
REPORT 6
(1215/52/IM)

WESTERN TREATMENT PLANT – ENVIRONMENT COURT APPEAL OPTIONS

1. Purpose of Report

The purpose of this report is to ask the Council to reconsider a resolution it made in August 2008 requiring access agreements to be reached with affected landowners prior to committing to renew, by 2023, the outfall pipeline of the Western Wastewater Treatment Plant. The Council's offer to renew the pipeline was made in order to resolve appeals to the Environment Court in relation to resource consents granted for the Plant. In the event that access arrangements are not agreed, the implications of other options to access the land of affected landowners are discussed in the paper.

2. Executive Summary

In 2006, Wellington City Council applied for five resource consents to continue the operation of the Western Wastewater Treatment Plant in South Karori. The Regional Council's Hearings Committee granted consents subject to conditions. In January 2007 the City Council appealed the decisions to the Environment Court, as did three other parties.

Key issues under appeal were the duration of the consents, the discharges of treated and untreated wastewater to the Karori Stream and to the South coast during wet weather, the condition and capacity of the outfall pipeline to the Coast and the effect of pipeline leakage on the stream environs. Three mediations have been held to resolve the issues under appeal.

In August 2008, the Strategy and Policy Committee and later the full Council passed the resolution:

“Agrees to authorise officers to implement option 3 as outlined in section 5 of the officer's report. This option includes the replacement of the South Karori Wastewater Treatment Plant outfall pipeline within 15 years.”

The replacement of the pipeline was conditional on the Council reaching agreement on appropriate access, construction and reinstatement agreements with the affected landowners. A mediated agreement was reached on this basis in October 2008.

Since then, officers of the Council have sought to progress the access agreements but, despite numerous attempts, this has not been successful. The lack of access agreements means the mediated agreement cannot stand as it is. The reason for returning to the Committee is to ensure it is happy to continue with the pipeline replacement, despite access not being agreed. In addition, the Environment Court is requiring resolution of the appeals and has given the Council until 26 March to decide whether the mediation agreement can become unconditional, whether another agreement can be reached or whether the appeals need to go to a full hearing.

The report concludes that reaching agreements over access with affected landowners is not required to enable ongoing maintenance and replacement of the outfall pipeline by the end of 2023. It appears there are sufficient access provisions available to the Council under existing legislation to enable the Council to fulfil its obligations, without requiring additional access agreements prior to resolution of the appeal. This means the appeals could be resolved simply by removing the requirement for access from the mediation agreement.

3. Recommendations

Officers recommend that the Strategy and Policy Committee:

- 1. Receive the information.*
- 2. Recommend that the Council agree to revoke Council's requirement that replacement of the Western treatment plant's outfall pipeline is conditional on the Council obtaining suitable access agreements with affected landowners.*
- 3. Note that parties to the Environment Court appeal concerning resource consents for the Western wastewater treatment plant will be informed of Council's decision. Consent orders can then be drawn up to resolve the appeals.*

4. Background

In 2006 Council applied for five resource consents that were required to continue operating the Western Wastewater Treatment Plant (WWTP) in South Karori. The consents sought were as follows:

1. The discharge of treated wastewater to the Coast (via the 6.25km pipeline to the coast)
2. The discharge of untreated (but milli-screened and settled) wastewater to the Coast (via the 6.25km pipeline to the coast) during very wet weather events
3. The discharge to air from the biofilter and the plant
4. The discharge of treated wastewater to the stream in very wet weather events
5. The discharge of untreated (but milliscreened) wastewater to the stream during exceptionally wet weather events.

This paper mainly relates to the wet weather stream discharge consents (4 and 5 above). In very wet weather the flow of wastewater is significantly increased by the entry of stormwater into the wastewater network. At times it exceeds both the storage within the network (and at the plant), the treatment capacity of the plant, and the capacity of the pipeline to the coast.

When that occurs 2 things happen:

1. The flows that are unable to be treated, are discharged to the coast (via the outfall pipeline)
2. The treated flows that can not be discharged to the coast via the pipeline (due to capacity) are discharged direct to the Karori Stream.

In exceptionally wet weather events (when the wet weather flows are at their maximum) there is a further discharge to the stream of untreated (but milli-screened) wastewater.

Currently discharges of treated wastewater to the stream are happening on an average of 3-4 times a year, and the untreated (but milli-screened) discharge has occurred 11 times in the past 7 years.

All consents were sought for a term of 25 years. The Hearings Commissioners granted the air discharge for 25 years, and the stream discharges for 10 years, and recommended that the treated discharge to the coast and untreated (but milli-screened) discharge to the coast were granted for 20 and 10 years respectively. While the Hearings Committee could not require the discharges to the stream to stop, it sought to send a strong message to WCC that there was a strong expectation on WCC to be in the position to stop the stream discharges at the end of that 10 year period.

A number of appeals were lodged by both WCC and submitters in January 2007. WCC appealed all of the consent durations (with the exception of the air discharge) and a number of conditions. Action for the Environment Inc and West Wellington Environmental Protection Society Inc (AFE/WWEPS) jointly appealed the durations and sought 3 years only for all consents, except the discharge of untreated (but milli-screened) wastewater to the stream which they have asked the Court to decline (WWEPS have subsequently withdrawn their appeal). The New Zealand Forestry Group (NZFG) (which owns some of the land on which much of the pipeline to the Coast is located) has also appealed a number of conditions.

Officers have been involved in three Environment Court mediations since August 2007 and further ongoing discussions. During these sessions all but one issue has been resolved, that being the issue of reaching agreement with affected landowners to enable access to maintain and eventually replace the outfall pipeline. The key issue for all parties had been the Council's proposal at the hearing to continue the stream discharges until such time as the useful life of the pipeline to the coast is at an end (and the pipeline is replaced) or for 25 years (whichever is sooner). This issue revolves around the effects of the stream discharges on the physical, cultural and social/ recreational qualities of the

stream and the condition of, and the timing of the replacement of, the pipeline to the Coast.

The pipeline is relevant as when it is replaced the capacity will be increased (i.e. a larger diameter pipe will be installed). This increased capacity provides the only practical opportunity to totally eliminate the 2 stream discharges. AFE (supported by NZFG) argue that replacement of the pipeline presents a viable, and far preferable, alternative to the stream discharges and that it should be implemented immediately (and the 3 year term sought will allow for that to occur). They argue that the pipeline is in poor condition and needs to be replaced. The appellants and Greater Wellington would not accept a proposal whereby the Council would commit to replace the pipeline at the end of its useful life, as determined by an independent expert.

During the mediation in June 2008, NZFG and AFE with assistance from Greater Wellington, tabled a proposal, without prejudice, that might enable all appeals to be resolved by consent. The parties proposed a condition obliging WCC to replace the pipeline to the coast by a certain date. Greater Wellington suggested that 15 years would be appropriate, and have confirmed that if that commitment was made by WCC it would agree to the extension of the stream discharge consents to 15 years (from 10 years). The other parties indicated that they would each prefer a shorter time period for the pipeline replacement and the consent durations (for instance 10 or 12 years) but were supportive of WCC making a firm commitment to a replacement date, rather than having the uncertainty of not knowing when that decision will be made and therefore when the stream discharges will cease.

In August 2008¹, the Strategy and Policy Committee considered options to progress the mediation process. The Committee and subsequently the Council resolved to authorise officers to negotiate a settlement that provided for the replacement of the outfall pipeline by 2023, 15 year durations on the 2 stream discharge consents subject to reaching agreement on appropriate access, construction and reinstatement arrangements with affected landowners.

Council's commitment to replacing the pipeline was crucial to reaching agreement in the Environment Court mediation of October 2008. However, it was noted in the mediation agreement that:

“Wellington City Council's agreement is subject to reaching a satisfactory agreement on appropriate access and construction arrangements with the affected landowners”

Since October 2008, Council officers have endeavoured to progress an access agreement with the one landowner (landowner 3) who has raised the most concerns. It is felt that if access issues could be resolved with that entity then such an agreement could be used as a basis for agreements with the other two affected landowners. Over the last five years suitable access arrangements have been reached with the other two landowners without difficulty. To date efforts to reach agreement with landowner 3 have not been successful. Officers have

¹ Western Treatment Plant – Resource consent condition options; report to Strategy and Policy Committee, 21 August 2008.

forwarded a draft access agreement and plans of the affected land and made multiple attempts to discuss the issues and move the agreement forward. However, they have not had any success with reaching agreement.

It should be noted that only one of the landowners affected by the maintenance of, and the proposed renewal of the outfall pipeline is a party to the appeal (NZFG). Council has had no difficulty negotiating access with this party since they have owned the land. Thus the Council and the Environment Court have limited ability through the appeal process to influence the resolution of access agreements.

An Environment Court pre-hearing conference was held on 27 January 2010 to review progress towards resolving the appeal. The Judge noted that the appeal process had been underway for nearly three years and needed to be resolved. The Judge was prepared to give one more opportunity for the October 2008 mediation agreement to be put into effect or some other settlement proposal to be agreed. The Judge² gave the parties until 26 March 2010 to report on whether a satisfactory agreement has been reached or not.

Officers continue to try and reach agreement on appropriate access and construction arrangements with the affected landowners. However in the event that suitable arrangements are not agreed by 26 March 2010, the Council has to advise whether it will stand by the mediation agreement (ie, to replace the pipeline) without access agreed, or not. If agreement could not be reached, the appeals would be set down for a hearing.

Normally mediation proceedings of the Court are confidential but the Court is aware of the need to refer these matters back to the Committee. It should be noted that any agreement reached in mediation will still need to be ratified by the Court and in the case of the coastal discharge permits, by the Minister of Conservation.

5. Discussion

Resolution of the Western treatment plant appeals are required by the Environment Court either by way of agreement or through a full hearing. The mediation agreement as currently worded is in danger of falling over, as suitable access arrangements with affected landowners have been unable to be agreed.

5.1 Why does the Council wish to formalise access agreements?

Currently the Council by its officers or agents, may enter onto private land to alter, renew, repair, or clean works (such as the lawfully constructed outfall pipeline) under the Local Government Act 2002 (**LGA 2002**). Over the last twenty years or so, access difficulties have resulted in delays to maintenance activities and at times strained relations between officers of Council and affected landowners. Experience of past difficulties encouraged officers to try and address these issues before committing to renew the pipeline.

² Minute of Environment Court, Judge C.J Thompson, concerning appeals under the Resource Management Act 1991 between Wellington City Council, Wellington Regional Council, New Zealand Forestry Group, Action for the Environment Incorporated and others; 27 January 2010.

In the spirit of co-operation that led to agreement at the October 2008 mediation, the Council offered to establish access agreements with affected landowners to formalise understandings and the obligations of all parties, to clarify landowner's and the Council's rights, to enable efficient delivery of current pipeline maintenance activities and to provide for pipeline renewal activities in the years leading up to 2023.

The Council has no current significant access issues with two of the affected landowners and provided a draft access agreement to the third landowner in June 2009. This latter landowner has appointed a legal representative but no response has been received as to how the draft agreement could be amended to suit their needs. Meanwhile, the Council continues to rely on provisions of the Local Government Act to conduct pipeline inspection and maintenance activities.

5.2 What happens if agreements with affected landowners cannot be achieved?

If agreement cannot be reached with affected landowners, then unless the Council decides to waive the access condition, the mediation agreement cannot stand.

Put simply, this means that the Council has to decide whether to:

- Abide by the balance of the terms of the mediation agreement, without access in place (ie, waive that term of the agreement).
- Attempt to come to some other agreement.
- Proceed to a hearing.

5.3 If access cannot be agreed - what can Council do?

The LGA 2002 gives the Council statutory powers to enter onto private land to construct new works or to maintain existing works, subject to a specific process being followed. Which process to follow depends on whether the replacement of the existing pipeline, with an increased diameter pipeline is a 'renewal' or construction of a new work. That issue has not yet been determined and will depend on matters such as final design and location and what new works need to be done. However, whether it is a new work or a renewal, the LGA 2002 sets out the process the Council must follow to access private property to do the work.

Accessing private land to 'renew' pipeline

Under section 181 of the LGA 2002 the Council may enter private land to renew or repair any work lawfully constructed under any former Act. Before the Council can enter onto the land, it must first give 'reasonable notice' of the intention to enter the land to the owner and the occupier (if any). 'Reasonable notice' is not defined, but the Council generally applies the process that is required under its general powers of entry in section 171 of the LGA 2002, which is notice:

- To the occupier of its intention to enter - not less than 24 hours in advance; and

- To the owner, if the occupier is not also the owner - as early as reasonably practicable before entry, or as soon as reasonably practicable after entry has been made.

Once reasonable notice is given, Council may enter onto the land and do the work.

Accessing private land to construct a 'new' pipeline

Under section 181 of the LGA 2002 the Council may enter private land to construct works that it considers necessary for sewage and stormwater drainage. Council must not enter private land to construct a new pipeline unless it has:

- The prior written consent of the owner; or
- Complied with the requirements of Schedule 12 of the LGA 2002.

If the prior written consent of the owner has not been obtained, Schedule 12 sets out that the Council must complete the following steps:

- Provide a description of the works, accompanied by a plan for public inspection.
- Give written notice of the intention to construct the works to the occupier and the owner.

The owner/occupier has one month to object and if a written objection is received the Council must hold a hearing and give the objector an opportunity to be heard. After hearing any objector, the Council can decide to abandon the works or to proceed with the works, with or without any alterations.

Any person who is aggrieved by the Council decision may appeal to the District Court within 14 days of the decision. The Court's decision is final.

In terms of construction of a new work or a renewal, the Council will have to comply with the Public Works Act 1981 with regard to compensation if there is injurious affection to the land as a result of the works.

In other words, subject to following a prescribed process, the Council can obtain access for maintenance and renewal of the pipeline, without any access agreements in place.

5.4 Options

Table 1 Potential options available to Council to assist resolution of the Environment Court appeal

No.	Option	Comment
1	Obtain landowner access agreements by 26 March 2010 and forward October 2008 mediation agreement to the Environment Court for ratification.	Looking unlikely – process began early in 2009 but little progress has been made, despite substantial efforts by officers. At this stage Council has not even been able to elicit a response to the last email correspondence. Even if agreement is in place with current owners, it does not bind future owners unless agreement is turned into a binding easement. Even without the agreement of landowners, the Council still has the statutory right to access the land.
2	WCC and other appeal parties develop an alternative “settlement proposal” acceptable to the Environment Court	This would require renegotiating issues already canvassed and getting all the parties back together. Given the timing provided for by the Court, this option is unlikely to be able to be completed by 26 March 2010. It could only realistically proceed if the Council were still to agree to replace the pipeline and that being the case there seems no benefit in pursuing this over keeping the current agreement and removing the access requirement.
3	WCC offers to drop the condition requiring access arrangements with landowners to be agreed as a condition of the mediation agreement and the balance of the agreement stands (ie, replace the pipeline in return for longer duration).	Subject to the other parties agreement to removal of the access requirement (which seems likely), the appeals could simply be resolved by varying the mediation agreement (NB: the coastal discharge still has to be approved by the Minister).
4	Revoke the agreement to replace the pipeline by 2023 and proceed to an Environment Court hearing.	Appellants have previously indicated that pipeline renewal is crucial to their agreement to extend consent durations. Depending on the scope of the hearing, the cost to the Council alone is estimated to lie in the range of \$200,000 to \$300,000. There would also be no certainty as to the duration given by the Court and/or the Minister.

5.5 Future proposal to access outfall pipeline

The Council will continue reasonable endeavours to agree access arrangements with affected landowners. At present the Council relies on the LGA provisions without additional written agreements or easements. Securing easements to facilitate access has been considered, but the benefits do not appear to outweigh the costs.

The favoured approach is to try and progress access agreements to the mutual benefits of parties, but not to make this a pre-requisite for resolution of the appeal. To manage the risk of access difficulties preventing pipeline renewal within timeframes set in resource consent conditions, the Council will compile a project plan covering the design, construction and commissioning of the new

pipeline. This plan will be prepared to support the detail of the CX334 wastewater renewal budget in the wastewater asset management plan and included in the 2012/2022 update to the LTCCP.

5.6 Consultation and Engagement

Extensive consultation has been carried out with all stakeholders and affected parties as part of the resource consent process and is continuing especially with landowners affected by the outfall pipeline.

5.7 Financial Considerations

Pipeline renewal expenditure (estimated at \$10 million) will be sourced from project CX334, wastewater network renewals of the Wastewater Asset Management Plan for construction in about 2020 to 2023, outside the timeframe of the current 2009/2019 LTCCP. Expenditure to resolve the Environment Court appeal is budgeted for from CX334 in 2009/10 and 2010/11.

5.8 Climate Change Impacts and Considerations

The impacts of climate change were considered and reported in the Assessment of Environmental Effects prepared to support the application for resource consents.

5.9 Long-Term Council Community Plan Considerations

The Council's commitment to replace the outfall pipeline will be reflected in project CX334, wastewater network renewals, to allow for the investigations, design construction and resource consents work necessary. It is envisaged that preparatory work for pipeline replacement will start in about 2020, running through to 2023 and be included in the updating of the LTCCCP to occur in 2012/2013.

6. Conclusion

The Environment Court is requiring resolution of the appeals relating to the granting of resource consents for the Western wastewater treatment plant. All issues appear to have been resolved except for a condition sought by the Council that suitable access arrangements be agreed with affected landowners to enable ongoing maintenance and the replacement of the outfall pipeline by the end of 2023. It appears there are sufficient access provisions available to the Council under existing legislation to enable the Council to fulfil its obligations without requiring additional access agreements prior to resolution of the appeal. Accordingly, it is recommended that the Council remove the requirement for access agreements from the mediation agreement. This would allow the appeals to be resolved without the need for a hearing.

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Supporting Information

1) Strategic Fit / Strategic Outcome

The policy supports Council activity as a provider of wastewater services and contributes to Council meeting the outcome of “reduce its environmental impact by making efficient use of.....resources....and minimising waste

2) LTCCP/Annual Plan reference and long term financial impact

Pipeline renewal expenditure will be sourced from project CX334, wastewater network renewals of the Wastewater Asset Management Plan for construction in about 2020 to 2023, outside the timeframe of the current 2009/2019 LTCCP. Expenditure to resolve the Environment Court appeal is budgeted for from CX334 in 2009/10 and 2010/11.

3) Treaty of Waitangi considerations

Consultation has been carried out with the tangata whenua as part of the resource consent process. No appeals have been received from them regarding these consents and they have not requested to be further involved at this stage.

4) Decision-Making

This is not a significant decision in that the expenditure will be required for Asset management purposes regardless. The decision is limited to the timing of the expenditure.

5) Consultation

a) General Consultation

Extensive consultation has been carried out with all stakeholders and affected parties as part of the resource consent process.

b) Consultation with Maori

see 4 above

6) Legal Implications

Council's lawyers have been consulted during the development of this report.

7) Consistency with existing policy

The recommendations in this report are consistent with existing WCC policies.