

In the Environment Court of New Zealand  
at Auckland

I mua i te Kōti Taiao o Aotearoa  
I te rohe o Tāmaki Makaurau

ENV-2020-AKL-

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*under:* the Resource Management Act 1991

*in the matter of:* an appeal pursuant to clause 14(1) of the First Schedule  
to the Resource Management Act 1991

*between:* **Mercury NZ Limited**  
*Appellant*

*and:* **Waikato Regional Council**  
*Respondent*

Notice of appeal of Mercury NZ Limited against Waikato Regional  
Council's decision on Proposd Plan Change 1 to the Waikato  
Regional Plan

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Dated: 8 July 2020

**NOTICE OF APPEAL AGAINST DECISION ON PLAN CHANGE**

*Clause 14(1) of the First Schedule, Resource Management Act 1991*

**To** The Registrar  
Environment Court  
Auckland

- 1 Mercury NZ Limited (*Mercury*) appeals against the decision of an independent hearing panel, adopted by the Waikato Regional Council, on Proposed Plan Change 1 (Healthy Rivers) to the Waikato Regional Plan (*PC 1*) (*Decision*).

**Mercury's interest in these proceedings**

- 2 Mercury made a submission and further submissions on PC 1.<sup>1</sup>
- 3 Mercury is not a trade competitor for the purposes of section 308D of the Resource Management Act 1991 (*RMA*).
- 4 Mercury received notice of Waikato Regional Council's Decision on 22 April 2020. However, pursuant to Judge Harland's decision of 30 April 2020, the appeal period applicable for Mercury is 50 working days from 28 April 2020.<sup>2</sup>
- 5 The parts of the Decision that Mercury is appealing are:
- 5.1 Policy 11;
  - 5.2 Policy 12;
  - 5.3 Policy 13;
  - 5.4 Table 3.11-2;
  - 5.5 Consequential Amendments:
    - (a) Rule 4.2.10.1(n);
    - (b) 4.3.3 Policy 1; and
    - (c) 5.2.3 Policy 2.
- 6 Overall, Mercury is interested in issues that may affect its ability to operate, maintain, upgrade and develop its renewable electricity generation assets, particularly its present and potential future assets that rely on the Waikato River.

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<sup>1</sup> Submissions dated 8 March 2017 and 17 May 2018; Further submission dated 14 September 2017.

<sup>2</sup> *Waikato Regional Council v Federated Farmers of New Zealand Incorporated* [2020] NZEnvC 51 at [87(a)].

## **Reasons for the appeal**

- 7 The reasons for the appeal are as follows:
- 7.1 Mercury considers that those parts of the Decision referred to above do not accord with the relevant requirements of the RMA, and are contrary to Part 2 of the RMA.
- 7.2 In particular, those parts of the Decision:
- (a) Do not promote the sustainable management of natural and physical resources;
  - (b) Do not promote the efficient use and development of natural and physical resources;
  - (c) Do not result in the most appropriate plan provisions in terms of section 32 of the RMA;
  - (d) Do not implement the Council's functions under section 30 of the RMA;
  - (e) Do not give effect to higher order planning documents under section 67(3) of the RMA including the National Policy Statement for Renewable Electricity Generation 2011; and
  - (f) Are contrary to good resource management practice.
- 8 Without limiting the generality of the reasons outlined above, the specific amendments and reasons for Mercury's appeal are listed below.

## **Policy 11**

### *Reasons for the Appeal*

- 8.1 Mercury's Waikato Hydro System (*WHS*) is Regionally Significant Infrastructure (*RSI*) pursuant to the Waikato Regional Policy Statement (*RPS*),<sup>3</sup> and is a significant physical resource that must be sustainably managed. Further, all decision-makers are required to have particular regard to the benefits to be derived from the use and development of renewable energy, including the *WHS*, under section 7(j) of the RMA.
- 8.2 The *WHS* is major source of renewable electricity generation, the benefits of which are recognised as a matter of national significance by the National Policy Statement for Renewable Electricity Generation 2011 (*NPS REG*). The *NPS REG* also recognises as a matter of national significance the need to develop, operate and upgrade renewable electricity generation activities.
- 8.3 PC 1 must "give effect to" the *RPS*, as a higher order planning document. The *RPS* contains broad, enabling, protecting provisions in relation to *RSI*, which includes the *WHS*.

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<sup>3</sup> Waikato Regional Policy Statement, Page G-9, "Regionally significant infrastructure" at (f).

- 8.4 In recognition of Part 2, and in giving effect to the NPS REG and RPS, PC 1 should:
- (a) Provide strong policy direction to enable the development, operation, and upgrade of RSI and in particular, renewable electricity generation; and
  - (b) Avoid the inclusion of policy hierarchy that undermines the strong policy support for existing RSI and, in particular, renewable electricity generation.

*Relief sought*

- 8.5 Either:
- (a) Deletion of the words "*subject to policies 12 and 13 and*" in Policy 11 (or amendments to like effect); or
  - (b) Such other relief that would address Mercury's concerns outlined above.

**Policy 12**

*Reasons for the Appeal*

- 8.6 The Decision amended Policy 12 to include "damming or diversion of water". However, the scope of this policy in PC 1 is limited to the regulation of direct point source discharges of the four contaminants from land use activities (nitrogen, phosphorus, sediment and microbial pathogens).
- 8.7 Dam and divert activities associated with hydroelectricity generation, such as the WHS, do not by their nature involve an activity that adds to a river's load of the four contaminants. Instead, dam and divert structures involve the discharge of 'water to water' rather than the discharge of 'contaminants to water'.
- 8.8 As the WHS is not a point source discharge of the four contaminants, such activities should not be referenced in Policy 12. Instead, Policy 12 ought to focus on adverse effects from the point source discharge of the four contaminants, and not adverse effects more generally related to renewable electricity generation damming and diversion activities.
- 8.9 It is inappropriate and inefficient to include hydroelectricity damming and diversion activities within Policy 12 when such activities are not within the scope of PC 1 and are not the original contributor of the four contaminants regulated by PC 1.
- 8.10 Policy 12's implied regulation of dam and divert activities risks double-counting the effects of discharges from land use, and inappropriately regulating activities that have no control over the upstream discharges of the four contaminants by land use activities that are regulated by PC 1.

8.11 Moreover, dam and divert activities such as the WHS are dealt with in a separate section of the Waikato Regional Plan that is not within the scope of PC 1.<sup>4</sup>

*Relief sought*

8.12 Either:

- (a) Reversion of Policy 12 to its original form in the notified version of PC 1 (numbered Policy 11 in the notified version); or
- (b) Amendments to Policy 12 to clarify that discharges that are associated with damming and diversion activities that pass water from a point upstream to a point downstream within the same river system are not subject to Policy 12; or
- (c) Such other relief that would address Mercury's concerns outlined above, including deletion of clause 12(c)(iii).

**Policy 13**

*Reasons for the Appeal*

8.13 As noted above, Mercury's activities for the WHS involve the discharge of 'water to water' and do not add to or increase the point source discharges of the four contaminants regulated by PC 1.

8.14 Activities of the WHS therefore should not be subject to Policy 13. For this reason, and for the reasons outlined above, Policy 13 requires amendment.

*Relief sought*

8.15 Either:

- (a) Reversion of Policy 13 to its original form in the notified version of PC 1 (numbered Policy 12 in the notified version); or
- (b) Amendments to Policy 13 to clarify that discharges that are associated with damming and diversion activities that pass water from a point upstream to a point downstream within the same river system are not subject to Policy 13; or
- (c) Such other relief that would address Mercury's concerns outlined above, including deletion of clause 13(j).

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<sup>4</sup> See 'Section 3.6 Damming and Diverting'.

### **Table 3.11-2**

#### *Reasons for the Appeal*

- 8.16 The note at the end of Table 3.11-2 is an important tool in the interpretation of the table.
- 8.17 It would be more appropriate and efficient for the text comprising the note to be a clear provision of the plan that is moved to a more prominent location in the text preceding Table 3.11-2. The preface "Note –" should also be deleted to avoid any suggestion that it is merely a non-binding advisory note.

#### *Relief sought*

- 8.18 Relocation of the note at the end of Table 3.11-2 to the top of the Table, and its insertion, with the exception of the word "Note - ", in the introductory text to the Table following newly inserted text "*For the purpose of this table, if a contaminant...*" (or amendments to like effect).

### **Consequential changes**

#### *Reasons for the Appeal*

- 8.19 The consequential changes below are sought to ensure clarity and consistency throughout the Plan for its correct and efficient application in future.

#### *Relief sought*

- 8.20 Delete "and in the case of the Waikato and Waipā River catchments, the relevant water quality objectives in Chapter 3.11" in Rule 4.2.10.1(n) (or amendments to like effect).
- 8.21 Delete the word "objectives" and replace with "policies" at 4.3.3 Policy 1 and 5.2.3 Policy 2 (or amendments to like effect).

### **Relief sought**

- 9 Mercury seeks the following relief from the Court:
- 9.1 The relief specified in this notice of appeal under each heading 'Relief sought'; and / or
- 9.2 Such further, consequential or alternative relief as may be necessary or appropriate to address Mercury's concerns as outlined in this appeal and to give full and proper effect to the relief sought.

### **Court's waivers**

- 10 In an Environment Court decision of May 2020, Judge Harland granted the following waivers for prospective appellants:<sup>5</sup>

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<sup>5</sup> *Wairakei Pastoral Limited* [2020] NZEnvC 63 at [24].

- 10.1 A waiver of the requirement to serve notices of appeal on every person who made a submission as service would be effected by the Court uploading copies of the notices of appeal to its website; and
- 10.2 A waiver of the requirement to provide copies of the appellant's submissions, further submissions, the Decision and a list of names and addresses of each person required to be served.
- 11 Accordingly, Mercury will not serve this notice of appeal on other submitters and does not attach the documents referred to above.

**Signed** for and on behalf of Mercury NZ Limited  
by its solicitors and authorised agents Chapman Tripp



Catherine Somerville-Frost  
Partner  
8 July 2020

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## **Advice to recipients of copy of notice**

### *How to become party to proceedings*

You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal.

To become a party to the appeal, you must,—

- within 15 working days after the period for lodging a notice of appeal ends, lodge a notice of your wish to be a party to the proceedings (in [form 33](#)) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and
- within 20 working days after the period for lodging a notice of appeal ends, serve copies of your notice on all other parties.

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in [section 274\(1\)](#) and [Part 11A](#) of the Resource Management Act 1991.

You may apply to the Environment Court under [section 281](#) of the Resource Management Act 1991 for a waiver of the above timing or service requirements (see [form 38](#)).

### *Advice*

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch