



Meeting of the Hawke's Bay Regional Council

LATE ITEM

Date: Wednesday 31 August 2022
Time: 1.30pm
Venue: Council Chamber
Hawke's Bay Regional Council
159 Dalton Street
NAPIER

Agenda

Item	Title	Page
Decision Items		
13.	Freshwater Science Charges - Water Holdings HB	3

Subject: FRESHWATER SCIENCE CHARGES - WATER HOLDINGS HB

Reason for Report

1. This report is prepared to inform the Council of the outstanding s.36 freshwater science charges attributable to resource consents that are currently unable to be exercised.
2. The report has previously been to the Corporate and Strategic Committee (Wednesday 24 August 2022) as a public excluded item. The Committee resolved to refer the matter to Council for consideration in open session and directed the Chief Executive to present a paper to the Council for open discussion excluding all matters that should be withheld under LGOIMA s.7(2)(a) and (7)(2)(b)(ii) that should be discussed in committee.
3. The report presents options for recovering or remitting these charges, including making changes to Council's fees and charges policy, and the implications for the Hawke's Bay Regional Council (HBRC) depending on which option is chosen. This report seeks a decision by the Council on recommendations to Council on the action to be taken.
4. Council Officers are bringing this to the attention of Council at this time due to the growing outstanding debt being incurred, and the need to provide direction to our Council Officers for the preparation of our Financial Statements.

Officers' Recommendation(s)

5. Staff recommend that the Council considers the information provided and provides staff with direction on the preferred approach to be taken.

Executive Summary

6. A local authority may fix Resource Management Act 1991 s.36 Administrative Charges for holders of resource consents, for the carrying out by the local authority of its functions in relation to the administration, monitoring, and supervision of resource consents.
7. Hawke's Bay Regional Council's s.36 freshwater science charges are related to the water science and monitoring that is undertaken by HBRC for the region that enables the council to make planning and consenting decisions in relation to the use of freshwater resources.
8. Section 36 charges are applied equally to resource consents that have or have not been exercised. This is because a consent holder has secured use of the resource, potentially at the exclusion of other users, and holds usage rights that come with obligations to contribute to the resource management effort of Council. The current policy also reflects the administrative complexity of determining which consents are exercised at any given time and determining at what point exercise has commenced. For water takes and discharges s.36 charges are calculated on consented, rather than actual volumes.
9. From time to time, consent holders raise objections with Council about paying for the s.36 charges on consents that have yet to be exercised. This is usually in relation to delays in project activation or where commercial considerations have delayed commencement. Given consents usually expire if they are not exercised after five years, these objections are usually short-lived.
10. Water Holding Hawke's Bay Limited (WHHB) hold resource consents, originally obtained by Council's subsidiary Hawke's Bay Regional Investment Company (HBRIC), for the Ruataniwha Water Storage Scheme (RWSS). The consents attract s.36 charges.
11. WHHB's s.36 freshwater science charges for the past two years remain outstanding, and charges are now accruing for the third year. The outstanding amount is \$259,805 for the past

two years. A further \$157,860 will be owed in March 2023 for the 2022-2023 year. WHHB have previously requested a deferral of their charges until such time the consents can be exercised. Council have indicated a willingness to consider such a request, but have advised the company that they remain liable for the charges.

12. Council officers consider this issue could apply to other consent holders and as such have provided several approaches that may be taken for the consideration of the Council.
13. Deferral of collection of the s.36 charges from allocated consent holders would result in a shortfall of budgeted revenue for Council and result in a higher deficit or lower surplus at year end.
14. Any deferral of revenue would be recognised as an asset on the Council's balance sheet as an accounts receivables item, which would require an annual impairment test (assessment of likely recovery) as part of the preparation of annual financial statements. If the consents lapse and some or all the funds owed cannot be recovered, this asset would be written off and result in a minor reduction in Council's net equity position. In the following years, Council will spread the revenue expected from these consents to other consent holders across the region through s.36 charging.

Background /Discussion

15. A local authority may fix Resource Management Act 1991 s.36 Administrative Charges for holders of resource consents, for the carrying out by the local authority of its functions in relation to the administration, monitoring, and supervision of resource consents (including certificates of compliance and existing use certificates), and for the carrying out of its resource management functions for the gathering of information and monitoring.
16. Hawke's Bay Regional Council's s.36 freshwater science charges are related to the State of Environment Monitoring and data collection that is undertaken by the HBRC science and environmental information teams for water science and monitoring for the region.
17. Water charges applied to consent holders significantly changed in 2021-2022 because of the changing methodology as consulted on in the 2021-2031 Long Term Plan.
18. The previous methodology for determining s.36 freshwater science charges was in effect to June 2021 and was a fixed charge per consent for all eligible consent holders, plus a variable charge based on the zone their consent was in (Wairoa, Mohaka, Esk, Heretaunga, Tūkituki, Porangahu or Southern Coast). Thirty five percent of the costs of the water science and monitoring in each zone were shared amongst the consent holders in that zone, based on a pollution index score for discharge consents, or on the maximum consented weekly volume of take (m³/week) for water takes (with separate rates calculate for surface water versus ground water takes).
19. The new methodology for determining the s.36 freshwater science charges as adopted as part of the 2021-2031 LTP, is still based on recovering 35% of the water science and monitoring costs for the region but replaces the zone-based variable charges with a region wide charge schedule. In the previous methodology, Water Holdings CHB's consents were charged using the Tūkituki zone charges, and these were significantly lower than the new region wide charge schedule, due to a large number of consents in that zone sharing a smaller proportion of the overall costs.
20. From time to time, consent holders raise objections with Council about paying for the s.36 charges on consents that have yet to be exercised. This is usually in relation to delays in project activation or where commercial considerations have delayed commencement. Given consents usually expire if they are not exercised after five years, these objections are usually short-lived. Council has to date not remitted such charges because a consent holder has secured use of the resource, potentially at the exclusion of other users, and holds usage rights that come with obligations to contribute to the resource management effort of Council.

21. The resource consents that are the primary subject of this report are the consents which were obtained by Council's subsidiary, Hawke's Bay Regional Investment Company (HBRIC) for the RWSS in 2015. These were transferred in 2018 to a private group, as part of a sale of intellectual property associated with the RWSS by HBRIC, along with liability for s.36 freshwater science charges that have applied since the consents were granted. The consents have been held in the name of Water Holdings Central Hawke's Bay Limited. This name was changed in 2019 to Water Holdings Hawke's Bay Limited. There is no issue with this change of name in terms of the liability.
22. The WHHB consents are highly unusual in that a legal impediment currently exists that prevents them from being exercised, which is beyond the control of the consent holder, and that the current consent provides for a longer than normal period of ten years in which the consents must be exercised before they lapse.
23. The resource consents held by WHHB are not able to be exercised at this time due to the inability to gain access to conservation land that will be inundated by the proposed dam through a land swap under the Conservation Act. The current HBRC s.36 freshwater science charges approach makes no distinction for consents that are unable to be exercised.
24. Where consents are not exercised, there is no consent monitoring undertaken and therefore no monitoring charges as there has been no activity to monitor, and nor have the consents themselves resulted in any additional activity or cost for Council. The s.36 freshwater charges continue to apply, however, as the science and monitoring activity that underpins and informs resource consenting activity for the region continues to be undertaken.
25. The s.36 charges that apply to these consents are unusually large – they are collectively the largest set of charges due from any resource consent holder in the region – due to the size of the water takes and discharges that are consented. To put this into context, the total volume of water consented to be stored within the RWSS reservoir exceeds the total estimated actual groundwater take from all users on the Heretaunga Plains in any given year.
26. WHHB recently applied to Council for extensions to the lapse date of their resource consents, due to expire in 2024, in order to provide time for the company to secure support for a legislative pathway and funding to enable the consents to be exercised and a water storage scheme to be established at the Makaroro dam site.
27. The resource consents potentially have 'option value' if legislation is amended in the future allowing the land swap, although it is difficult to determine the likelihood and timing of such a change.
28. It may be possible for WHHB to apply for a variation of consent to construct a smaller water storage facility that does not result in the inundation of Conservation land and therefore avoid the current legal impediment for the consents to be exercised, and in this respect achieve partial exercise for these consents. Such a variation of the consent would likely be material to the consent conditions, including impacts on the environmental flow regime, and therefore involve a publicly notified hearings process. Furthermore, if this occurred the s.36 charges would then need to be significantly reduced for the smaller volumes of water involved in a revised scheme.
29. There is merit in considering whether these charges are "reasonable" given the resource consents are in a situation that does not allow them to be legally exercised, regardless of the intentions or actions of the consents' holder. If Council considers there is an issue with the reasonableness test, there may be merit in considering deferring the collection of the s.36 freshwater science charges until they are able to be exercised.
30. It is also possible that other consents within the region are precluded from being exercised from time to time by legal impediment or through no fault of the consent holder. Examples could include consents secured for projects for which associated consents, including from other

consenting authorities, have not been secured or remain in dispute, or where contractual issues with third parties preclude the consent being exercised.

31. This could be recognised by remitting, in part or full, the current charges and proposing a change in the fees and charges schedule of the 2023-2024 Annual Plan to exempt resource consents from s.36 freshwater charges where they are unable to be exercised by factors beyond the control of consent holders.
32. The council has discretion under s.36 of the RMA and may in accordance with s36AA , “in any particular case and in its absolute discretion, remit the whole or any part of any charge of a kind referred to in s.36 that would otherwise be payable”.
33. However, it should be noted that, upon issuing consents, Council expects consent holders to have undertaken appropriate due diligence such that they therefore accept full accountability and responsibility for all conditions until termination, or expiry. For this reason, it may be more appropriate to defer collection of s.36 charges for such consents, rather than remit the charges in part or full.

Options Assessment

34. As there are increasing charges that are overdue for WHHB, Council needs to decide what course of action to take in relation to the outstanding debt. Two options exist. Primarily:
 - 34.1. Making no change to existing policy that will result in Council officers pursuing payment in full of the current outstanding charges and any future charges.
 - 34.2. Deferring collection of current outstanding charges and future charges, where legitimate legal reasons exist where consents cannot be used until such time as the consents expire, or are able to be exercised and proposes amendment to Council’s fees and charges policy at the next available opportunity to ensure Council takes a consistent approach to all consents that have a legal impediment to being exercised that is beyond the control of the consent holder.
 - 34.3. Alternatively, Council may choose to delay making a decision on either option above until such time as a decision has been made on the WHHB’s application for lapse date extension, given that, this decision will have material impact on the duration of any deferral and the size of the liability that will accrue for the consent holder. A decision on this is likely to be made in early September. This will effectively result in a deferral of the current outstanding charges.

Options Analysis

35. **Option1** – No change to existing policy that will result in Council officers pursuing payment in full of the current outstanding charges and any future charges.
 - 35.1. The first option is for Council to make no decision or change to the existing policy and indicate to the Chief Executive that they expect payment for charges to be received.
 - 35.2. Under this option, Council officers will pursue full recovery of the charges owed to date and continue to charge these and pursue recovery in the future.
 - 35.3. In some instances, HBRC recognise that some consent holders may have no limited assets or income, and in such circumstances pursuing debt may result in the consent holder becoming insolvent with the Council unable to recover some or all of the outstanding charges.
 - 35.4. Financial impacts to HBRC: HBRC will continue to invoice individual consent holders on an annual basis. Outstanding amounts are and will continue to be recognised as accounts receivable (debt) with required impairment testing undertaken on a regular basis (Provision for Doubtful Debts) as per our normal debt collection and financial reporting processes.

- 35.5. Probable delays in the receipt of outstanding amounts (current and ongoing per annum) will be absorbed within current financial budgets, with allowances made from the general fund to cover any potential non-payment.
 - 35.6. Risks: Should consent holders be unable to make payment through debt collection, HBRC will be required to write off this debt. Any non-provisioned prior amounts will be recognised at that point and result in further impacts to general funds.
 - 35.7. Debt collection will likely incur administrative costs of around 10%-15% which will reduce any amounts collected.
 - 35.8. It should be noted that charges to the consent holder into the future will likely increase per annum to account for future inflationary or price adjustments to our science charges.
36. **Option 2** – Deferring collection of current outstanding charges and future charges where legitimate legal impediments exist where consents cannot be used until such time as the consents expire or able to be exercised.
- 36.1. HBRC provide a deferral of unpaid, current and future year charges to reflect the period of uncertainty the consent holder has and continues to face.
 - 36.2. Deferral means existing and future expected charges remain an invoiced amount per annum to the Consent Holder, however, the due date for payment is deferred with no penalty.
 - 36.3. If Council considers the recovery of charges in circumstances where they relate to a consent that is granted, but not yet able to be exercised is unreasonable and collection should be deferred, then it would be appropriate to amend the Council's policy on s.36 charges to ensure a consistent approach is taken to all such consents.
 - 36.4. A change to the policy would only have effect going forward. The three years of unpaid charges for WHHB would not be resolved by this change. However, if the Council are of the view that this should not be charged in the future or only partially charged it may be of the view that collection of the previous charges can be deferred now.
 - 36.5. Financial Impacts: Based on WHHB, deferral of current charges (FY/21/22/23) would be \$383,777. There would be no immediate impact on other consent holders. The consequences of non-receipt of cash for the invoices amounts means costs of science will effectively have to be paid via increase loans or reduced reserves until the revenue is ultimately received.
 - 36.6. Officers have not proposed an option of remission. Approving partial or full remission of the charges owed by WHHB would result on these costs falling to ratepayers when the consent holder has been aware of their obligations and have not disputed that they are owed. Approving a change to Council's fees and charges policy to enable remission of any future charges would result in the s.36 science charges for such unexercised consents having to be spread over other consent holders across the region given the current allocation methodology. Staff would need to create a process for this and ensure consent holders were aware of the policy.
 - 36.7. Based on the current analysis of consent holders across the WHHB region, should remission of future charges be proposed (\$160k per annum), this would result in up to a 17% increase in s.36 charges to other consent holders in the future.

Strategic Fit

- 37. The strategic plan sets water quality, safety, and climate- resilient security along with climate smart and sustainable land use and healthy, functioning and climate-resilient biodiversity as priority areas. There is a significant investment in the science that is required to understand these areas, to measure progress towards strategic goals and to determine the impacts and

interactions of resource uses on the environment across the region. The LTP recognises there is a need to budget for this.

38. Discharges to water or land and water take consent holders are charged for the costs of performing science investigations and monitoring to manage and inform on effects, or potential effects, on the region's freshwater resources. These charges are authorised by section 36 of the RMA. Consent holders pay for only a part of the costs of this science. The regional community pays for the remainder via the general rate, as the wider community also benefits from the information gained and the natural resources being well managed. The proportion of the freshwater science costs recovered from consent holders is set in the Revenue and Finance Policy. The LTP recognises that there are benefits to consent holders of the HBRC science and monitoring programme that include the protection of the resource through its management on a sustainable basis and early warning of changes in resources. There is an established case that the science is necessitated, at least in part, by those who take and use natural resources and that these parties should share in funding the regions science costs.
39. This approach has been established through consultation and is set up in the LTP. Charging resource consent holders for a share of the Council's state of the environment science costs has been carried out for the past 10 years. Prior to that the cost was fully borne by the ratepayer.

Significance and Engagement Policy Assessment

40. If these charges are not collected now, \$383,777 over 3 years, will need to be absorbed through current reserves or general rates up until such time as this is collected. The significance is low to medium.
41. The Council has the discretion to remit these charges in part or in full. If Council chooses not to remit these charges and if the consent holders surrender the consents, future costs will automatically be recovered from the rest of the consent holders. This would not require any change to the LTP. The significance would be low.
42. If Council chooses to defer collection of these charges, there is short term financial impact that is offset by expected payment later. The significance of such a decision would be low.
43. If the Council chooses to remit these charges for the period that these consents remain inoperable that would impose more cost on the rest of the consent holders. The significance would be high. In this case the LTP should be revised to allow for engagement to justify this approach. This could be justified on the basis that while the consents have been issued, they cannot be legally exercised.

Climate Change Considerations

44. WHHB consider that if their consents were exercised, they would provide 'a strategic water storage opportunity in the Tukituki Catchment to provide water security for environmental, social and economic activity, in the face of climate change and population growth which is increasing pressure on the water resource'.
45. The consents were originally secured by HBRIC with funding from Council to, in part, achieve climate change resilience. Although there is some disagreement about this in the community, with some groups and individuals considering the ensuing water storage scheme would intensify land use in a manner that creates greater reliance on an increasingly unreliable water resource.

Considerations of Tangata Whenua

46. Tāngata whenua were a party to the consent process that granted these consents. The consents are part of the existing environment and could be exercised at any time, subject to land ownership constraints being resolved.
47. Tāngata whenua are not directly affected by the non-payment of s.36 charges.

Financial and Resource Implications

48. Option 1 and Option 2 presented, will result in the likely delay or non-receipt of current charges owed of \$383,777. As a result of non-receipt of cash, HBRC will incur costs of borrowing to the extent required to cover this shortfall. Borrowing at LGFA funding rates of ~ 3.5% will result in HBRC incurring ~\$13,432 of interest charges on borrowing.
49. For any proposed future charges incurred (should further consent be granted to WHHB out to 2031) total amounts owed by WHHB could reach ~\$1.48m. ¹ Over this period based on 3.5% interest, the cost of borrowing would be ~\$52,000 to HBRC.

Consultation

50. No public consultation has occurred on this matter. There will be opportunity for this via the Annual Plan process in 2023 for the 2023-2024 Annual Plan.

Other Considerations

51. There are other considerations.

Decision Making Process

52. Council and its committees are required to make every decision in accordance with the requirements of the Local Government Act 2002 (the Act). Staff have assessed the requirements in relation to this item and have concluded:
 - 52.1. The decision to defer collection of s.36 freshwater science charges for Water Holdings Hawke's Bay Limited does not significantly alter the service provision or affect a strategic asset, nor is it inconsistent with an existing policy or plan.
 - 52.2. The RMA allows for the Council to remit charges in whole or part in any particular case. The decision is not significant under the criteria contained in Council's adopted Significance and Engagement Policy.
 - 52.3. The decision to defer collection of Water Holdings Hawkes Bay Limited's s.36 freshwater science charges until such time as the consents are able to be exercised is not significant.
 - 52.4. This decision is not significant under the criteria contained in Council's adopted Significance and Engagement Policy. However, it is recommended that if Council choose to defer collection of Water Holdings Hawkes Bay Limited's s.36 freshwater science charges is consults on changes to fees and charges in the 2023-24 Annual Plan so that a consistent approach can be taken to all similar consents.
 - 52.5. The persons affected by this decision are all persons with an interest in the region's management of natural and physical resources under the RMA and all ratepayers.
 - 52.6. Given the nature and significance of the issue to be considered and decided, and also the persons likely to be affected by, or have an interest in the decisions made, Council can exercise its discretion with regards to the current years charges and previous years outstanding charges and make a decision without consulting directly with the community or others having an interest in the decision.

¹ This amount is unadjusted for inflation and assumes current consented rate remains constant.

Recommendations

That Hawke's Bay Regional Council:

1. Receives and considers the *Freshwater Science Charges - Water Holdings HB* staff report.
2. Agrees that the decisions to be made with regard to the previous years' outstanding charges and current years accruing charges are not significant under the criteria contained in Council's adopted Significance and Engagement Policy, and that Council can exercise its discretion and make decisions on this issue without conferring directly with the community or persons likely to have an interest in the decision.

EITHER

3. Agrees not to change the existing policy, which will result in Council officers pursuing payment in full of the current outstanding charges and any future charges for all s.36 liable consent holders regardless of whether consents can be exercised or not.

OR

4. To defer collection of current outstanding charges and future charges on the WHHB consents until such time as the consents are able to be exercised and proposes amendment to Council's fees and charges policy at the next available opportunity to ensure Council takes a consistent approach to all consents that have a legal impediment to being exercised that is beyond the control of the consent holder.

OR

5. To defer making any decision on this matter until the application by the consent holders for an extension to their lapse date has been determined by an independent commissioner in September. Should this option be chosen, financial consequences remain the same as deferring the Debt (Option 2 above).

Authored by:

Katrina Brunton
GROUP MANAGER POLICY & REGULATION

Susie Young
GROUP MANAGER CORPORATE SERVICES

Approved by:

James Palmer
CHIEF EXECUTIVE

Attachment/s

There are no attachments for this report.