

# A 'HOW TO GUIDE' FOR SECURING 35 YEAR DISCHARGE CONSENTS

*M D Bourne (Watercare) and P M S McNamara (Simpson Grierson)*

---

## **ABSTRACT**

Since reorganisation of local government in Auckland, Watercare Services Limited (Watercare) has successfully obtained resource consents for five long term (35 year) wastewater treatment plant discharge consents to freshwater and coastal receiving environments. Obtaining long-term consents is a key issue for wastewater operators who seek to achieve the level of certainty required to support significant investment in infrastructure. With a 35 year consent, a long-term view of investment can be made in the asset, which ultimately produces a better outcome for the customers, the facility owner and the environment.

In the majority of cases, Watercare has offered a consent condition that requires a 5-yearly monitoring and technology review report (MTRR) outlining significant technological changes and advances in relation to wastewater management, inflow reduction, treatment and reuse, and consideration of whether any option or combination of options represents the best practicable option (BPO).

The paper outlines the MTRR conditions contained in the consents that have been granted, and their relationship with other conditions such as those relating to community liaison groups and review of conditions. It explains how MTRR conditions have been used to address uncertainty, both from submitters and consent authorities, and particularly whether any given treatment technology or discharge method will remain the BPO over the duration of a long term consent.

The paper positions the MTRR approach in the wider context of Environment Court decisions concerning the use of similar technology review conditions, starting with the Moa Point wastewater treatment plant decision in 2009, and then considering three more recent decisions regarding municipal wastewater discharges in the Manawatu-Wanganui Region (Fielding, Shannon and Foxton wastewater discharges).

It concludes with observations about the role MTRR conditions and related conditions can play in securing long term consents for wastewater treatment plant discharge consents, and circumstances in which experience suggests such conditions may be insufficient to secure long-term consents.

## **KEYWORDS**

wastewater discharges, technology review conditions, best practicable option, membrane bioreactor

## **PRESENTER PROFILE**

Mark Bourne – Mark is Watercare's Head of Servicing and Consents. He is responsible for strategic and statutory planning, policy development as well as several other portfolios. Mark has been with Watercare and its predecessors for 30 years, holding a wide variety of roles including infrastructure planning, trade waste, water and wastewater operations manager.

Padraig McNamara - Padraig heads the resources and infrastructure department at Simpson Grierson. He has 25 years' experience advising councils, CCOs, and corporate clients on resource management, local government, administrative law, and public policy issues. Padraig has particular expertise in consenting major infrastructure (especially water and wastewater projects), infrastructure funding, bylaws, and Local Government Act issues.

## 1 INTRODUCTION

Every Council or network utility operator that has sought resource consents for major capital projects knows the importance of obtaining consents of long duration, both to provide long-term certainty for the consent holder about its right to operate its infrastructure, and to justify the level of capital expenditure involved. While under section 123 of the Resource Management Act 1991 (**RMA**) most land use consents are of unlimited duration, discharge consents required for wastewater treatment infrastructure can only be granted for a maximum of 35 years. From a policy perspective, a maximum duration of 35 years for discharge consents is justified because the environmental effects of discharges are ongoing, and because both the receiving environment and standards that in a broad sense determine the "acceptability" of the discharge will change over time.

Most consent authorities understand, and are sympathetic to, the reasons why wastewater network operators seek long term consent for wastewater treatment plant (**WWTP**) discharges, often the maximum 35 year term allowed under the RMA. However, they are also mindful of changing (generally increasing) environmental standards, and public expectations in terms of freshwater and marine water quality, and are concerned with ensuring that proposals wastewater network operators present as the Best Practicable Option (**BPO**) during the resource consent process, remain so throughout the life of a long term consent.

This paper briefly discusses three long term (35 year) discharge consents granted to Watercare Services Limited (**Watercare**) since the re-organisation of local government in Auckland in 2010. In particular it examines the consent granted in respect of the Pukekohe WWTP in some detail, and identifies the key reasons why a 35 year discharge permit was able to be secured. These include the requirement, volunteered by Watercare as a condition of consent, to prepare and submit to Waikato Regional Council every 5 years a monitoring and technology review report (**MTRR**).

The paper then traces the development of MTRR conditions from the discharge consents granted to Wellington City Council in 2009 for its WWTP discharges at Moa Point, through to three more recent cases all from the Manawatu-Wanganui Region which have come before the Environment Court. The paper concludes with observations about conditions and other key strategies that may assist wastewater operators to secure long term WWTP discharge consents under the RMA.

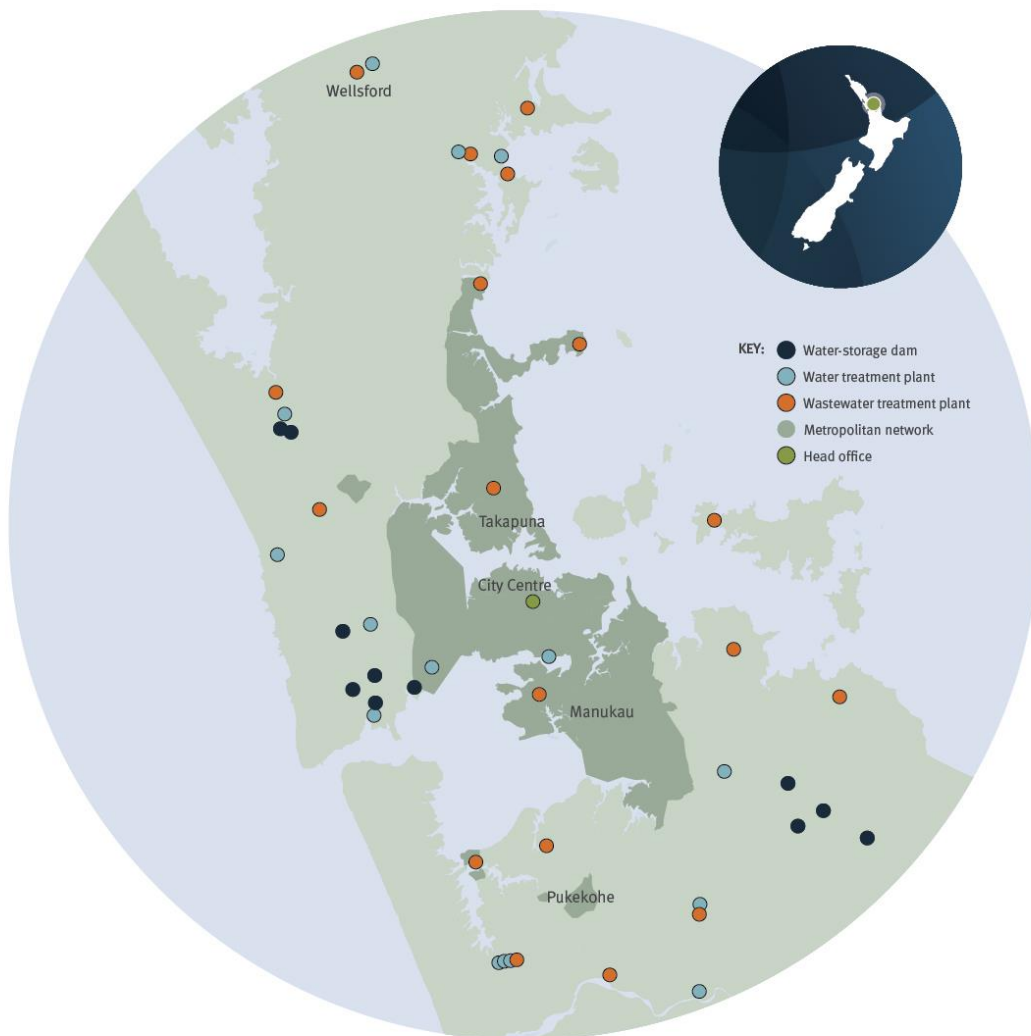
## 2 WASTEWATER CONSENTING IN AUCKLAND SINCE LOCAL GOVERNMENT REORGANISATION

Watercare is New Zealand's largest water and wastewater company, responsible for the provision of integrated water and wastewater services to approximately 1.4 million people in Auckland. Watercare provides services to existing and future urban communities in Auckland (Te Hana to Pukekohe) and to Waikato District Council to service the northern part of its district.

Watercare is a Council Controlled Organisation, 100% owned by Auckland Council. It manages \$10 billion in assets which include:

- 18 wastewater treatment plants;
- 514 wastewater pump stations;
- 8,072 kilometres of wastewater pipes.

Watercare's vision is to be 'trusted by our communities for exceptional performance every day'. However, some of the assets inherited on 1 November 2010 fell short of providing exceptional performance, especially in non-metropolitan parts of the region. This was a key area of challenge for Watercare where a balancing of needs and levels of service was required between metropolitan and non-metropolitan areas of the Region.



*Figure 1: Map illustrating location of Watercare treatment plants*

Since reorganisation, Watercare has successfully obtained five long term (35 year) WWTP discharge consents to freshwater, land and coastal receiving environments. These are:

- Consent to discharge treated wastewater from the Pukekohe Wastewater Treatment Plant to the Waikato River (granted in 2017 by independent commissioners appointed by Waikato Regional Council, with no appeals received);
- Consent to discharge treated wastewater from the new Snells Beach Wastewater Treatment Plant to an upgraded ocean outfall about 600 metres off the coast, to the south of Martins Bay into the Hauraki Channel (granted in 2017 by independent commissioners appointed by Auckland Council, with no appeals received);
- Consent to discharge treated wastewater from a new Waiuku Wastewater Treatment Plant to serve the growing communities of Kingseat, Waiuku, Glenbrook and Clarks Beach to a new outfall in the Waiuku River channel (granted in 2018 by way of consent order from the Environment Court, following an appeal by the Manukau Harbour Restoration Society against the granting of consent);
- Consent to discharge treated wastewater to a tributary of the Hoteo River from an expanded Wellsford Wastewater Treatment Plant (granted in 2017 by independent commissioners appointed by Auckland Council, with no appeals received); and
- Consent to discharge treated wastewater to land from the Omaha Wastewater Treatment Plant (granted in 2017 by independent commissioners appointed by Auckland Council, with no appeals received).

Obtaining long-term consents was critical for Watercare if it was to be able to justify the significant level of investment associated with each of these five projects. Apart from normal obligations, at governance level, for Watercare's board of directors to be prudent in its management of the capital works programme and use of customer revenue, Watercare has particular legal obligations under section 57 of the Local Government (Auckland Council) Act 2009. These include to manage its operations efficiently with a view to keeping the overall costs of water supply and wastewater services to its customers (collectively) at the minimum levels consistent with the effective conduct of its undertakings and the maintenance of the long-term integrity of its assets.

## **2.1 PUKEKOHE WWTP DISCHARGE CONSENT**

Watercare owns and operates the Pukekohe WWTP located at Parker Lane, Buckland in Northern Waikato. It acquired the WWTP, which was previously owned and operated by Franklin District Council, on local government reorganisation in 2010. The WWTP comprises two Sequencing Batch Reactors (**SBRs**) and treated wastewater disinfection, consisting of ultraviolet (**UV**) treatment. A constructed wetland provides the final treatment prior to the wastewater being discharged to the Parker Lane Stream, a tributary of the Lower Waikato River.

The catchment for the WWTP included domestic (90% by flow) and industrial (10% by flow) wastewater sources from Pukekohe, Buckland, Patumahoe and Tuakau, as well as a new connection from Pokeno. Population growth within the catchment was and continues to be rapid, with significant residential, business and industrial (trade waste) growth identified under the Auckland Unitary Plan and the Waikato District Plan. By 2051 the connected population is projected to grow from 27,500 to 82,200.

Watercare held resource consents for the discharge of contaminants to water, and land use consents for the Pukekohe WWTP which expired on 30 June 2015. To allow Watercare to continue to operate the WWTP in accordance with the existing resource consent, and until new ones were issued, it applied for new consents (in accordance with section 124(1)

of the RMA) in March 2015. After an extensive consultation and engagement process both before and after lodgment, notification and a hearing before independent commissioners appointed by the Waikato Regional Council, on 22 October 2017 Watercare was granted resource consent for the discharge of treated wastewater from the Pukekohe WWTP for a period of 35 years. The decision was not appealed, and the consent has now commenced.

The consent is the longest in duration (by 10 years) granted by the Waikato Regional Council for a discharge of municipal treated wastewater to the Waikato River. The consent provides for:

- A clear strategic direction for sustainable long-term wastewater treatment and discharge that enables growth to take place at the same time as maintaining and enhancing the Waikato River receiving environment.
- Long-term (35 years) certainty in terms of wastewater discharge infrastructure to support the significant projected population growth in the southern Auckland Council and northern Waikato regions.
- Ongoing collaboration with tangata whenua through Te Taniwha o Waikato, a group of nine marae covering iwi and hapu in the Lower Waikato River, throughout the duration of the consent.
- A projected improvement in the water quality of the receiving environment—Parker Lane Stream and Waikato River—over the 35-year consent period, achieved by implementing state-of-the-art wastewater treatment technology within four years of the consent commencing. The technology deployed is an Enhanced Membrane Bioreactor + UV disinfection (Enhanced MBR + UV).
- A approach consistent with achieving the Vision and Strategy for the Waikato River, developed by the Guardians Establishment Committee in 2008.
- Ongoing monitoring, environmental effects and technology reviews throughout the consent duration.
- One hectare of riparian planting on land owned by Watercare.
- Ongoing consultation and collaboration with key stakeholders throughout the consent duration.

### **2.1.1 CONSENTING CHALLENGES**

The legislative planning framework that governs the statutory process for discharges of treated wastewater is dominated by the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 and the Vision and Strategy for the Waikato River. These seek to protect and restore the health and wellbeing of the Waikato River from its current degraded state. This, combined with a significant population increase as identified in the Auckland Unitary Plan, provided a unique planning challenge for Watercare to respond to.

Particular challenges that required the innovative use of planning techniques to secure a 35-year discharge consent included how to:

- Achieve support from Te Taniwha o Waikato.
- Provide for long-term population growth while improving the water quality of the receiving environment.

- Address submitters' and hearing commissioners' concerns about the effects of the discharge, and developments in technology that may supersede the treatment technology deployed by Watercare, over the 35 year consent duration that Watercare was seeking.

### **2.1.2 ACHIEVING SUPPORT FROM TE TANIWHA O WAIKATO**

Watercare's approach to engaging with Te Taniwha o Waikato and the community in respect of its activities was to engage early and often. This engagement has not ended with the granting of a resource consent. For the Pukekohe Wastewater Discharge Consenting Project, there was a close working relationship with nine marae covering iwi and hapu in the Lower Waikato River, collectively known as Te Taniwha o Waikato. Throughout engagement with Te Taniwha o Waikato numerous matters of interest or concern were raised.

After lodging the application and Assessment of Effects on the Environment in March 2015, Watercare requested that the Waikato Regional Council put it hold, pending the results of a technical investigation into the dispersion of the (at that time) proposed direct discharge of treated wastewater into the Waikato River, and the receipt of a Cultural Impact Assessment (**CIA**) that was being prepared by Te Taniwha o Waikato.

Feedback received through the CIA highlighted a particular concern with a discharge structure being placed on the bed of the Waikato River, which Waikato-Tainui recognise as a tupuna (ancestor) that has mana and in turn represents the mana and mauri of Waikato-Tainui.

In light of the CIA and feedback from Te Taniwha o Waikato, Watercare further investigated alternative discharge locations and methods whilst simultaneously working alongside Te Taniwha o Waikato to develop an alternative proposal for the Pukekohe WWTP. This resulted in the proposed point of discharge being relocated from the Waikato River itself to a tributary of the River, Parker Lane Stream. However it also meant that there would be less immediate dilution of the discharge, and a larger reasonable mixing zone, than had initially been proposed under the discharge to the River itself. Eventually, in March 2016 a second CIA in support of the revised proposal was received from Te Taniwha o Waikato.

The outcome of these investigations and further engagement with iwi was a revised resource consents application and AEE for an upgraded Pukekohe WWTP to a proposed Membrane Bioreactor (**MBR**) plus UV disinfection (Enhanced MBR + UV). The revised proposal aimed to improve the quality of the Parker Lane Stream and Waikato River from their current degraded state and contribute towards their protection and restoration in line with the Vision and Strategy for the Waikato River.

In response to these issues and concerns, Watercare substantially revised the proposal and as a result at the hearing the mana whenua submitters to the application either fully supported or conditionally supported the proposal (subject to appropriate conditions).

# Pukekohe Wastewater Treatment Scheme

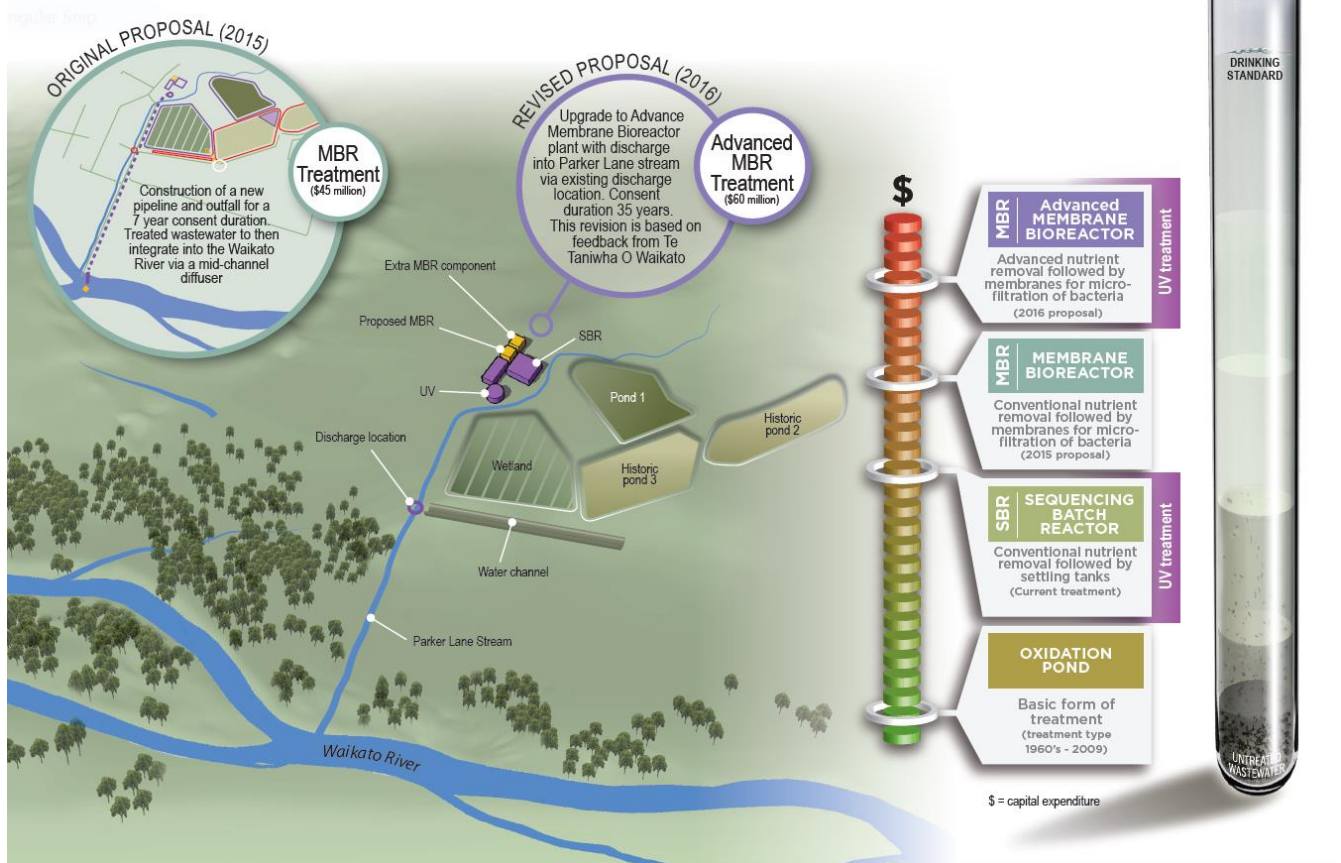


Figure 2: Map showing Pukekohe Wastewater Treatment Scheme and comparison between original and revised proposal

## 2.1.3 PROVIDING FOR LONG TERM GROWTH AND IMPROVING WATER QUALITY

A key issue was the projected increase in wastewater flows as a result of the anticipated population growth and the overarching policy direction to improve the health and wellbeing of the Waikato River.

This required an ongoing assessment of alternative wastewater treatment and discharge technologies and associated assessment of environmental effects of various options with respect to the overall policy direction set through the Vision and Strategy for the Waikato River. The outcomes of this assessment of alternatives were provided to Te Taniwha o Waikato on an ongoing basis which resulted in an iterative process: in particular, improvements to both the discharge location and the treatment technology to be applied, in each case reducing the potential effects of the discharge.

The consented treatment and discharge option (Enhanced MBR + UV) will improve the water quality of the receiving environment—both in terms of a comparison to the effects of the existing discharge, and when compared to background (upstream) water quality in the Parker Lane Stream.

## 2.1.4 RESPONDING TO CONCERNS ABOUT THE EFFECTS OF THE DISCHARGE, AND DEVELOPMENTS IN TECHNOLOGY, OVER THE LONG TERM

At the hearing submitters and the hearing commissioners raised concerns about two areas of uncertainty, both of which (it was suggested) pointed to a consent duration of less than 35 years:

- Uncertainty over the effects of the discharge; and
- Uncertainty over the developments in technology over the 35 year consent duration that Watercare was seeking. One submitter in particular stated that the 35-year duration was unacceptable given the possibility of further technological advances being made over that period.

Whilst Watercare sought a 35-year consent, with support from the Waikato District Council and Pokeno Village Holdings, the Waikato Regional Council's reporting officer, Fish and Game, and Te Taniwha o Waikato sought a 25-year duration.

As long ago as 2001, the Environment Court in *PVL Proteins Ltd v Auckland Regional Council* A61/2001 stated that relevant factors to determining consent duration include whether the applicant proposes, or the consent authority intends to impose, consent conditions that:

- require adoption of the best practicable option (BPO) to prevent or minimise any actual or likely adverse effect on the environment of the discharge;
- require supply of information relating to the exercise of the consent;
- require observance of minimum standards of quality in the receiving environment;
- reserve the power to review consent conditions.

Watercare proposed conditions of this type in its application. In response to uncertainty over the environmental effects of the discharge, beyond the predictions of effects contained in the AEE, Watercare proposed several conditions requiring collecting information over the term of the consent, with Waikato Regional Council able to respond if the information demonstrates that the discharge is causing adverse effects. These included:

- Fortnightly treated wastewater quality monitoring.
- Annual reporting requiring summary results to the Waikato Regional Council.
- A requirement to prepare a MTRR every 5 years.
- A condition allowing Waikato Regional Council to review the consent conditions if the monitoring indicates that the discharge is having adverse effects on the receiving environment.

In respect of cultural effects over time, a consent condition requires Watercare to request an updated cultural impact assessment from Te Taniwha o Waikato (to be provided to the Waikato Regional Council) by the 10<sup>th</sup>, 20<sup>th</sup> and 30<sup>th</sup> anniversaries of the consent.

In response to uncertainty over the advances in wastewater treatment technology over the duration of the consent, the 5 yearly MTRR is required to include an 'outline of any technological changes and advances in relation to wastewater management, treatment, discharge and beneficial reuse technologies' whilst also including an assessment of whether any newly available technology options or combination of options represent the BPO, and advice on whether Watercare intends to adopt that BPO and incorporate such changes.

The combination of continuous monitoring, reporting and consent holder reviews (including an ongoing review of technological changes and advances) were critical considerations in the commissioners' decision to grant the 35-year term to Watercare. The commissioners'



decision on this matter was a majority one, with one commissioner supporting the 25-year term and the remaining two commissioners supporting the 35-year period sought, which was granted, on the basis that:

- Case law (such as the *PVL Proteins* case) supported a longer-term.
- The potential environmental risks were low over the consent period.
- There was little or no uncertainty regarding future environmental effects, given the conditions of consent.
- The suite of conditions had significant safeguards built in, particularly with respect to the MTRR and regular reviews.

As with the Snells Beach and Waikuku consenting projects, for the Pukekohe WWTP consent Watercare offered a consent condition that requires a 5-yearly MTRR. A key purpose of the condition is to require Watercare to prepare a report outlining significant technological changes and advances in relation to wastewater management, inflow reduction, treatment and reuse, and consideration of whether any option or combination of options represents the best practicable option (BPO). The full list of matters that must be contained in the MTRR is set out below:

*(a) An assessment of ongoing compliance with the requirements of this resource consent particularly in relation to any reported non-compliance with consent conditions;*

*(b) An assessment of any relevant national, or regional water quality policies, environmental standards or guidelines and Iwi Environmental Management Plans in effect at the time;*

*(c) An assessment of the results of the monitoring undertaken in accordance with this consent, including the adequacy and scope of such monitoring;*

*(d) A summary of any actual or potential effects of the discharge; irrespective of whether the discharge complies with the conditions of the discharge permit;*

*(e) An outline of any technological changes and advances in relation to wastewater management, treatment, discharge and beneficial reuse technologies; and*

*(f) An assessment of whether any newly available technology option/s or combination of options identified through (e) above represent the Best Practicable Option (BPO) to minimise the potential and actual adverse effects of the discharge and whether the consent holder intends to adopt that BPO and incorporate such changes.*

*(g) Having regard to (a) to (f) above, conclusions and recommendations regarding whether, and what measures should be adopted to reduce the summer total nitrogen mass load and total phosphorus mass load treated wastewater quality limits of condition 29.*

The MTRR is also important for its link to the consent condition relating to review. The review condition for the Pukekohe consent provides Waikato Regional Council with a power to review conditions on the 5<sup>th</sup>, 10<sup>th</sup>, 15<sup>th</sup>, 20<sup>th</sup>, and 25<sup>th</sup> anniversaries of commencement of these consents. Consistent with section 128 of the RMA, the review must be for one of the purposes specified in the consent. These include, after MTRR has been submitted, to

review the BPO assessment contained in that report and respond to the consent holder's intention to adopt/not adopt a revised BPO, if any, for the treatment and discharge of treated wastewater.

Through the inter-relationship of the MTRR and review conditions in the consent, Waikato Regional Council can have confidence in its ability to review consent conditions if the regular BPO assessments it receives from Watercare over the life of the consent identify that new wastewater management treatment, discharge and beneficial re-use technologies now constitute the BPO.

## **3 BROADER LEGAL CONTEXT**

### **3.1 ENVIRONMENT COURT DECISIONS**

Watercare's approach described above and its use of MTRR conditions can be seen in the wider context of Environment Court decisions that concern the use of similar technology review conditions in New Zealand, and illustrate the factors relevant to determining an appropriate term for WWTP discharge consents.

#### **3.1.1 MOA POINT WASTEWATER TREATMENT PLANT DECISION**

The decision of *Wellington City Council v Wellington Regional Council* W020/2009 related to applications to enable the ongoing operation of the Moa Point WWTP.

The applicant (Wellington City Council) had applied to the Wellington Regional Council for two coastal permits for restricted coastal activities (for the discharges), and for a coastal activity permit and a discharge to air permit. The consents enabled treated wastewater from the Wellington City wastewater treatment facility to be discharged approximately 1.87k offshore via a submarine pipeline into the waters of Cook Strait. The plant received approximately 80% of Wellington City's wastewater.

The applicant sought a 35 year duration for the consents but the duration was opposed by submitters, particularly in relation to the proposed bypass discharges (during and / or immediately after heavy rainfall). Following discussions and Court-assisted mediation, parties accepted a revised duration (25 years) and agreed conditions relating to the permits.

Each of the consents included a consent condition that required the preparation of a MTRR which would provide the basis for an assessment of whether any technological changes over the life of the consent would alter the BPO.

In particular the condition required a report on the 9<sup>th</sup> and 19<sup>th</sup> anniversaries of the consent that assessed the following:

- Ongoing compliance with the consent;
- Compliance / consistency with any relevant national or regional water quality policies, standards or guidelines;
- Results of monitoring;
- Any improvements made to the reticulation, treatment or disposal system since the grant of the permit;
- Any residual actual or potential effects of the discharge;

- An outline of technological changes and advances in relation to wastewater management, treatment, disposal and beneficial use technologies, which may be available to address any residual effects; and
- Whether any such options or combination of options represent the BPO to minimise the effects of the discharge and whether the permit holder intends to incorporate such changes.

While the wording of the condition was not examined closely by the Court in its decision (which was a recommendation to the Minister of Conservation to grant the applications), it does record that the conditions agreed between the parties dealt with the relevant issues under section 104, were appropriate in terms of section 108, and would promote the RMA's purpose of the sustainable management of natural and physical resources.

This condition has, in some ways, provided a template for subsequent MTRR conditions used on WWTP discharge consents, including the Watercare consents discussed earlier.

### **3.1.2 SHANNON WASTEWATER TREATMENT PLANT DECISION**

In the Environment Court decision relating to resource consents to enable the ongoing operation of the Shannon WWTP (*Re Horowhenua District Council* [2015] NZEnvC 45), a consent duration of 34 years was approved by the Court. The Shannon plant is owned by Horowhenua District Council and services the communities of Shannon and Mangaore.

The plant is based on an oxidation pond system and first became operational in the 1970s. Plant improvements were completed in 2009. Historically treated wastewater was discharged to Otauru Stream, which flows into the Mangaore Stream, and further downstream the Manawatu River. The District Council applied for the resource consents to enable the ongoing discharges from the operation of the plant.

The proposed discharges included the proposed discharge of treated wastewater to a drain (for a term of 2 years, to allow the new system to be constructed and become operational), onto land by irrigation (for a term of 35 years) and to the river when flows in the river were above a certain level (for a term of 35 years). Other regional and land use consents also formed part of the package of consents considered by the Court.

The applicant had considered a range of alternatives including irrigating all treated wastewater to land. The Court accepted the evidence that to enable all wastewater to be irrigated would require significantly more land and high additional costs, without demonstrable benefits. The Court found that this would not meet the overall purpose of the RMA and not be in the best interests of the community.

The Court commented that consultation, and in particular engagement with Ngati Whakatere and some landowners in the immediate vicinity, had a number of shortcomings. However, the Court's overall conclusion was [at paragraph 94]:

*Subject to appropriate conditions, the effects of the proposal will be no more than minor and there will be an overall improvement in the quality of the local environment as a result of the proposal. The proposal is consistent with the relevant objectives and policies in regional and district planning documents and the new treated wastewater discharge system will ensure the relevant One Plan water quality targets will be met. The proposal will remove more treated wastewater from the Manawatu River than the Council committed to remove under the Manawatu River Leaders Accord.*

The duration of the consents was one of the major issues between the Applicant and Council at the hearing, with the applicant seeking 34 years, and the Regional Council recommending a term of 24 years. The Court concluded that a term of 34 years (to coincide with the common catchment expiry dates in the One Plan) was appropriate for a number of reasons including [see paragraph 110]:

- Effective wastewater collection, treatment and discharge facilities are essential for community health and well-being;
- The applicant had explored a range of possible alternatives and in response to community feedback adopted a solution that placed more emphasis on social, cultural and recreational benefits than economic benefits;
- Treatment plant performance has been demonstrated over a long time-frame to be able to meet the treated wastewater quality used as a basis for assessing the effects of the discharge on the environment;
- Land application of treated wastewater is well proven in New Zealand and internationally and the conditions require the use of best practice management;
- All expert evidence was that the effects on the environment will be no more than minor and undetectable in the case of discharges to the river, and discharges to the river are expected to occur on average of only 10 days a year;
- The proposal was consistent with all relevant planning documents and provisions; and
- The Applicant has a substantial existing investment and this will become even more substantial once the works authorised by the consents are in place.

The consent conditions, as approved by the Court, did not include provision for a monitoring and technology report (or similar). However, the section 128 condition, in particular for the permit to discharge wastewater to the river, does allow for review of the consent conditions if necessary for consideration of whether the option of the BPO is required to prevent or minimise adverse effects from the exercise of the consent.

### **3.1.3 FIELDING WASTEWATER TREATMENT PLANT DECISION**

The Environment Court decision of *Manawatu District Council v Manawatu District Council* [2016] NZEnvC 53 related to resource consent applications and a notice of requirement to alter a designation to enable the upgrading and ongoing operation and maintenance of the Fielding WWTP and dual treated wastewater discharge systems to the Oroua River and to land.

The plant serves the communities of Fielding and Bunnythrope. It was built in 1967 and the treatment approach has developed over the years, with historically all discharges going to the river, but these applications included the proposal to discharge as much treated wastewater as practicable to land when flows in the river were below a certain low flow level.

The plant had continued to operate for a period between 2009 and the date of the decision under section 124 of the RMA because it had applied prior to the earlier consent expiring. The Court commented that it was concerned at the time it had taken to bring the matter to application, particularly where it had been operating under outdated management regimes.

The Court considered there were a number of uncertainties with the proposal and used these to justify a precautionary approach and to require the consent holder to adopt the BPO. The Court granted consent in its decision in March 2016. However, the Court considered more information was required (during the duration of the consents) to confirm the effects of the discharge on the river, how the plant and associated systems were working and the effectiveness of the management options chosen by the consent holder. The Court imposed a consent condition requiring these matters to be comprehensively addressed in an interim report by December 2020 and in a full report to enable a review of the BPO in 2025.

In the decision, the Court commented [paragraphs 144 and 146]:

*"Section 108(2)(e) of the Act provides that where a discharge permit does something that would otherwise contravene Section 15 a condition may be imposed requiring the consent holder to adopt the best practicable option (BPO) to prevent or minimise any actual or likely adverse effect on the environment of the discharge. There are provisions in the One Plan requiring us to consider whether it is appropriate to adopt the BPO.*

...

*We have outlined a range of uncertainties that are of concern to us which in our view justify a precautionary approach. Accordingly we consider it appropriate to require the consent holder to adopt the BPO. We consider that the BPO adopted now could change as more information becomes available and we make provision for this by way of conditions which require the Applicant to provide all relevant information necessary to allow confirmation or review of the BPO before the end of the term of consent."*

Related to the Court's concerns was the duration of the consents sought. While the applicant had originally sought a 35-year term for the discharge consent, it was granted by the Council Commissioners (in the first instance decision) for a term of 10 years, and by the time of the appeal the applicant was seeking a reduced 25 year term. The decision records the Court's concern that a shorter-term consent would not necessarily provide the best outcome in terms of meeting the overall purpose of the RMA. Overall, however, it held that the three factors supportive of a shorter term outweighed the factors supportive of a longer term (certainty, efficiency and cost) "by a very substantial margin". These were:

- uncertainty of performance (relating to the ability of the WWTP as currently proposed to meet the treated wastewater nitrogen limit);
- effects on the *mauri* of the river which was a matter of national importance under section 6(e) of the RMA; and
- a specific Regional Plan policy that required a precautionary approach given the uncertainties about plant performance and poor compliance history.

Taking all of the factors into account the Court granted a 10-year consent.

The Court signaled to the parties that a co-operative and well informed approach would offer the best opportunity to determine the most appropriate long-term solution for Fielding. It recognised that "complete avoidance of the treated wastewater to surface water is unlikely to be a realistic expectation for practical, affordability and overall sustainability reasons" [paragraph 150].

Other consent conditions imposed by the Court required:

- Preparation of a WWTP management plan (to be certified by the Regional Council) to address previous issues with consent compliance and cover matters such as design parameters, operation and maintenance requirements;
- Undertaking a comprehensive assessment of alternatives to address the requirements of the One Plan policy;
- Monitoring for any unexplained increases in infiltration and inflow;
- Preparation of a future directions report confirming the BPO.

This decision highlights the relevant factors that the decision maker will consider when determining whether to grant discharge consents for a long term. In particular, the three reasons the Court imposed a shorter term of consent in this case are important matters for any applicant to consider carefully when preparing an application for the discharge of treated wastewater.

### **3.1.4 FOXTON WASTEWATER TREATMENT PLANT DECISION**

The Environment Court's interim decision in 2018 relating to the Foxton WWTP (*Horowhenua District Council v Manawatu-Wanganui Regional Council* [2018] NZEnvC163) granted consents to enable the ongoing operation of the plant.

The Foxton WWTP is owned by the Horowhenua District Council and serves the community of Foxton. The applicant proposed to remove a direct discharge to the Loop which is part of the Manawatu River, by spraying treated effluent onto surrounding farm land owned by a third party and sought consents to discharge all treated wastewater to land. The owner of the land intends to use the land for beef farming.

The regional consents sought included the discharge of treated wastewater to land which may enter water for 35 years, and the discharge of treated wastewater from the plant onto and into land by irrigation. A number of other consents were required including a short term consent to continue discharging treated wastewater from the plant to the Loop (while the project is built) and land use consent for the intensive farming activity (to allow the beef farming to continue on the irrigated land).

The Court considered whether it was appropriate or necessary to impose a condition requiring the consent holder to adopt the BPO to prevent or minimise any actual or likely adverse effects on the environment of the discharges (under section 108(2)(e)). The Court stated that it considered "*there was a clear requirement to and acceptance by the Applicant of the need to adopt the BPO*" [paragraph 102].

With reference to the consideration of alternatives, the Court noted [at paragraph 160]:

*"The consideration of alternatives provides a key input to the process to determine the BPO for the project. We consider that the BPO needs to be determined on a whole of project basis, not just by selecting the best sites for the treatment plant and land application area which appeared to be the over-riding approach taken by the Applicant. In this particular case where nitrogen losses to water are critical considerations in determining the outcome, the assessment of the BPO must include detailed consideration of other components that could reduce such losses, including lining the oxidation ponds and improving nitrogen removal efficiencies within the FTWP."*

There was considerable discussion in the decision regarding the BPO process undertaken by the Applicant. At the conclusion of that analysis the Court agreed that the proposal before the Court was the BPO [at paragraph 304].

In relation to the duration of the consents sought, the planners for the Applicant and Regional Council agreed that a 31-year term was appropriate (to align with common expiry dates for the catchment). Other parties expressed a range of views including seeking a shorter term of 10 years. The Court commented that it considered whether a shorter term would be appropriate "but concluded that the community needs certainty for essential infrastructure and this supported a longer term" [at paragraph 323]. The Court held that a 31 year term was appropriate, subject to conditions requiring reviews.

The Court stated [at paragraphs 326 and 327]:

*"In view of the uncertainties associated with the proposal, we consider that there should be an initial operational review no later than two years after commencing irrigation to allow for any initial start-up issues to be resolved. Thereafter, and subject to a satisfactory initial review, reviews shall be every three years with provision to move to five-yearly reviews after two consecutive three-yearly reviews showing satisfactory operation.*

*These reviews are limited to the extent to which the operating procedures adopted satisfy the relevant resource consent conditions. They are in addition to the optimization investigation required by Condition 33 of the General Conditions..."*

This case highlights that the use of review conditions (under section 128), with the power to review arising regularly throughout the term of the consent, can be an alternative to imposing a shorter term, as was done in the previous Fielding decision. However, there are limits to the Council's powers under a review condition which is focused on the conditions of consent. The outcome of a review cannot effectively stymie a resource consent and does not enable cancellation of the consent itself (see *Barrett v Wellington CC* [2000] NZRMA 481 (HC)).

### **3.2 CONCLUDING COMMENTS ON CASE LAW**

Together these cases provide a useful illustration of key considerations for any applicant to be cognisant of in the preparation of resource consent applications for the discharge of treated wastewater to freshwater and coastal receiving environments.

In particular, a robust consideration of alternatives and comprehensive engagement with mana whenua, and other key stakeholders, are likely to be critical to the success of the application in terms of obtaining a long-term consent on satisfactory conditions. While the Environment Court has recognised the positive benefits of wastewater collection, treatment and discharge facilities, there is also a strong drive to ensuring that the proposed discharge represents the BPO in the particular circumstances and on an ongoing basis. While the Manawatu-Wanganui region decisions do not include provision for a MTRR type condition, the Court has also imposed conditions reflecting the power in section 128 for the Council to review the conditions of a consent to ensure that effects of any discharges are minimised.

In terms of duration, these decisions reiterate the relevant considerations that the council decision maker or Environment Court will weigh up and balance when determining an application for a 35-year discharge consent. This includes the certainty and costs considerations, against any uncertainties in terms of the understanding of the environmental effects of what is proposed and the particular receiving environment. Where

there are concerns regarding the latter, these have (for example in the Fielding decision) weighed against the approval of a long term consent.

## **4 CONCLUSIONS**

The following observations come from the combined experience of the authors. To justify the significant investment in WWTPs, either new plants or upgrades to existing plants, it has been necessary for Watercare to secure long-term consents that provide certainty that the discharges will be authorised well into the future. This certainty ultimately produces a better outcome for Watercare's customers, and the environment.

The high level of investment in treatment technology evident in the Watercare examples discussed in this paper, may not always be realistic or achievable for smaller wastewater providers without the customer or ratepayer base that can fund this investment.

However, other features of Watercare's approach which have enabled long-term consents to be approved include:

- the use of the 5-yearly MTRR condition linked to a review condition;
- setting the BPO as a project objective at the outset;
- early engagement with key stakeholders and in particular iwi, and taking mana whenua through the options process and consideration of alternatives; and
- the preparation of an expert / robust application and early involvement of the team of experts to guide the applicant towards the BPO.

The cases and our experience suggests these features can be usefully applied to all applications for WWTP consents, whether large or small, urban or rural, throughout New Zealand.

## **REFERENCES**

*Barrett v Wellington CC* [2000] NZRMA 481 (HC)

*Horowhenua District Council v Manawatu-Wanganui Regional Council* [2018] NZEnvC163

*Manawatu District Council v Manawatu District Council* [2016] NZEnvC 53

*PVL Proteins Ltd v Auckland Regional Council* A61/2001

*Re Horowhenua District Council* [2015] NZEnvC 45

Resource Management Act 1991

*Wellington City Council v Wellington Regional Council* W020/2009