

Extraordinary Whangarei District Council Meeting

Agenda

Date: Monday, 17 March, 2025

Time: 2:00 pm

Location: Civic Centre, Te Iwitahi, 9 Rust Avenue

Elected Members: His Worship the Mayor Vince Cocurullo
Cr Gavin Benney
Cr Nicholas Connop
Cr Ken Couper
Cr Jayne Golightly
Cr Phil Halse
Cr Deborah Harding
Cr Patrick Holmes
Cr Scott McKenzie
Cr Marie Olsen
Cr Carol Peters
Cr Simon Reid
Cr Phoenix Ruka
Cr Paul Yovich

For any queries regarding this meeting please contact the Whangarei District Council on (09) 430-4200.

1. **Karakia/Prayer**
2. **Apologies / Kore Tae Mai**
3. **Declarations of Interest / Take Whaipānga**
4. **Decision Reports / Whakatau Rīpoata**
 - 4.1 Fluoride Decision – March 2025
5. **Public Excluded Business / Rāhui Tangata**
6. **Closure of Meeting / Te katinga o te Hui**

3

Recommendations contained in the Council agenda may not be the final decision of Council.

Please refer to Council minutes for final resolution.

4.1 Fluoride Decision – March 2025

Meeting: Extraordinary Whangarei District Council
Date of meeting: 17 March 2025
Reporting officer: Simon Weston – Chief Executive

1 Purpose / Te Kaupapa

To update Council on the progress and outcome of interim relief proceedings and to reconsider the 28 November 2024 Council resolution as per the Director-General of Health's letter dated 18 February 2025.

2 Recommendation/s / Whakataunga

That the Council:

1. Notes the letter received from the Director-General of Health dated 18 February 2025.
2. Notes that interim relief has not yet been granted by the Courts, and the Director-General's direction requires compliance by 28 March 2025.
3. Notes that interim relief hearing is scheduled for 18 March 2025, so any decision will not be before this date and there is no certainty as to when a decision might be given on the application for interim relief.
4. Notes that Council will not be able to comply with the Director-General of Health's direction by 28 March 2025 if wet testing processes does not begin on or before 19 March 2025.
5. Revokes the resolution of 28 November 2024 that stated that Council "Resolves not to add fluoride to the Whangarei District's water supplies as required by the directive from the Ministry of Health (MOH)", to allow staff to commence the wet testing required to meet the Director General of Health's Directive by 28 March 2025.
6. Directs staff that if interim relief is granted following the hearing on 18 March 2025, to cease fluoridation of Council's water supplies.
7. Directs staff to delay adding fluoride to the water supply until the morning of 19 March 2025, being the latest date possible to still be able to meet the requirements of the Director General of Health's directive.
8. Directs staff to prepare a press release advising of the forthcoming hearing and recording that commissioning and wet test processes will commence, and would cease if the relief sought from the High Court permitted.

3 Background / Horopaki

On 28 November 2025, Council made a resolution “not to add fluoride to the Whangarei District’s water supplies as required by the directive” of the Director-General of Health.

While litigation proceedings have been initiated, if interim relief is not granted before 28 March 2025, Council will be non-compliant with the direction of the Director-General of Health if it does not revoke the 28 November 2024 resolution and commence fluoridation of those water supplies contained within the direction.

4 Discussion / Whakawhiti kōrero

At the Council meeting on 12 February 2025, the Council resolved to initiate legal proceedings challenging the safety of fluoridation and seeking interim relief. On 18 February 2025 the Director-General of Health wrote to Council stating that:-

I encourage the Council to reconsider its position and resolve to comply with its legal obligations. However, if the Council persists with its resolution not to comply and/or does not comply by the due date of 28 March 2025, I will give consideration to legal options. Those options have been canvassed in prior correspondence.

An urgent hearing has been set for 18 March 2025 to consider the application for interim relief. An update of total of legal costs, will be provided at the meeting.

4.1 Financial/budget considerations

Each of these costs are unbudgeted. Insurance will not cover any legal proceedings taken against the Council.

Costs of continuing to refuse to comply with the Direction include:

- Under 116J of the Health Act the costs of a fine for contravention of a direction to fluoridate is up to \$200,000 upon conviction and a further fine of up to \$10,000 per day.
- In addition to the costs from legal proceedings, the capital costs of fluoride equipment have been funded by the Ministry. This cost comes to \$4,557,856.88 (excl GST). Half of this, \$2,278,928.44, has already been paid to Council. The remaining \$2,278,928.44 is due for payment on completion of the commissioning of the sites. Staff have budgeted to receive this payment within this financial year. This funding is subject to contractual terms that Council undertakes the fluoridation. The Ministry may demand the return of the money already paid and refuse to pay the outstanding amount.
- Council had sought additional funding from the Ministry of Health for adding the fluoridation equipment for the Poroti Water Treatment Plant. The estimated cost of these works is \$1.5 million. This is not currently budgeted for. Under the current circumstances, the Ministry of Health is unlikely to consider providing additional funding.
- The actual costs of the legal proceedings, including expert costs, sat at \$73,571.56 plus GST as of 11 March 2025. These costs will have increased by the date of this 17 March 2025 meeting.

4.2 Risks

Councillors have been informed of the risks of not following the direction of the Director-General of Health, these risks have been outlined in more detail in previous agenda items.

The following risks remain (and in some instances will continue to increase for as long as Council refuses to comply with the Director-General's direction):

A. Risks of personal liability to Elected Members

Litigation costs are increasing.

Therefore, the potential costs that Councillors supporting these actions may be liable for, are going to increase.

If Council is unsuccessful or withdraws from the proceedings, it is likely to have to pay for the costs of other involved parties, including the costs of their experts.

In addition, under 116J of the Health Act the costs of a fine for contravention of a direction to fluoridate is up to \$200,000 upon conviction and a further fine of up to \$10,000 per day.

The Auditor General may make a report that money from the local authority has been unlawfully expended, or a liability has been unlawfully incurred by the local authority (section 44 Local Government Act 2002). Such a debt is owed jointly and severally by the parties (section 46 Local Government Act 2002). What each person would be liable for would be dependent on the total amount being considered.

Under the current joint and several liability scheme, if two or more people are responsible for a loss, each person then also potentially liable for the full amount of the loss. If one person is not able to pay (including when their assets are protected), the other defendants have to cover their costs.

B. Risks of liability to Staff

There is potential liability for staff of failing to carry out the direction. Under section 116N of the Health Act 1956, any person acting as an employee can be liable under that section in the same manner and to the extent as if they personally committed the offence.

However, it is a defence to such a charge if the staff member took all practicable steps to prevent the commission of the offence.

The costs of the fines and possible legal costs have been outlined above under Financial/Budget considerations

C. Risks of intervention/action by Ministry of Health

There are legal options available to the Ministry under the Health Act 1956 instead of or in addition to prosecution.

It should be noted that the Director-General of Health specifically mentions an application for writ of mandamus in her 30 January 2025 letter.

- Apply for a writ of mandamus to compel a local authority to perform any duty that the local authority has failed to perform under the act (section 123A Health Act 1956).
- Intervene directly to implement the direction: Where the local authority ... fails to exercise any power or perform any duty under this Act, the Director General may himself or herself exercise the power or perform the duty (section 123(2)) or get employees or contractors to do so (section 123(3)).

Each of these would involve the legal costs of Council responding to claims and potentially responsibility for the costs of the Ministry in bringing the proceedings.

D. Risks of intervention by Minister for Local Government

Further refusal to comply with the direction increases the potential for intervention by the Minister of Local Government. The broad powers of intervention of the Minister in a local authority outlined in the Local Government Act 2002 are based on the occurrence of a “problem”.

“Problem” is defined under section 256(a)(ii) of the LGA as a significant or persistent failure by the local authority to perform 1 or more of its functions or duties under any enactment.”

A continued refusal or resolution not to comply with the direction meets the above definition and the threshold for intervention by the Minister.

The continued refusal to comply with the resolution is also not in accordance with building strong relationships with the government or the Ministry of Health.

In addition, not complying with the Director-General of Health’s direction and arguing the merits of fluoridation is not core Council business, complying with the legislation, and in particular the Health Act is core business.

E. Contractual breach

The Ministry of Health could apply to the Courts to recover the funding granted to Council to install the fluoridation equipment. Whether or not there is a strong basis for such a claim, the costs of defending it in the Courts are a potential expense.

When assessing a party’s obligations under an Agreement, the Agreement must be read as a whole. While it has been suggested that Clause 2.2 may be considered ambiguous as to whether the works need to be turned on for Council to comply with the conditions, when reading the Agreement as a whole there are other clauses in the Funding Agreement which set out obligations which Council will be in breach of by not turning the works on:

- The severability clause (10.5) states that any unenforceable clause of the Agreement will not affect the validity or enforceability of the Agreement. The
- Completion of works is a defined term in the funding agreement and includes one month’s continuous operation of the works in accordance with the operational specifications (Clause 1.1).
- The Council is responsible for the Works complying with all relevant law (Clause 2.6) which would include the Health Act 1956 and compliance with a direction.
- There are obligations in the contract relating to the completion of works (as a defined term) including Clause 7.4 Confirmation required on completion of works, clause 7.5 issue of confirmation letter, Clause 7.6 Details of the letter to be provided by the engineer. Council will not be able to satisfy those conditions until fluoridation is started.

There are remedies available to the Ministry for a “Material breach” of the Agreement. A Material breach is a serious breach of the contract which has negative consequences. It is a breach that goes to the core of the contract. Council’s actions could be considered to be a repudiation which is a material breach of a contract. A repudiation is implicit where the reasonable inference from the other party’s conduct is that they no longer intend to perform their side of the contract. The remedies available to the Ministry for breach of contract include:

- repayment of the funding amounts and any costs reasonably incurred in doing so (Clauses 9.1 and 9.3) for a material breach of the Agreement.
- There are also remedies available to the Ministry under the Contract and Commercial Law Act 2017 which include variation the contract or awards of compensation.

In any event having accepted this funding such is a serious impediment to now seeking injunctive relief. A court may consider such acceptance, without a commitment to immediately repay, as a barrier to any grant of relief.

4.3 Commissioning

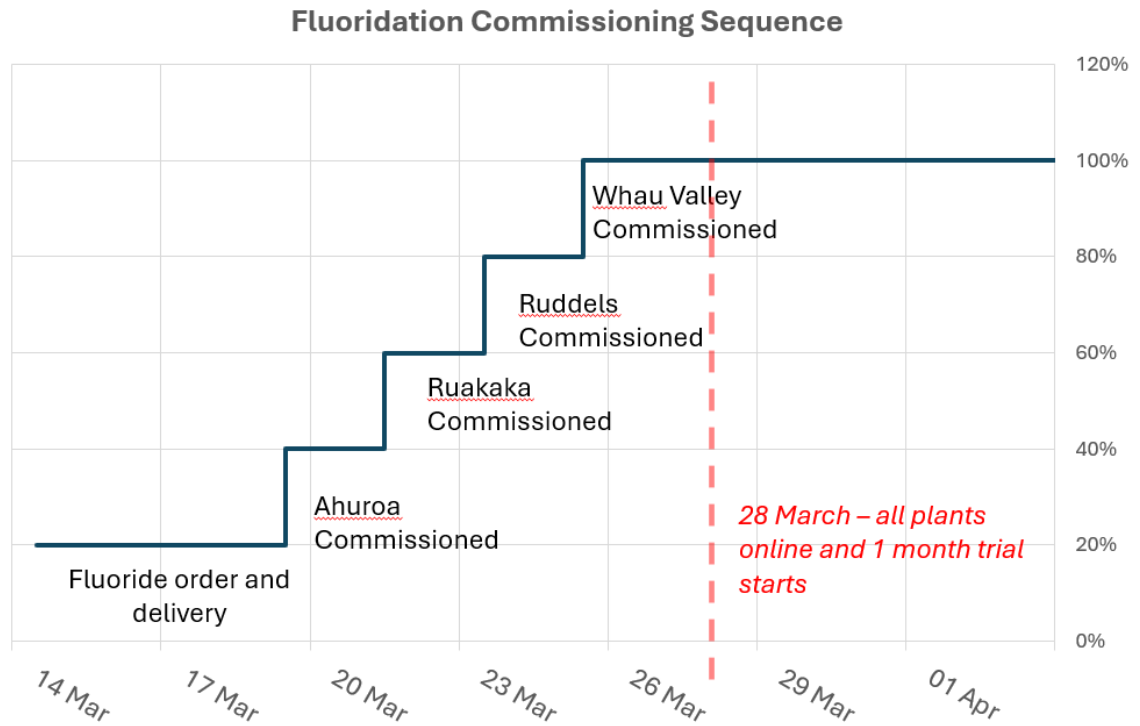
The final stage of the commissioning process for the fluoride equipment is now ready to start. This will test the full functionality of the dosing and monitoring system including all safeguards, protections and interlocks. This will commence once the Council has given the approval to add fluoride to the water supply. Each site has difference delivery arrangements which have already been certified as compliant. Special care will need to be taken when receiving fluoride as hazardous materials procedures must be followed and tanks and pipework will need to be double checked.

Fluoride will be transferred from the storage tanks to the day tanks and the dilution systems checked. The analysers need to be set up specifically for each site and staff need to be trained on the operation and calibration of the analysers for that site. Staff and contractors will then work through all operating scenarios with fluoride to ensure full functionality.

Once the fluoride is being dosed staff and contractors will be checking the operation of the analysers and monitoring equipment to compare with hand-held instruments, ensuring performance standards are achieved. These tests cannot be undertaken until fluoride is actually being dosed. Staff will check that all interlocking systems are communicating, accurate and consistent dosing is achieved. It is essential to check and confirm all equipment performance through a range of dose rates and a range of water flows. Staff and contractors will also check emergency shut off systems and check other emergency procedures. Staff will then look to confirm a consistent dose of between 0.7mg/l and 1.0mg/l with a target setting of 0.85mg/l.

It is anticipated that if all runs smoothly this process can be undertaken in two working days for each treatment plant once fluoride has been delivered to the site. There is also some dependency on contractors who will assist with the process, and they may not be available due to prior commitments. A total commissioning time of 8 working days is considered achievable if fluoride is already on site, or between 10 and 13 working days if the fluoride still needs to be delivered. Fluoride was ordered on 12 March to fill storage tanks.

The last date to start wet commissioning is then the morning of 19 March 2025 to meet the 28 March 2025 directive. This does not allow for any unexpected events such as a severe storm or staff illness or contractor unavailability. It should be noted that the process of commissioning described above is significantly truncated compared to that proposed in earlier information, and as a result there is increased risk of non-compliance. See fluoridation commissioning sequence diagram below.



As fluoride will spread through the network slowly from the four treatment plants not all consumers will receive fluoridated water at the same time. Staff will be testing fluoride levels in the network to confirm compliance with required levels. This will continue until levels have stabilised at the directed dose throughout the whole network.

5 Significance and engagement / Te Hira me te Arawhiti

The decisions or matters of this Agenda do not trigger the significance criteria outlined in Council's Significance and Engagement Policy, and the public will be informed via agenda publication on the website.

6 Attachments / Ngā Tāpiritanga

1. Letter from Director-General of Health dated 18 February 2025



133 Molesworth Street
PO Box 5013
Wellington 6140
New Zealand
T+64 4 496 2000

18 February 2025

Ref. H2025061237

Simon Weston
Chief Executive Officer
Whangarei District Council
c/o rebecca.vertongen@wdc.govt.nz

Tēnā koe Simon

I refer to your letter of 12 February 2025. In that letter you advise of resolutions adopted by the Council at an Extraordinary Meeting held on 12 February 2025. That Meeting was held to consider the issue of community water fluoridation following my letter of 30 January 2025.

In my letter I asked that the Council confirm by 14 February 2025 whether or not it intended to comply with the direction to fluoridate the Bream Bay and Whangarei water supplies. My letter set out in detail the Council's relevant legal obligations in that regard, and possible consequences should the Council not follow its legal obligations, as well as referring the Council to my Bill of Rights Analysis and associated scientific analysis.

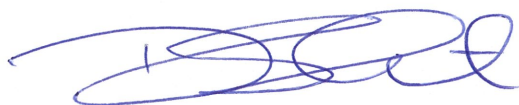
Your letter advises that the Council has decided not to revoke its resolution of 28 November 2024 "not to add fluoride to the Whangarei District's water supplies as required by the direction from the Ministry of Health". In addition, the Council has resolved to, among other things, commence judicial review proceedings to challenge the direction to fluoridate and seek urgent interim relief, and has confirmed instructions to the Council's lawyer in this regard. I understand from your letter and prior correspondence that there is no logistical or technical impediment to the Council complying with the direction by the due date of 28 March 2025.

All public bodies have an obligation under the rule of law to act according to law. In this case the relevant law is Part 5A of the Health Act 1956, passed by Parliament.

I re-state my expectation that the Council will comply with its mandatory statutory duty under the Health Act 1956 to implement the direction to fluoridate the Bream Bay and Whangarei water supplies by 28 March 2025. I encourage the Council to reconsider its position and resolve to comply with its legal obligations. However, if the Council persists with its resolution not to comply and/or does not comply by the due date of 28 March

2025, I will give consideration to legal options. Those options have been canvassed in prior correspondence.

Nāku noa, nā



Dr Diana Sarfati
Director-General of Health
Te Tumu Whakarae mō te Hauora

RESOLUTION TO EXCLUDE THE PUBLIC

That the public be excluded from the following parts of proceedings of this meeting.

The general subject of each matter to be considered while the public is excluded, the reason for passing this resolution in relation to each matter, and the specific grounds under Section 48(1) of the Local Government Official Information and Meetings Act 1987 for the passing of this resolution are as follows:

1.	The making available of information would be likely to unreasonably prejudice the commercial position of persons who are the subject of the information. {Section 7(2)(c)}
2.	To enable the council (the committee) to carry on without prejudice or disadvantage commercial negotiations. {(Section 7(2)(i))}.
3.	To protect the privacy of natural persons. {Section 7(2)(a)}.
4.	Publicity prior to successful prosecution of the individuals named would be contrary to the laws of natural justice and may constitute contempt of court. {Section 48(1)(b)}.
5.	To protect information which is the subject to an obligation of confidence, the publication of such information would be likely to prejudice the supply of information from the same source and it is in the public interest that such information should continue to be supplied. {Section 7(2)(c)(i)}.
6.	In order to maintain legal professional privilege. {Section 2(g)}.
7.	To enable the council to carry on without prejudice or disadvantage, negotiations {Section 7(2)(i)}.

Resolution to allow members of the public to remain

If the council/committee wishes members of the public to remain during discussion of confidential items the following additional recommendation will need to be passed:

Move/Second

"That _____ be permitted to remain at this meeting, after the public has been excluded, because of his/her/their knowledge of Item _____.

This knowledge, which will be of assistance in relation to the matter to be discussed, is relevant to that matter because _____.

Note:

Every resolution to exclude the public shall be put at a time when the meeting is open to the public.