

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

Decision No. [2020] NZEnvC 063

IN THE MATTER

of the Resource Management Act
1991 (**the Act**)

AND

of potential appeals under Clause 14 of
Schedule 1 of the Act against the decision
of the Waikato Regional Council on
Proposed Plan Change 1 to the Waikato
Regional Plan

AND

of an application for waivers and directions
under s 281 of the Act

BY

WAIRAKEI PASTORAL LIMITED
AUCKLAND / WAIKATO & EASTERN
REGION FISH & GAME COUNCILS
BEEF & LAMB NZ LTD
BT MINING LTD
DAIRYNZ
DIRECTOR-GENERAL OF
CONSERVATION
FONTERRA CO-OPERATIVE GROUP LTD
GENESIS ENERGY LTD
HANCOCK FOREST MANAGEMENT (NZ)
LTD
HAMILTON CITY COUNCIL
HORTICULTURE NZ
MERCURY NZ LTD
MIRAKA LTD
OJI FIBRE SOLUTIONS (NZ) LTD
ROYAL FOREST & BIRD PROTECTION
SOCIETY OF NZ INC
SOUTHERN PASTURES LP
WARTA (WAIKATO REGION
TERRITORIAL AUTHORITIES)
WAIKATO & WAIPA RIVER IWI
WAIKATO RIVER AUTHORITY
WATERCARE SERVICES LTD

ENV-2020-AKL-000044

Applicants



Court: Environment Judge M Harland

Date of Decision: 14 May 2020

Date of Issue: 15 May 2020

DECISION OF THE ENVIRONMENT COURT

- A: The application for waiver and directions is granted as set out at [24] of this decision.
- B: Decision [2020] NZEnvC 059 is recalled.

REASONS

Introduction

[1] On 30 April 2020 the applicants¹ filed an application seeking waivers and directions in relation to Proposed Waikato Regional Plan Change 1 – Waikato and Waipa River Catchments (**PC1**) to the Waikato Regional Plan.

[2] The applicants were all submitters and/or further submitters on PC1.

[3] On 30 March 2020 the Waikato Regional Council (**Council**) made an application seeking the following waivers and directions:

(a) Appeal Period

- (i) A waiver in favour of submitters of the requirement under clause 14(4) of Schedule 1 to the RMA to lodge appeals with the Environment Court on PC1 within 30 working days of service of the notice of WRC's decision under clause 11 of Schedule 1 of the RMA.
- (ii) A direction that all appeals on PC1 must be lodged with the Environment Court within 50 working days of service of the notice of WRC's decision under clause 11 of Schedule 1 of the RMA.

(b) Service of Notices of Appeal

- (i) A waiver in favour of appellants of the usual requirement in clause 14(5) of Schedule 1 of the RMA, regulations 5 and 7 and Form 7 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003 to serve a copy of the notice of appeal on every person who

¹ Auckland / Waikato & Eastern Region Fish & Game Councils, Beef & Lamb NZ Ltd, BT Mining Ltd, DairyNZ, Director-General of Conservation, Fonterra Co-operative Group Ltd, Genesis Energy Ltd, Hancock Forest Management (NZ) Ltd, Hamilton City Council, Horticulture NZ, Mercury NZ Ltd, Miraka Ltd, Oji Fibre Solutions (NZ) Ltd, Royal Forest & Bird Protection Society of NZ Inc, Southern Pastures LP, WARTA (Waikato Region Territorial Authorities), Waikato & Waipa River Iwi, Waikato River Authority, Wairakei Pastoral Ltd & Watercare Services Ltd.



made a submission on the provision or matter to which the appeal relates.

- (ii) A direction that service of notices of appeal on every person who made a submission on the provision or matter to which the appeal relates will instead be deemed to be effected by the Court uploading copies of the notices of appeal received to the Environment Court's website.
- (iii) A waiver of the requirement in regulation 26 and Form 7 to give written notice to the Registrar of the Environment Court of the name and address of each person required to be served with the notice of appeal, and the date of service on each such person.
- (iv) A waiver in favour of the appellants of the usual requirement in Form 7 to file an original and one copy of the Notice of Appeal with the Environment Court.
- (v) A direction that appellants instead file one hard copy of the Notice of Appeal with the Environment Court, and one electronic copy by email to an email address to be specified by the Court in these directions.
- (vi) A direction that any notice of appeal must be served on the WRC electronically by email to PC1Appeals@waikatoregion.govt.nz.

(c) Documents to be attached to Notices of Appeal

- (i) A waiver in favour of appellants of the requirement in Form 7 to provide copies of the WRC's decision on PC1 with a Notice of Appeal, when it is lodged with the Environment Court.

(d) Section 274 notices

- (i) A waiver of the usual requirement in section 274(2A) of the RMA to serve a copy of any section 274 notice on the "relevant local authority", and of the usual requirement in section 274(2B) to serve a hard copy of any section 274 notice on "all other parties".
- (ii) A direction that service of section 274 notices on "all other parties" will be deemed to be effected by the Environment Court uploading copies of the section 274 notices that are received onto its website as soon as possible after the date the section 274 period closes.
- (iii) A direction that any section 274 notices be served on the WRC electronically by email to PC1Appeals@waikatoregion.govt.nz.
- (iv) A direction that any section 274 notice must be served on the Appellant at its specified address for service.

(e) All other documents filed in relation to the appeal

- (i) A direction that, unless hard copies are subsequently specifically required to be filed and/or served by the Court:

all other documents relating to the appeal filed by any party may be:

- Filed electronically with the Environment Court by email to an address to be specified by the Court in these directions;
- And - Served electronically on the appellant and/or the WRC, as appropriate, by email to PC1Appeals@waikatoregion.govt.nz.

Service of all other parties will be deemed to be effected by the Environment Court uploading the document(s) to its website.

[4] Following the Court's Minute dated 9 April 2020, the Council withdrew the above application and filed an amended application seeking to extend the appeal period only. This amended application was determined in decision [2020] NZEnvC 51, along with an application for waiver filed by Federated Farmers of New Zealand.

[5] The applicants now wish to pursue the earlier request made by the Council in its application of 30 March 2020 to reduce the administrative burden on parties associated with the filing and service of any notices of appeal, the operation of s 274 of the Act, and the filing of any further Court documents.



The application

[6] The applicants seek the following waivers and directions:

(a) Service of Notices of Appeal

- (i) A waiver in favour of appellants of the usual requirement in clause 14(5) of Schedule 1 of the Act, regulations 5 and 7 and Form 7 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003 to serve a hard copy of the notice of appeal on every person who made a submission on the provision or matter to which the appeal relates.
- (ii) A direction that any notice of appeal must be served on the WRC electronically by email to PC1Appeals@waikatoregion.govt.nz.
- (iii) A direction that service of notices of appeal on every person who made a submission on the provision or matter to which the appeal relates will instead be effected by the Council uploading copies of the notices of appeal received to the Council's website.

(b) Document to be attached to Notices of Appeal

- (i) A waiver in favour of appellants to the requirement in Form 7 to provide copies of the appellant's submissions and/or further submissions on PC1 with a Notice of Appeal, when it is lodged with the Environment Court.
- (ii) A waiver in favour of appellants to the requirement in Form 7 to provide copies of the WRC's decision on PC1 with a Notice of Appeal, when it is lodged with the Environment Court.
- (iii) A waiver of the requirement in regulation 26 and Form 7 to give written notice to the Registrar of the Environment Court of the name and address of each person required to be served with the notice of appeal, and the date of service on each such person.

(c) Section 274 notices

- (i) An extension of the time for lodging s 274 notices to 30 working days.



- (ii) A waiver of the usual requirement in s 274(2A) of the Act to serve a hard copy of any s 274 notice on the “relevant local authority”, and of the usual requirement in s 274(2B) to serve a hard copy of any s 274 notice on “all other parties”.
- (iii) A direction that any s 274 notices be served on the Council electronically by email to PC1Appeals@waikatoregion.govt.nz.
- (iv) A direction that service of s 274 notices on “all other parties” will instead be effected by the Council uploading copies of the s 274 notices that are received onto its website as soon as possible after the date the s 274 period closes.

(d) All other documents filed in relation to the appeal

- (i) A direction that, unless hard copies are subsequently specifically required to be filed and/or served by the Court:
 - all other documents relating to the appeal filed by any party may be:
 - Filed electronically with the Environment Court by email to an address to be specified by the Court in these directions; and
 - Served electronically on the appellant and/or the Council, as appropriate, by email.
 - Service of all other parties will be deemed to be effected by the Council uploading the document(s) to its website.

(e) An affidavit in support of the Notice of Motion

- (i) A waiver of the requirement in s 291 of the Act for this notice of motion to be supported by an affidavit as to the matters giving rise to the application.



[7] In support of the application the applicants adopted the explanation and reasons supplied by the Council in its application of 30 March 2020.² The applicants also submitted that the granting of the waivers and directions will not result in any undue prejudice to any party and will instead be of great assistance to all potential parties.

[8] Federated Farmers and the Council have both confirmed that they do not oppose this application.³

Recall of decision [2020] NZEnvC 059

[9] On 12 May 2020 the Court issued decision [2020] NZEnvC 059. This decision addressed and granted the waivers and directions the applicants sought in relation to the timeframe for filing s 274 notices, how s 274 notices were to be filed and served and the documents to be filed with the s 274 notices. The waiver to file an affidavit in support of the application was also granted. Unfortunately, the decision did not determine the other waivers and directions sought. In order to correct this omission, I have decided to recall this decision and to re-issue a new decision that determines all of the waivers and directions together and in their entirety.

[10] There is no procedure provided for in the Act to recall a decision that has been issued. However, s 278 of the Act allows the Court to look to the District Court Rules 2014 for guidance in these circumstances. Rule 11.9 provides that:

A Judge may recall a judgment given orally or in writing at any time before formal record of it is drawn up and sealed.

[11] The Environment Court has previously discussed the issue of whether it can recall a judgment, given the wording of Rule 11.9, which states that the Court may do so "before a formal record ... is drawn up and sealed."

[12] In *Lai v Auckland Council*⁴ the issue of sealing was addressed. The Court noted that the Environment Court's procedures for sealing are different from those which apply in the District or High Court, where the decision is issued, and the order is sealed thereafter. The result was that the Court found that the sealing of a decision in the Environment Court does not create an impediment to the application for recall, as the

² See the Memorandum of counsel dated 30 March 2020 at [19]-[30] & [35].

³ See email of N Edwards dated 1 May 2020 on behalf of Federated Farmers and email of G Lanning dated 5 May 2020 on behalf of the Council.

⁴ *Lai v Auckland Council* [2011] NZEnvC 308.



affixing of it was simply for authentication purposes. To hold otherwise would mean that there were no circumstances in the Environment Court where a decision could be recalled, given that the practice is for all Environment Court decisions to have the seal affixed to them.⁵

[13] Having determined that the Court is able to recall the decision, the issue then becomes whether it should be recalled. The leading decision concerning recall is the Court of Appeal Judgment *Horowhenua County v Nash (No 2)*.⁶ Wild CJ, on behalf of the Court said:

Generally speaking, a judgement once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty.

There are, I think, three categories of cases in which a judgement not perfected may be recalled - first, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.⁷

[14] In this case I consider that there is a special reason to recall the decision, as it did not address all the waivers and directions sought. Furthermore, I determine that re-issuing a new decision that addresses all the waivers and directions sought will reduce any confusion and is in the best interests of justice in the circumstances. Accordingly, Decision [2020] NZEnvC 059 is recalled.

[15] I now consider and determine the waivers and directions applied for.

Analysis of the application for waivers and directions

[16] The key issue for determination by the Court in considering whether to grant applications for waiver is whether, in granting such an application, there will be undue prejudice to any party.⁸

[17] Determining whether there is undue prejudice in granting a waiver is a matter of fact, dependent on the individual circumstances of a case and the context in which an application for waiver arises. I agree with and adopt the meaning of "undue prejudice" outlined in *Re Auckland Council*⁹ as follows:

⁵ *Lai v Auckland Council* [2011] NZEnvC 308 at [19].

⁶ [1968] NZLR 525.

⁷ *Horowhenua County v Nash (No 2)* [1968] NZLR 525 at [633].

⁸ s 281(2) of the Act

⁹ [2017] NZEnvC 207 at [38].



[38] The Court has on numerous occasions noted that the question of whether there would be undue prejudice means that there must be prejudice beyond what would necessarily follow in every case from the granting of a waiver.¹⁰ The qualifier “undue” connotes something more than what is merely incidental.¹¹ It also connotes a prejudice that is unwarranted. It is often considered in light of the fundamental principles that litigation should be conducted as expeditiously as practicable in the interests of justice and that certainty and finality are desirable goals of the litigation process.¹² The Court will also take into account whether a waiver would adversely affect other interests of the parties, such as contractual commitments.¹³

Will any party be unduly prejudiced if this application is granted?

[18] In the context of the COVID-19 emergency I am satisfied that allowing the waiver and directions regarding filing and service of appeals is appropriate. It is also appropriate that the submitters be granted additional time to file their s 274 notices. This reflects the potential number of appeals that may be filed, and the potential size of the task to review all relief sought and identify areas to support or oppose. In addition, the directions sought concerning service of documents will facilitate the appeal and case management process to the parties’ advantage and reduce the administrative burden on all submitters.

[19] Given the COVID-19 emergency there will inevitably be some delay in progressing these appeals. However, the Council has confirmed that it supports this application, and given the importance of PC1, appeals will receive significant case management attention and can be granted priority if that is warranted. I also note the Court has already granted a blanket waiver of the requirement to file paper originals and copies in Court in its COVID-19 Protocols.¹⁴ In this context I determine that no party will be unduly prejudiced by the granting of this application.

Is there likely to be undue prejudice to other submitters if they are not served with this application?

[20] The application has not been served on the submitters beyond the applicants listed, the Council and Federated Farmers. As the waivers sought will benefit all submitters I am satisfied that no person will be unduly prejudiced by not being served with a copy of this application. I am therefore satisfied that service of the application on other submitters is not warranted at this time. Any party that requires further time to file a

¹⁰ For example, *Pukekohe HIAB Transport Ltd v Auckland Council* [2012] NZEnvC 142 at [7]-[8].

¹¹ *Noel Leeming Appliances Ltd v North Shore CC* (1992) 2 NZRMA 113; *Reilly v Northland RC* (1993) 2 NZRMA 414.

¹² For example, *Robinsons Bay Trust v Christchurch CC* C128/07; *Omaha Park Ltd v Rodney DC* A120/09; *Hedley v Wellington RC* W048/99.

¹³ For example, *Harris v Tasman DC* W099/00.

¹⁴ See the 3rd set of Directions and Advisory Notes subsequent to Protocol of 25 March 2020, dated 12 May 2020 at [10].



notice under s 274 can pursue this through an individual application for waiver, which the Court will consider on its own merits.

Should the requirement to file an affidavit with this application be waived?

[21] In the context of the COVID-19 emergency, I agree to waive the requirement that the application for waivers and directions be accompanied by an affidavit in support. The Court is also in a position where it is familiar with the context of PC1 through the affidavits filed by the Council and Federated Farmers in support of their previously determined applications for waiver.

Should the Council's website be utilised for service?

[22] The suggestion that the Council website be used as the vehicle through which service could be achieved, arose because at the outset of Alert Level 4 it was unclear whether the Court would be able to do so. However, as matters have progressed, I have now been assured by the National Manager that the Environment Court Registry is now able to fulfil this function.

[23] I have considered the applicants' request for the service of appeals and s 274 notices to be facilitated and hosted by the Council in light of the recent advice I have received from the National Manager. I have concluded that the more appropriate forum is via the Environment Court's website. This will enable the Court to oversee the filing and service process. I am however grateful to the Council for offering to undertake this task when it appeared that the Environment Court would not be able to do so.

Decision

[24] I grant the following waivers and directions in respect of all submitters / potential appellants and potential s 274 parties:

(1) *Service of Notices of Appeal*

- (b) Any notice of appeal may be filed with the Court electronically by being emailed to the Court's dedicated email address at WRC.PC1appeals@justice.govt.nz.



- (c) Service of notices of appeal on every person who made a submission on the provision or matter to which the appeal relates will be effected by the Court uploading copies of the notices of appeal to its website.¹⁵
- (d) Any notice of appeal must be served on the Council electronically by email to PC1Appeals@waikatoregion.govt.nz.
- (e) The requirement to serve a hard copy of the notice of appeal on every person who made a submission on the provision or matter to which the appeal relates is waived.

(2) Document to be attached to Notices of Appeal

- (a) The requirement to provide copies of the appellant's submissions and/or further submissions on PC1 with a Notice of Appeal, when it is lodged with the Environment Court is waived.
- (b) The requirement to provide copies of the Council's decision on PC1 with a Notice of Appeal, when it is lodged with the Environment Court is waived.
- (c) The requirement to provide the Registrar of the Environment Court with a list of the name and address of each person required to be served with the notice of appeal, and the date of service on each such person is waived.

(3) Section 274 Notices

- (a) The period within which to file a s 274 notice is extended from 15 working days to 30 working days. The 30 working days will start from the end of extended appeal period granted to those submitters that are individual farmers or growers as set out at [86](a) of decision [2020] NZEnvC 051. For clarity, all s 274 notices are to be filed with the Court by **29 September 2020**.
- (b) Any person seeking to join an appeal as a s 274 party may file an electronic copy of any s 274 notices by email to the Court's dedicated email address at WRC.PC1appeals@justice.govt.nz which may be

¹⁵ <https://environmentcourt.govt.nz/>



signed or unsigned, in which case no hard copy need be filed with the Court.

- (c) For those persons who decide to file a hard copy of their s 274 notices with the Court, the requirement to file an extra copy of the notice is waived.
- (d) The requirement to lodge a signed original and 1 copy of any s 274 notice with the Court is waived.
- (e) The requirement to file a copy of the appellant's submission and/or further submission, a copy of the Council's decision and a list of the parties to be served with the s 274 notices is waived.
- (f) An electronic copy of any s 274 notice must be served by email on the appellant at their address for service and on the Council at PC1Appeals@waikatoregion.govt.nz.
- (g) The requirement to serve a copy of any s 274 notice on "all other parties" is waived. Instead, service of s 274 notices on "all other parties" will be effected by the Court uploading copies of s 274 notices received to the Environment Court's website.¹⁶

(4) All other documents filed in relation to the appeal

- (a) Unless hard copies are subsequently specifically required to be filed and/or served by the Court:

all other documents relating to the appeal filed by any party may be:

- Filed electronically with the Environment Court by email at WRC.PC1appeals@justice.govt.nz; and
- Served electronically on the appellant and/or the Council, as appropriate, by email.

Service of all other parties will be deemed to be effected by the Council uploading the document(s) to its website.¹⁷

¹⁶ <https://environmentcourt.govt.nz/>

¹⁷ <https://environmentcourt.govt.nz/>



(5) The requirement to file an affidavit in support of this waiver application

- (a) The requirement to file an affidavit in support of this application is waived.



M Harland

M Harland
Environment Judge