

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of a Board of Inquiry appointed under s149J of the Resource Management Act 1991 to determine an application for resource consents sought by Watercare Services Limited for its Waikato River Take and Discharge Proposal.

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**MEMORANDUM OF COUNSEL FOR WATERCARE SERVICES LIMITED**

**Response to deferral request**

**25 August 2021**

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## **MAY IT PLEASE THE BOARD**

1. This memorandum is filed in response to the 24 August 2021 joint memorandum for Te Whakakitenga o Waikato Incorporated (**Te Whakakitenga**) and the Waikato River Authority (**joint memorandum**), which opposes the conduct of the hearing by video conference and requests deferral of the hearing that is scheduled to commence on 31 August 2021.

### **Summary of Watercare's position**

2. Watercare has considered and acknowledges the reasons for deferral expressed in the joint memorandum. In response and in summary, Watercare considers that a fair hearing by video conference commencing on 31 August is both achievable and necessary, and requests that the hearing commence as currently scheduled.
3. The Board's 23 August memorandum advised that the first week of the hearing will now be conducted by video conference, with a decision about the second week to be made once the relevant Covid-19 alert levels are known with more certainty. Watercare respectfully supports this general approach, which provides the parties with certainty about the first week of the hearing while not pre-judging the situation the hearing participants may be in for the second hearing week.
4. The hearing schedule produced by the EPA indicates that the parties presenting in the first week will be Watercare, Waikato Regional Council, John Kerr and four submitters who support the application. Te Whakakitenga, other mana whenua and the Waikato River Authority are to appear in the second week. Watercare is able to present its case by video conference, and submitters will have a fair opportunity to cross examine Watercare's witnesses.
5. Watercare proposes that the first hearing week proceed via video conference, with the Board deferring until the end of the first hearing week a decision as to whether the second hearing week:
  - (a) Runs from 6 – 10 September 2021, or is deferred; and
  - (b) Proceeds by video conference or proceeds in person.

6. This approach allows the hearing to substantially progress, with no immediate impact on how Te Whakakitenga, other manawhenua and the Waikato River Authority present their cases to the Board. However, Watercare respectfully submits that should there be any deferral of the second hearing week, it should not be so long as to prejudice the Board's ability to meet its present requirement to issue its decision by 12 November 2021.

### **Virtual hearings**

7. Virtual hearings have become a much more regular occurrence since the 2020 Covid lockdowns, and are expressly enabled under section 39AA of the RMA. The Ministry for the Environment has produced helpful guidance for running Council-level virtual hearings in a fair, transparent and participatory manner, in accordance with legislative requirements: <https://environment.govt.nz/publications/practical-guide-to-virtual-hearings-under-the-rma/>.
8. While Board of Inquiry hearings differ in some respects (including the ability to have cross-examination), the principles and approach in the guidance remain helpful. Counsel have been involved in a range of hearings that have involved cross-examination over video-conference facilities, with little to no difficulty or disruption.
9. As acknowledged in section 39AA and the MfE guidance, fairness remains an important aspect for virtual hearings. The latter document confirms that there is no reason why the principles and requirements of open and natural justice cannot be met by a virtual hearing. It also confirms that tikanga is dynamic, and that protocols and ceremonial practices can be adapted to suit a change in circumstances. Counsel note that the guidance was prepared with input from experts in tikanga.

### **Response to matters raised in request for deferral**

*Mechanisms to enable preparation for and attendance at the hearing are readily available*

10. The joint memorandum raises concerns about the parties and their counsel being compromised in their ability to prepare for the hearing, including in relation to access to documents and the co-ordination of witnesses and submitters.

11. Watercare acknowledges that the current Covid-19 lockdown has had an impact on preparation for the hearing. The adjustments that are needed affect all parties, including Watercare. However:
- (a) All of the key documents in relation to the proceedings have been available online throughout, so there should be no issue with access to documents.
  - (b) Watercare itself has responded to the restrictions and has adapted its preparation so that it will be ready to proceed on 31 August as scheduled, and it remains committed to participating in a virtual hearing in accordance with the Board's directions.
  - (c) Watercare has the largest number of witnesses of any hearing participant and has been able to make arrangements to co-ordinate them using phone, email and video communications that have been commonplace throughout New Zealand for a long time. Te Whakakitenga and the Waikato River Authority do not suggest they are *unable* to use these mechanisms.

*A virtual hearing is readily able to be accommodated*

12. The joint memorandum refers to the nature of the hearing (including likely significant questioning and/or cross-examination) making it very difficult to participate effectively.
13. However, the hearing schedule, which is based on cross-examination requests prepared when the parties anticipated a hearing in person, confirms that this hearing will not involve significant questioning or cross-examination. Te Whakakitenga has signalled a total of 3.2 hours of cross-examination, and the Waikato River Authority a total of 1.2 hours. Both Te Whakakitenga and the Waikato River Authority intend to cross-examine only 5 out of 17 witnesses appearing for Watercare. Watercare has signalled a slightly larger amount of time for questioning submitters' witnesses and so Watercare is more affected if cross-examination is undertaken via video conference: but the overall amount of cross-examination is actually quite limited.

*Participation by kaumātua is important and can be accommodated*

14. Watercare acknowledges the importance of all submitter participants, including kaumātua, being able to participate appropriately in the hearing.

- 15.** As noted earlier, the MfE guidance on virtual hearings confirms that tikanga is dynamic, and practices including tangihanga have adapted to cater for virtual participation. In some situations, virtual participation better provides for the health and wellbeing of all participants. Observance of appropriate protocols remains achievable in a virtual hearing and Watercare supports the participation of kaumātua to the fullest extent possible.

*Familiarisation with the site is still achievable*

- 16.** As noted in the joint memorandum, the intended site visit will not be able to occur before the hearing commences next week.
- 17.** However, Watercare has made preparations for a site flyover video to be presented and explained to all hearing participants on the first day of the hearing to provide useful context until the Board is able to carry out a site visit in person. Other participants may wish to present photo or video material to the Board to contextualise the points being made in their submissions before a site visit is undertaken, and Watercare would support that.
- 18.** There is no absolute requirement to hold a site visit before a hearing commences, and a site visit after the Board has heard some or all of the evidence could have significant advantages because the Board will have more context for what it is viewing on the site visit. Watercare would hope and expect a site visit in person could be undertaken by the Board in person before adjournment of the hearing, allowing locations of significance to mana whenua to be visited.

*The current drought is creating urgency*

- 19.** The joint memorandum states that there is no particular urgency that requires the hearing to proceed at this time.
- 20.** However, for the reasons outlined below, it is critical to Watercare, and to Auckland's water supply, that certainty is obtained about this application by November 2021.
- 21.** Since late 2019, the Auckland region has been in a severe drought with rainfall for the period between January and May 2020 being 30% of what would normally be expected. In response to the drought, Watercare and Auckland Council implemented a range of measures to both reduce demand and improve security of supply during the drought,

including introducing water restrictions, investing in the Waikato 50 water treatment plant, and re-establishing supply from previously decommissioned sources (including the Hays Creek Dam and Pukehohe groundwater source). The urgency of securing a further water source in response to the drought also contributed to the call-in of the present application by the Minister.

- 22.** Auckland is still in a drought, with storage levels currently at approximately 62% compared to an historical average of 88% for this time of year. Watercare currently expects to enter the upcoming summer with dam storage at 70-75%, which is lower than last year.
- 23.** As a result, securing additional water for processing through Watercare's Waikato 50 treatment plant is now critical as part of the drought recovery, and to avoid the adverse effects on Auckland and the economy that would follow if the drought continues. Should the Board grant consent to the water permit sought, Watercare intends to draw water under that consent as soon as the consent commences, treating that water via the "Waikato 50" WTP which became operational in July 2021.
- 24.** With the Waikato 50 WTP in place, Watercare has the treatment capacity at the Waikato River site to process up to 225 million litres of water per day (**MLD**). Abstracting this full amount this summer will be essential to reduce the depletion of already-low storage lakes.
- 25.** In the absence of the water permit sought from the Board, between October and April Watercare is only permitted to take 150 MLD from the River if the River (assuming the River is below median flow), and up to an additional 25 MLD subject to that water not being required by Hamilton City Council. Gaining temporary access to additional water not being used by current consent holders would require additional consents from the Waikato Regional Council, and is not a straight-forward process.
- 26.** Accordingly, Watercare has a genuine need for certainty about the existing application within the existing 9-month statutory timeframe. If the decision is made within that time (i.e. by 12 November 2021), the appeal period will expire on or about 3 December 2021, providing certainty at that point in time. If the 9-month time period is extended and the appeal period is pushed out into January or later, Watercare will have lost several weeks of potentially greater abstraction from the Waikato River, and there is an increased likelihood of supply constraints later in the summer.

27. Contrary to the view proffered in the joint memorandum, there is genuine urgency that requires the hearing to proceed. There is a real prospect that a deferral would prejudice both Watercare and the communities that rely on it for provision of water supply.

## Conclusion

28. In light of all of the above matters, Watercare respectfully requests that the hearing commence as currently scheduled on 31 August 2021. The parties presenting in the first week (Watercare, Waikato Regional Council, John Kerr and four submitters who support the application) could all present their cases via video conference.
29. Whether submitters scheduled for the second week present their cases virtually in accordance with the current directions, or the second hearing week is deferred to allow for the possibility of these submitters presenting in person, can be revisited at the conclusion of the first hearing week when more information should be available about ongoing Covid-19 restrictions.
30. This approach allows the hearing to substantially progress, with no immediate impact on how Te Whakakitenga, other manawhenua and the Waikato River Authority present their cases to the Board. Watercare is able to present its case by video conference, and submitters will have a fair opportunity to cross examine Watercare's witnesses.
31. However, Watercare respectfully submits that should there be any deferral of the second hearing week, it should not be so long as to prejudice the Board's ability to meet its present requirement to issue its decision by 12 November 2021, given the matters outlined in paragraphs 19-27 above.
32. Counsel are available at short notice to discuss these matters if that would assist.



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25 August 2021