

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

Decision No. [2020] NZEnvC 44

IN THE MATTER of the Resource Management Act
1991

AND of the proposed direct referral of
applications for resource consents for
activities associated with Te Ahu a
Turanga: Manawatū Tararua Highway
Project

AND

IN THE MATTER of an originating application under
sections 281 and 291 Resource
Management Act for waivers and
directions

BETWEEN WAKA KOTAHI NZ TRANSPORT
AGENCY

Applicant

AND MANAWATŪ-WHANGANUI
REGIONAL COUNCIL

Regulatory Authority

Court: Environment Judge B P Dwyer sitting alone under s 279 of
the Act

Hearing: In Chambers at Wellington

Counsel: D Randal, T Ryan and F Wedde for Waka Kotahi NZ Transport
Agency

Date of Decision: 16 April 2020

Date of Issue: 16 April 2020

**DECISION OF THE ENVIRONMENT COURT
ON EX-PARTE NOTICE OF MOTION
BY WAKA KOTAHI NZ TRANSPORT AGENCY UNDER SECTIONS 281 AND
291 RMA FOR WAIVERS AND DIRECTIONS**



- A: Waivers granted and directions made on anticipatory basis as per paras 5, 6 and 7 of notice of motion
- B: Indicative comment made on key initial steps and dates

REASONS

Introduction

[1] Waka Kotahi NZ Transport Agency (the Transport Agency) proposes to construct approximately 11.5 kms of new state highway between Ashhurst and Woodville in the Manawatū (the Project) to replace the indefinitely closed SH 3 route through the Manawatū Gorge. The Project requires authorisation by way of both notice of requirement (NoR) from three territorial authorities and resource consents from the Manawatū-Whanganui Regional Council (the Council).

[2] On 27 March 2020 the Court issued an order by consent in respect of the NoRs.

[3] On 11 March 2020 the Transport Agency lodged with the Council an application for various regional resource consents which it requires to advance the Project in conjunction with the NoRs. At the same time, the Transport Agency made a request to the Council pursuant to s 87D RMA that the resource consent application be directly referred to this Court for determination.

[4] The application for resource consents was formally accepted by the Council on 17 March 2020 and public notification of the application was made on 25 March 2020. I am advised that submissions on the resource consent application are due to close on 24 April 2020. I am also advised that the earliest date at which the Council might approve the request for direct referral is 25 May 2020. Assuming that the Council grants the Transport Agency's request on that date, it anticipates filing a notice of motion with the Court pursuant to s 87G(2)(a) applying for the grant of the resource consents on 26 May 2020.

[5] This notice of motion seeks waivers and directions as to the manner in which the anticipated proceedings before the Court might progress. In particular the Transport Agency seeks:



- Waivers and directions to enable the simplification of the s 274 interested party process in the proceedings before the Court;
- Waivers and directions to facilitate the electronic case management of the proceedings;
- Confirmation of key early steps and dates ahead of hearing and an indicative endorsement of an amended overall draft timetable provided by the Transport Agency;
- Directions relating to communication regarding the proceedings with the public.

Background Issues

[6] Before determining the notice of motion, I make two general observations by way of background.

[7] The first is that the Court is aware of the contended significance of the Project which seeks to replace a section of SH 3 that has been rendered unusable for a period of somewhere in the order of three years. Evidence regarding the Project and its importance was provided to the Court as part of a jurisdictional hearing on which the Court issued a decision on 3 March 2020.¹

[8] I appreciate that the matter of the significance and/or urgency of the Project might potentially be a matter of contention at the hearing of resource consent applications. I do not prejudge that issue on the merits, but for the purpose of considering this notice of motion I am prima facie satisfied that the Project is a matter of considerable significance in the national context which might properly be processed and considered as a matter of urgency. I am conscious that in doing so the Court must act in accordance with its statutory obligations under RMA and ensure that the process is conducted in such a manner that all participants are afforded the opportunity to fairly present their cases to the Court.

[9] The second matter is that I concur with the submission made on behalf of the Transport Agency that the Court has power to make these orders and directions on an anticipatory basis. I refer to the decision of this Court in *Panuku Development Auckland Limited v Auckland Council*² in that regard.



¹ *Director-General of Conservation v New Zealand Transport Agency* [2020] NZEnvC 19.
² *Panuku Development Auckland Limited v Auckland Council* [2018] NZEnvC 64.

The Waivers and Directions Sought

[10] Addressing the matters of s 274 processes and electronic filing identified in the first two bullet points of paragraph [5] (above), I refer to the relevant provisions of the Transport Agency's notice of motion (paragraphs 5-9 - footnotes deleted) which set out the waivers and directions sought, together with the grounds on which they are based:

Filing requirements

Section 274 processes

5. The Transport Agency respectfully seeks that the following requirements under section 274 of the RMA be waived:
 - (a) the requirement that a party lodge a signed original and one copy of their section 274 notice with the Court, with the direction instead that section 274 parties can file electronically (via email) a copy of their section 274 notice, which may be signed or unsigned; and
 - (b) the requirement under section 274(2B) that a section 274 party serve a copy of their interested party notice on "*all other parties*". A prospective section 274 party should instead be required to serve their notice on the Transport Agency and Horizons only, with service on other parties to be achieved via uploading the notice to a website established for the proceeding (ideally by the Court Registry – as tentatively indicated in the Court's Minute of 24 March 2020 – otherwise by Horizons).
6. The Transport Agency seeks a direction that otherwise all section 274 notices must meet the requirements of form 33 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003 and the RMA, including the requirement under section 274(3)(b) that a party state, with reasons, whether the person supports or opposes the proceedings.

Electronic filing

7. The Transport Agency also seeks directions that:
 - (a) all documents related to the proceeding may be filed with the Court electronically, via email;
 - (b) all documents may be served on the Transport Agency and Horizons electronically via email (at the email addresses specified below); and
 - (c) service of all documents on any other party will be achieved by uploading them to the website established for the proceeding, referred to at paragraph 5(b) above.
8. Service on the Transport Agency and Horizons (respectively) can be effected as follows:



Address for service	Transport Agency	Horizons
By email:	david.randal@buddlefindlay.com	SJohnston@crlaw.co.nz
By post:	David Randal, c/- Buddle Findlay, Aon Centre, 1 Willis Street, PO Box 2694, Wellington 6140	Shannon Johnston, c/- Cooper Rapley Lawyers, 227 Broadway Avenue, Palmerston North 4414

Grounds

9. The waivers and directions outlined above are sought on the following grounds:
- (a) Counsel understand from the Court's minute dated 24 March 2020 that the Court is prepared to establish a dedicated website for the Application, if considered practicable by the Registry staff. If this is not possible, Horizons' website (which currently hosts the Application and associated materials) is able to be used for this purpose.
 - (b) Waiving the requirements to file and serve hard copies of section 274 notices and other documents will enable these documents to be circulated more easily and efficiently. The use of electronic means of communication in the direct referral process is endorsed in the Environment Court Practice Note 2014 as a way of managing the process efficiently.
 - (c) Due to current nationwide restrictions on travel, post, and other operations arising from the Covid-19 pandemic, the filing and service of hard copies of documents in this proceeding may not be achievable.
 - (d) A direct referral process is likely to attract more parties than usual proceedings in the Environment Court. Waiving the requirement to serve documents on all parties will alleviate some of the issues that can arise for section 274 parties in the direct referral process.
 - (e) Generally, the waivers and directions sought will facilitate the efficient case management of the Application and assist with administrative challenges associated with managing large volumes of documents.

[11] I have set out in full the grounds on which the Transport Agency requests the Court to grant the waivers and directions sought as I concur with the various comments contained therein. I understand that the Court's practice in dealing with potentially substantial matters such as this is for the Registry to set up a dedicated page on the Environment Court website. Counsel for the Transport Agency and the Council should liaise with either the Court Registrar, Ms R Staunton at



Rachel.Staunton@justice.govt.nz or my Case Manager, Ms J Gerritsen at Jennifer.Gerritsen@justice.govt.nz to resolve any details in that regard.

[12] I determine that it is appropriate that I grant the waivers and make the directions sought in paras 5, 6 and 7 of the notice of motion accordingly.

[13] The second set of directions which the Transport Agency seeks relate to matters of timetabling and case management. Details of the directions sought and grounds upon which they are sought are set out in these terms in the notice of motion (footnotes deleted):

Timetable and case management

Timetabling

10. The Transport Agency respectfully seeks directions:
 - (a) approving the draft timetable attached as **Appendix A** on an indicative basis (ie subject to confirmation by the Court in due course); and
 - (b) fixing now the dates for the initial steps in the timetable.
11. In particular, confirmation of the following milestones and dates is requested at this early stage:
 - (a) the Transport Agency to file (and serve on Horizons and any other parties) its evidence-in-chief by **Friday, 12 June 2020**, with any necessary supplementary evidence (in light of the parties' section 274 notices, the agreed statement of issues, and the outcomes of mediation and expert conferencing) to be filed by **Monday, 20 July 2020**;
 - (b) a pre-hearing conference to be scheduled shortly after the close of the section 274 period, on **Friday, 19 June 2020**;
 - (c) Court-assisted mediation to take place following the pre-hearing conference, on **Monday and Tuesday, 22 and 23 June 2020**;
 - (d) in relation to expert conferencing:
 - (i) an agreed statement of issues to be filed by the parties two working days following mediation, on **25 June 2020**; and
 - (ii) Court-assisted expert conferencing to take place between **26 June and 8 July 2020** (with the expert planners to conference at the end of that period).
12. In relation to expert conferencing, the Transport Agency also seeks a direction that 'will-say' statements not be required, as conferencing discussions can be framed by the evidence-in-chief filed by the Transport Agency and the parties' agreed statement of issues.



Communicating with submitters

13. In order to facilitate active and early communication with submitters and potential section 274 parties, the Transport Agency seeks the following directions:
- (a) Horizons must provide a copy of the Court's Minute containing waivers and directions, including the indicative timetable and any fixed dates, when it serves its section 87F report on submitters in accordance with section 87F(5)(b) of the RMA;
 - (b) the Transport Agency must provide a copy of the Court's Minute containing waivers and directions, including the indicative timetable and any fixed dates, when it serves notice of its direct referral application on submitters in accordance with section 87G(2)(b)(ii) of the RMA; and
 - (c) Horizons must publish the Court's Minute containing waivers and directions, including the indicative timetable and any fixed dates, on its website.

Grounds

14. The waivers and directions outlined at paragraphs 10 to 13 above are sought on the following grounds:
- (a) As the Court is aware, there is a high degree of public interest in the Project, which will replace the section of SH3 indefinitely closed following landslides in April 2017. The Project will improve safety and travel times in the Manawatū-Whanganui Region, and deliver significant national, regional and local benefits. In light of the evolving situation with Covid-19, the Project will (subject to the Court) play a significant role in providing stimulus for the local, regional, and national economy.
 - (b) Given the importance of the Project, the Transport Agency is highly motivated to complete the Project as quickly as possible. The Transport Agency aims to complete the Project in the summer of 2024/2025. In order to achieve this completion date, the Transport Agency hopes to begin the Project's main works in the summer 2020/2021 earthworks season.
 - (c) The directions and waivers sought are to provide for an efficient process, and the timing of this notice of motion is intended to enable the Transport Agency and Horizons to communicate with submitters regarding the process and allow all parties to begin to prepare for a hearing as early as possible.
 - (d) Bringing forward the due date for filing and serving the Transport Agency's evidence-in-chief (from 20 July to 12 June) will assist



prospective parties in deciding whether to join the proceedings and participating in the process.

- (e) The directions sought at paragraph 13 above will ensure that submitters are well aware of (and in a position to prepare for) the proposed direct referral of the Application. This will prevent any party from being unduly prejudiced.

I have appended to this decision Appendix A of the notice of motion which sets out the Transport Agency's updated draft timetable.

[14] Even acknowledging my prima facie acceptance of the need for urgency in this matter, I retain concerns as to the timetable suggested by the Transport Agency. In the normal course of events, it would represent a "tight" but achievable process. In the current Covid Level 4 situation, it is almost certainly extremely difficult (if not impossible) for submitters to receive detailed legal or expert advice prior to the closing of submissions. Nor is it clear the extent to which that might happen over the following months, whether at Level 4 or some lesser level of controls.

[15] Paragraph 11(a)-(d) of the notice of motion requests the Court to confirm a number of milestones and dates when it is unaware of the number of submitters who/which might be involved in these proceedings and the weight of the issues which they wish the Court to consider. I am reluctant to make further directions as sought at the present time until these matters (including the ability of submitters to receive adequate advice) are known. I will consider making further orders if necessary once submissions have closed at the Council and (assuming that most submitters will participate in the Court process) the Court has some indication as to what might be required in respect of case management directions.

[16] I direct the Transport Agency to file a further memorandum in this regard as soon as it may practically do so following the closing of submissions. The Court will consider these issues further at that time and then make such further directions as may be appropriate. However, I make the following indicative comments at this time:

- The Court will look to have a prehearing conference in these proceedings no later than five working days after closure of the s 274 notice period (presently estimated 17 June 2020). The venue for and form (in person, AVL or otherwise) of the conference will be



determined and details notified on the Court website as soon as practicable after the number, identity and addresses of submitters at the Council are known;

- The purpose of the prehearing conference will be for the Court to make directions towards a hearing of the applications tentatively anticipated to commence on 24 August 2020;
- At the prehearing conference all parties other than the Transport Agency (whose first tranche of evidence will have been filed by 12 June 2020) will be required to identify the specific issues they wish to advance at hearing together with the identity and contact details of all witnesses they wish to call;
- Parties and witnesses must be available to participate in prehearing processes (exchange of evidence, mediation and expert witness conferencing) within the period between the conference and tentative hearing date and be available for a hearing for a reasonable period following that date;
- Not less than two working days prior to the prehearing conference the Transport Agency shall file for publication on the Court website a draft timetable for the exchange of evidence, mediation and expert witness conferencing. In my view the exchange of evidence (other than the Transport Agency's rebuttal evidence) should precede mediation and expert witness conferencing;
- Any other party seeking directions from the Court on any matter shall file notice accordingly for publication on the Court website (which shall constitute service on the Transport Agency and Council in that respect notwithstanding my earlier directions), not less than one working day prior to commencement of the prehearing conference.
- Finally in this regard, I record that these comments are made on an indicative basis in light of the Covid Level 4 situation. Final directions will have regard to any circumstances or disadvantages to any party which might arise as a result of that situation.

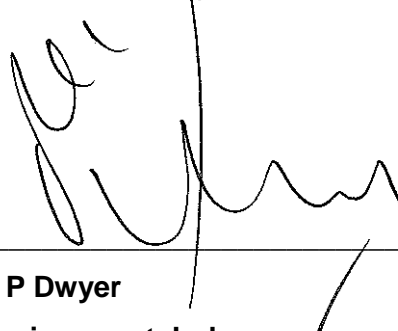
Outcome

[17] I grant the waivers and make the directions sought in paras 5, 6 and 7 of the Transport Agency's notice of motion.




[18] The Transport Agency is to urgently draft and lodge an order to the above effect for execution under seal of the Court. In addition to the waivers and directions, the order should incorporate the indicative comments contained in para [16] (above).

[19] The Council is directed to serve a copy of the order on all parties who/which file a submission on the resource consent applications, including those who/which have already filed submissions. The Council shall keep a copy of this decision, advise parties that it is available for perusal and provide a copy to any party who/which so requests.



B P Dwyer
Environment Judge



The seal is circular with the text "THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND" around the perimeter. In the center is the coat of arms of New Zealand, featuring a shield with a crown on top, supported by two figures, and a banner below.

Appendix A – updated draft timetable

Transport Agency lodged application for Main Works Consent (and request direct referral to the Court under section 87D)	Wednesday, 11 March 2020 (done)
Formal acceptance by Horizons of application	Tuesday, 17 March 2020 (done)
Public notification of application	Wednesday, 25 March 2020 (note: Horizons notified the Application two working days earlier than foreshadowed in counsel's joint memorandum of 5 March 2020)
Submissions close	Friday, 24 April 2020 (20 WD from public notification, excluding Good Friday and Easter Monday)
Preparation of Horizons' section 87F report	Monday, 25 May 2020 (20 WD from submission close excluding the Anzac Day holiday)
Notice of motion filed with the Environment Court	Tuesday, 26 May 2020 (next working day)
Applicant to file and serve on Horizons and any other parties its evidence-in-chief (soft copy only)	Friday, 12 June 2020
Close of interested party period	Wednesday, 17 June 2020 (15 WD from notice of motion, excluding Queen's Birthday)
Pre-hearing conference	Friday, 19 June 2020 (2 WD after close of section 274 period)
Mediation	Monday and Tuesday 22 and 23 June 2020 (Next WD after PHC)
Agreed statement of issues	Thursday, 25 June 2020 (2 WD after mediation)
Expert conferencing (facilitated by the Court)	Friday 26 June 2020 to Wednesday 8 July (with planners on the Wednesday)
Applicant to serve any supplementary evidence on other parties	Monday, 20 July 2020 (8 WD after conferencing)
Applicant's supplementary evidence filed in Court, together with joint witness statements (soft copy only)	Tuesday, 21 July 2020
Section 274 parties and Horizons to serve evidence on other parties	Monday, 3 August 2020



	(10 WD after applicant's supplementary evidence)
Section 274 parties' and Horizons' evidence filed in Court (soft copy only)	Tuesday, 4 August 2020
Common bundle of documents filed in Court (soft copy only)	Friday, 7 August 2020
Applicant to serve rebuttal evidence on other parties	Monday, 17 August 2020 (10 WD after section 274 parties' and Horizons' evidence)
Rebuttal evidence filed in Court (soft copy only)	Tuesday, 18 August 2020
Hard copies of all evidence and common bundle of documents filed in Court	Wednesday, 19 August 2020
Hearing	Monday to Friday, 24 August to 4 September 2020 (two weeks) 4 WD from lodgement of rebuttal evidence

