

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2022] NZEnvC 69

IN THE MATTER of the Resource Management Act 1991

AND of a notice of motion under s149T(2) to decide proposed Plan Change 1 to the Regional Plan: Waste for Otago (referred to the Environment Court by the Minister for the Environment under s142(2)(b) of the Act)

BETWEEN OTAGO REGIONAL COUNCIL

(ENV-2020-CHC-128)

Applicant

Court: Environment Judge P A Steven
Environment Commissioner J A Hodges

Hearing: In Chambers on the papers

Last case event: Submissions received 18 March 2022

Date of Decision: 29 April 2022

Date of Issue: 29 April 2022

**FURTHER DECISION OF THE ENVIRONMENT COURT
SCOPE**

A: Mr Cocks' submission on PC1 is struck out under s279(4) of the Resource Management Act 1991 as it discloses no relevant case.

REASONS

ORC PC1 – SCOPE DECISION



Introduction

[1] The Minister for the Environment directed that Plan Change 1 ('PC1') to the Regional Plan: Waste for Otago ('Waste Plan') be referred to the Environment Court under s142(2)(b) of the Resource Management Act 1991 to give a decision on the provisions and matters raised in submissions.

[2] The court's decision *Re Otago Regional Council* [2021] NZEnvC 185 deals with the PC1 topic of the use of dust suppressants, and particularly, waste oil in Chapter 6.¹ The court's decision followed the lodgement of amended provisions agreed by the parties who attended mediation and an affidavit in support of Dolina Lily Lee, a senior analyst freshwater and land at the Regional Council.² After a hearing on the papers, the court approved, pursuant to s149U(6) and c110(1) to (3) of Schedule 1 of the Resource Management Act 1991, an amended version of PC1 as set out in 'Annexure 1: Plan Change 1 (Dust Suppressants) Provisions' to that decision.

[3] Since then, the landfills provisions (PC1, Chapter 7) have been mediated. A mediation agreement was signed by parties, including John Cocks. Since then, Mr Cocks has lodged a memorandum raising issues with the mediated agreement.³ Mr Cocks says that PC1 contains contradictory provisions that would complicate the administration of the Waste Plan and create ambiguities for landfill operators.⁴ Mr Cocks says that he drew attention to differences between the types of landfills in PC1 and those in the Waste Minimisation (Calculation and Payment of Waste Disposal Levy) Amendment Regulations 2021 ('Regulations') and suggested that regulators and operators would be frustrated by these and the application of the regulations will be compromised.⁵ Mr Cocks considers that these differences

¹ Followed by *Re Otago Regional Council* [2022] NZEnvC 26.

² *Re Otago Regional Council* [2021] NZEnvC 185 at [4]-[6].

³ Memorandum dated 17 December 2021.

⁴ Cocks memorandum dated 17 December 2021 at [2].

⁵ Cocks memorandum dated 17 December 2021 at [2].

should be addressed before PC1 is finalised.⁶

[4] The Regional Council responded stating that his submission seeking these amendments is not within the scope of PC1.⁷

[5] Other parties subsequently lodged a joint memorandum and draft amended provisions for Chapter 7 in PC1.⁸ Mr Cocks has advised that he will not sign the joint memorandum.

[6] The court issued a Minute on 20 January 2022 and invited the Regional Council to identify any relief sought by Mr Cocks in his submission on PC1 that it contends is outside the scope of PC1 and not “on” PC1, by 11 February 2022. Mr Cocks was given until 18 February to advise whether he disputed the scope issue and intends to pursue his submission on PC1.

[7] Mr Cocks advised he did wish to dispute the scope issue and pursue his submission and parties were given an opportunity to make submissions about scope.

Scope arguments

Council submissions

[8] Mr Cocks’ submission⁹ seeks the following relief:

⁶ Cocks memorandum dated 17 December 2021 at [3].

⁷ ORC memorandum dated 22 December 2021.

⁸ Joint memorandum PC1 – Chapter 7 – Landfills dated 11 February 2022.

⁹ Under a heading “What decision would you like the Environment Court to make?” and subheading “The reasons for my view and/or any amendments I am seeking are”.

7.6 Landfill rules

Rule 7.6.1 excludes cleanfills, offal pits, farm landfills and greenwaste landfills.

Cleanfills and greenwaste landfills should **not** be excluded.

The Guidelines have a class of landfill that is a Clean Fill. The Clean Fill material definition in the Guidelines is different to the cleanfill definition in the Plan. Having two types of ‘cleanfills’ in the Plan will create ambiguity, and frustrate good practice and good regulation.

Greenwaste landfills have a high content of organic waste. In the Guidelines, there is a limit on the organic content of waste going to all classes of landfill except a Class 1 Landfill (ie Municipal Solid Waste Landfill). This limit is 5% or less by volume per load. The Climate Change (Waste) Regulations impose a charge on landfills that emit greenhouse gases. The regulations assign a high emission factor Greenwaste. Currently, the regulations apply to a type of landfill known as a waste disposal facility. The Waste Minimisation Act defines such a facility, which is a subset of a Class 1 Landfill. Maintaining a greenwaste landfill in the regional plan undermines the guidelines, frustrates the purpose of the levy, and avoids provisions of the Climate Change Act.

Glossary

Remove the definition of Cleanfill and adopt the definition given in the Guidelines for Clean Fill material.

[9] The Regional Council submits there is no scope within PC1 to make the changes sought by Mr Cocks and submits that a submission needs to relate to a change proposed to the status quo.¹⁰

[10] The Regional Council points to the following matters that illustrate the limited scope of PC1:

¹⁰ ORC memorandum dated 11 February 2022 at [18].

- (a) that the existing Waste Plan defines landfills so as to capture a number of types, depending upon the type of waste they accept. This includes farm, cleanfill, offal pit, and greenwaste. These terms are each separately defined;
- (b) the Waste Plan contains specific rules that apply to these different types of landfills, including for cleanfill and greenwaste landfills. In particular, it includes:¹¹
 - (i) Rules 7.6.3 and 7.6.4 regulate discharges of contaminants from cleanfill landfills; and
 - (ii) Rules 7.6.10 and 7.6.11 regulate discharges of contaminants from greenwaste landfills.
- (c) the above rules and the definitions of the different types of landfills that they apply to are operative and not proposed to be amended by PC1;¹²
- (d) in addition to those rules, the Waste Plan includes a transitional regime for new or operating landfills, under Rule 7.6.1. However, the rule excludes landfills caught by the above-mentioned rules;
- (e) PC1 included reference to Rule 7.6.1 although that was to provide context for an understanding of the change. Both the introduction to Chapter 7, along with Rule 7.6.1 itself, make it clear that Rule 7.6.1 explicitly excludes cleanfill and greenwaste landfills;¹³
- (f) the introduction to PC1 included guidance as to what is proposed to be amended by PC1. It also states that the document should be “read in conjunction with” the s32 report and the Waste Plan.¹⁴

[11] PC1 proposes a new policy and amendments to the information requirements and assessment matters for resource consent applications under Rule

¹¹ There are other rules for offal pits, farm landfills, composting and silage production as well.

¹² ORC memorandum dated 11 February 2022 at [19(a)] and affidavit of Dolina Lily Lee dated 11 February 2022 at [11] and [16].

¹³ ORC memorandum dated 11 February 2022 at [19(b)]-[19(c)].

¹⁴ ORC memorandum dated 11 February 2022 at [19(e)].

7.6.1, so as to improve the operation and management of landfills in order to reduce the adverse effects of landfill activities caught by this rule. However, PC1 does not propose any amendments in relation to landfills caught by the other rules in the Waste Plan.¹⁵

[12] The Regional Council has committed to considering rules applying to cleanfill and greenwaste landfills as part of the forthcoming review of the Waste Plan. The s32 report sets out the relationship between the confined nature of PC1 and the much broader scope of the new Land and Water Regional Plan.¹⁶

[13] However, the submission made by Mr Cocks seeks to widen the field of PC1, by seeking to amend provisions that are operative, and are not intended to be amended by PC1.

[14] Although the fact sheet refers to landfills *generally*, the Regional Council says that this cannot alter the scope of PC1.¹⁷ Counsel notes that the courts have accepted that background material, such as the s32 report and the public notice for a plan change, can be relevant but not determinative of scope. The Regional Council submits that no weight can be placed on the fact sheet's wording when considering the plain wording of PC1 as notified.¹⁸

[15] The Regional Council submits that, given the limited scope of PC1, the relief sought by Mr Cocks is not something that could reasonably have been foreseen by potentially affected persons at the time PC1 was notified.¹⁹ There is no indication in PC1 itself, the s32 report, nor the Key Issues Report that PC1 intends to change the rule framework regulating cleanfill and greenwaste landfills

¹⁵ ORC memorandum dated 11 February 2022 at [19(f)].

¹⁶ ORC memorandum dated 11 February 2022 at [19(g)].

¹⁷ ORC memorandum dated 11 February 2022 at [19(h)].

¹⁸ ORC memorandum dated 18 March 2022 at [4], and referring to *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [132]; and *Hawke's Bay Fish and Game Council v Hawke's Bay Regional Council* [2017] NZEnvC 187 at [42] to [47].

¹⁹ ORC memorandum dated 11 February 2022 at [21].

or as to how these landfills are defined.²⁰

[16] Overall, the Regional Council maintains that PC1 does not advance a change to the status quo of Rule 7.6.1 or the definition of “cleanfill”. Therefore, the relief sought by Mr Cocks is not “on” or “about” PC1. The relief sought by Mr Cocks seeks to address broader issues in relation to the planning framework for cleanfill and greenwaste landfill activities in a more far reaching way than PC1 anticipated.²¹

Mr Cocks’ submissions

[17] We have considered Mr Cocks’ memoranda of 17 December 2021, 20 February 2022 and 3 March 2022 in relation to scope. We have not referred to all of the matters raised in these memoranda as much of their contents relate to the merits of the changes he seeks.

[18] Mr Cocks states that his submission on PC1 related to the exclusion of cleanfill landfills and greenwaste landfills in Rule 7.6.1, and the definition of cleanfill.²² Mr Cocks submits that guidance as to the scope of PC1 is provided in the Regional Council fact sheet and the introduction in PC1.²³ Neither the scope nor the purpose of PC1 is stated anywhere in these documents.²⁴ However, he was persuaded to take an interest in Chapter 7 of PC1, having read the fact sheet and particularly the statement in that which states “All landfills would require a resource consent...”.²⁵

[19] It also states that the *Technical Guidelines for Disposal to Land* (“Guidelines”)²⁶

²⁰ ORC memorandum dated 11 February 2022 at [21].

²¹ ORC memorandum dated 11 February 2022 at [26].

²² Cocks memorandum dated 17 December 2021 at [10].

²³ Cocks memorandum dated 17 December 2021 at [13].

²⁴ Cocks memorandum dated 17 December 2021 at [13].

²⁵ Cocks memorandum dated 3 March 2022 at [3].

²⁶ Waste Management Institute New Zealand (‘WasteMINZ’) *Technical Guidelines for Disposal to Land* (WasteMINZ, 2018).

would be the applicable industry standard, and further states that “These requirements would mean Otago’s landfills are managed using best practice standards developed by the industry and will reduce the adverse effects of landfills”.

[20] In his opinion, these statements determine the scope of the change.²⁷

[21] He notes that PC1 proposes to introduce a new policy, Policy 7.4.11, which will require the use of the Guidelines, with which he is familiar. He notes that these Guidelines are intended for planned disposal at new landfill facilities, or extensions of existing landfills.

[22] However, he notes that Rule 7.6.1 in PC1 excludes cleanfill landfills and greenwaste landfills. With reference to the ‘Guidelines’ and a Ministry for the Environment document,²⁸ Mr Cocks states that the majority of landfills will not require a resource consent.²⁹

[23] In addition, he says that the introduction in PC1 refers to “amend[ed] existing provisions for ... Minimum standards for new landfills”. He notes that new Policy 7.4.11 introduces requirements for new and operating landfills to be in accordance with the Guidelines. The Guidelines state that they are intended for planned disposal at new landfill facilities or extensions of existing landfills.

[24] In Mr Cocks’ opinion, if a potential submitter had read only the introduction, they would have been misinformed about the scope of the amendments.³⁰

[25] He also says that PC1 requires operating landfills be in accordance with the

²⁷ Cocks memorandum dated 3 March 2022 at [11].

²⁸ Ministry for the Environment *Reducing waste: a more effective landfill levy – consultation document* (Ministry for the Environment, Wellington, 2019).

²⁹ Cocks memorandum dated 17 December 2021 at [14]-[18].

³⁰ Cocks memorandum dated 17 December 2021 at [20]-[23].

Guidelines, which is contrary to the intention of the Guidelines.³¹ Mr Cocks says that the “scope” of PC1 with respect to landfills is primarily new landfill Policy 7.4.11, which requires that certain activities are “in accordance with” the Guidelines.³²

[26] Mr Cocks also says that the purpose of PC1 is not explicit,³³ and postulates that a purpose of PC1 could be to align the meanings of landfills in the plan with those in the Regulations although if that is its purpose, then he considers there will be misalignment of the Waste Plan and Regulations.³⁴

[27] Further submissions are contained in his memoranda, although they are addressing the merits of the changes he seeks to have made. As such, these submissions are irrelevant to the question of whether his submission was “on” the plan change.

Law

[28] The court has already considered a scope issue with regard to PC7, also referred to the court under s142(2)(b).³⁵ One of the issues addressed in that decision is the difference in terminology used in (for example) s149E(1) RMA (submissions must be “about” a matter) and in cl5(2) of Schedule 1 of the RMA (submissions must be “on” a plan).

[29] The court considered that “on” and “about” are used interchangeably when dealing with the same subject matter, such that the principles established by higher courts when establishing jurisdiction to grant relief on submissions would apply.³⁶

³¹ Cocks memorandum dated 17 December 2021 at [24].

³² Cocks memorandum dated 17 December 2021 at [25].

³³ Cocks memorandum dated 17 December 2021 at [34].

³⁴ Cocks memorandum dated 17 December 2021 at [39].

³⁵ *Re Otago Regional Council* [2021] NZEnvC 164.

³⁶ *Re Otago Regional Council* [2021] NZEnvC 164 Annexure 2 at [10].

[30] The Regional Council submits that the same approach should apply in relation to PC1.³⁷

[31] We accept that submission. We adopt the two-part test for whether a submission is “on” or “about” the plan change. A submission is on the plan change if:

- (a) the submission addresses the extent to which the plan change would alter the status quo; and
- (b) the submission does not cause the plan change to be appreciably amended without real opportunity for participation by those potentially affected.³⁸

[32] When thinking about scope, the s32 report can be a useful guide in defining the breadth of the change. If the submission raises matters that should have been addressed in the s32 report, but were not, the matters are unlikely to fall within the ambit of the plan change.

[33] Incidental or consequential changes are permissible provided that no substantial s32 analysis was required to inform affected persons of the comparative merits of that change.³⁹

[34] If Mr Cocks’ submission is not “on” or “about” PC1, then the relief he seeks cannot be granted by the court.

Discussion

[35] The introduction to PC1 as notified says:

³⁷ ORC memorandum dated 11 February 2022 at [10].

³⁸ *Re Otago Regional Council* [2021] NZEnvC 164 Annexure 2 at [11], referring to *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003 at [66].

³⁹ *Re Otago Regional Council* [2021] NZEnvC 164 Annexure 2 at [13], referring to *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [81].

The Otago Regional Council has prepared Proposed Plan Change 1 (Dust suppressants and landfills) to the Regional Plan: Waste for Otago. Proposed Plan Change 1 (Dust suppressants and landfills) amends existing provisions for:

- Use of dust suppressants and waste oil, and
- Minimum standards for new landfills.

This document should be read in conjunction with:

- Section 32 Evaluation Report; and
- Regional Plan: Waste for Otago (operative as at 11 April 1997). ...

[36] Ms Lee prepared an affidavit in relation to the scope of PC1. She considers the impact of the further changes sought by Mr Cocks with reference to the breadth of the changes introduced by PC1.⁴⁰ Her affidavit formed the basis for the Regional Council's submissions summarised earlier on.

[37] Ms Lee outlined sections of the s32 report that assist in demonstrating the purpose or scope of PC1. The s32 report states:

The Waste Plan was made operative in 1997 and has not been amended or reviewed under section 79 of the RMA since that time. As a result, it has become out of date with current expectations regarding environmental management. The entirety of the Waste Plan will be reviewed alongside the Water Plan in preparation of a new LWRP. PC1 is an interim measure to address two pressing issues with the existing Waste Plan provisions in order to improve environmental outcomes until the review of the Waste Plan has been completed and that Plan has been integrated into the new LWRP.

In tandem with PC8, the overall purpose of PC1 is to strengthen the management of discharges in order to maintain, as a minimum, water quality in Otago. It does this by introducing stricter controls on the use of dust suppressants (and particularly waste oil) and improved minimum standards for landfills in order to

⁴⁰ Lee affidavit dated 11 February 2022.

reduce the adverse effects of these activities.⁴¹

PC1 complements the focus of PC8 on making targeted improvements to Otago's planning framework until the new LWRP is notified in 2023. The Waste Plan has been operative for over 20 years but has not been amended in that time. Ultimately the Waste Plan will be reviewed and incorporated into the new LWRP, however in the meantime PC1 aims to ensure that its provisions remain fit-for-purpose.

The original scope of PC1 was to address overlaps between the Water and Waste Plans, however once assessments of the overlaps began it became clear that there are structural and jurisdictional issues with the Waste Plan that make it difficult to resolve the main tensions between the plans without a full review. Accordingly, the scope was then limited to issues with waste oil and landfills that were considered to be pressing environmental concerns.⁴²

[38] The s32 report lists the provisions that are proposed to be amended or introduced to achieve that purpose:

PC1 introduces a new policy for landfills requiring implementation of current best practice for the design, construction and operation of landfills and deletes Appendix 2 which sets out the matters to be included in a landfill development and management plan. The intent of the amendments is to improve the current minimum standards for landfills. The relevant provisions are:

- New Policy 7.4.11
- Amendments to 7.6.1.1 Information requirements
- Amendments to 7.6.1.2 Assessment matters
- Amendments to Appendix 2
- Consequential amendments to Issues 7.2.2 and 7.2.3, Objectives 7.3.1 and 7.3.2, Policy 7.2.6, Method 7.5.7, 7.6.6.1 Information requirements and 7.6.7.1 Information Requirements

⁴¹ Section 32 report at [4.2].

⁴² Section 32 report at [4.3].

[39] She states that the new Policy 7.4.11 seeks to manage adverse effects of discharges from new and operating landfills, by requiring that the design and operation of landfills be in accordance with current industry best practice, being the Guidelines.⁴³

[40] While Chapter 7 refers to landfills using the broad definition, she explains that other parts of the chapter (including the rule framework) clearly delineate the different types of landfills⁴⁴ (as noted earlier in this decision) and these are not proposed to be amended by PC1.⁴⁵

[41] She agrees with Mr Cocks that new Policy 7.4.11 will be given effect through Rule 7.6.1.⁴⁶ New Policy 7.4.11 applies to new and operating landfills and does not exclude its application to any specific types of landfill.

[42] As set out above, the introduction of the Waste Plan states that the term “landfill”, refers generally to all landfills unless otherwise specified. New Policy 7.4.11 does not specify otherwise and therefore would apply to all landfills, including cleanfill and greenwaste landfills, if new applications for resource consents are lodged.

[43] New Policy 7.4.11 would not apply to existing landfills operating under an existing resource consent, unless a change in the operation of that landfill meant a relevant permitted activity rule could not be complied with.⁴⁷

[44] Ms Lee disagrees that the purpose of PC1 is not explicit and refers to the affidavit filed in support of the provisions agreed at mediation, which includes further detail of the intent of PC1. She states that the purpose is to strengthen the management of discharges in order to maintain, as a minimum, water quality in

⁴³ Lee affidavit dated 11 February 2022 at [19].

⁴⁴ Lee affidavit dated 11 February 2022 at [15].

⁴⁵ Lee affidavit dated 11 February 2022 at [21].

⁴⁶ Lee affidavit dated 11 February 2022 at [25].

⁴⁷ Lee affidavit dated 11 February 2022 at [26]-[27].

Otago.⁴⁸ She also notes that the s32 report states that the overall purpose of PC1 (as relevant to Chapter 7) is to introduce improved minimum standards for landfills in order to reduce the adverse effects of these activities whilst listing the provisions that are proposed to be amended or introduced to achieve that stated aim.⁴⁹

[45] Ms Lee explains that PC1 is only an interim measure, in order to improve environmental outcomes, until the review of the Waste Plan has been completed and integrated into the new Land and Water Regional Plan.⁵⁰

[46] Ms Lee adds that the Regional Council is committed to considering rules applying to the cleanfill and greenwaste landfills as part of the review of the Waste Plan and the new Land and Water Regional Plan.⁵¹

[47] We consider the scope of PC1 is clear from a reading of the plan change itself. It is limited in its breadth. Rule 7.6.1 is not amended and nor are the definitions of any of the terms that refer to the types of landfills addressed in the Waste Plan. Those provisions remain as they are.

[48] The essence of PC1 as it relates to the Guidelines is that a new policy is introduced, and reference to the Guidelines is added in various places, including in information requirements and assessment matters (for resource consent applications).

[49] Mr Cocks' relief does not address the extent to which PC1 changes the status quo. His relief, if granted, would go significantly further than PC1, and other persons with an interest in Chapter 7 of PC1 would be left at a disadvantage. No person could reasonably have appreciated that a wider review of the operative and unamended provisions of the Waste Plan and their interaction with various documents such as the Guidelines and Regulations would result from decisions on

⁴⁸ Lee affidavit dated 11 February 2022 at [31].

⁴⁹ Lee affidavit dated 11 February 2022 at [32].

⁵⁰ Lee affidavit dated 11 February 2022 at [32].

⁵¹ Lee affidavit dated 11 February 2022 at [22].

submissions to PC1 bearing in mind its very limited scope.

[50] Passages in the s32 report earlier referred to clarify the narrow limits of PC1.

[51] Mr Cocks' submission appears to concern the broader relationship between (for example) the Guidelines and the Regulations and the Regional Council's statutory plans in dealing with landfills, and what provision should be made for those documents. His concerns are better addressed in the context of the new Land and Water Regional Plan.

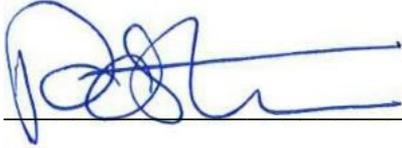
Decision

[52] The relief sought in Mr Cocks' submission is not "on" or "about" PC1. Section 149U(8) of the Act provides that "Part 11 [of the Act] applies to proceedings under this section, except if inconsistent with any provision of this section". The court's strike out power is in s279(4), which is in Part 11. There is no inconsistency with s149U in applying s279(4). Accordingly, the court has the power to direct that the submission be struck out.

[53] The court has considered whether, in the case of a plan change referred to the court for a decision on submissions, it should be even more reticent than is usual in striking out a person's case. However, in this case, Mr Cocks' submission requests relief the court simply cannot grant, and so it does not disclose a relevant case. It is appropriate it should be struck out. We note that Mr Cocks has had the benefit of raising his concerns in court-assisted mediation of PC1, and will have the opportunity to be involved in the new Land and Water Regional Plan processes.

[54] Mr Cocks' submission is struck out.

For the court



P A Steven
Environment Judge

