation process which formed the basis for the structure of the consent applications.

97. The applications represent the best solution to the discharge of wastewater, treading the fine path between what is permissible in terms the RMA imperatives of achieving the sustainable management of resources within the Local Government imperatives of prudent financial management in the delivery of services.
98. The proposed conditions of consent have been well traversed by the experts witnesses in caucusing and form a sound basis for the granting of consent.
99. It is submitted that consent should be granted subject to those conditions.

A handwritten signature in black ink, appearing to read 'M. B. Lawson', with a large, stylized flourish at the end.

M B Lawson

Counsel for the Applicant