

Before Hearing Commissioners
at Waikato Regional Council

I mua i te kaikōmihana
ki te kaunihera o te rohe o Waikato

under: the Resource Management Act 1991

in the matter of: Proposed Plan Change 1 to the Waikato Regional Plan

and in the matter of: Hearing Block 3

between: **Mercury NZ Limited**
Submitter 73182

and: **Waikato Regional Council**
Consent Authority

Opening legal submissions on behalf of Mercury NZ Limited
(Submitter 73182)

Dated: 2 August 2019

REFERENCE: Catherine Somerville-Frost (catherine.somerville-frost@chapmantripp.com)
Alana Lampitt (alana.lampitt@chapmantripp.com)

Chapman Tripp
T: +64 9 357 9000
F: +64 9 357 9099

23 Albert Street
PO Box 2206, Auckland 1140
New Zealand

www.chapmantripp.com
Auckland, Wellington,
Christchurch



OPENING LEGAL SUBMISSIONS ON BEHALF OF MERCURY NZ LIMITED

INTRODUCTION AND SCOPE OF SUBMISSION

- 1 These legal submissions are presented on behalf of Mercury NZ Limited (*Mercury*) (Submitter 73182), in relation to Hearing Block 3 of Proposed Plan Change 1 to the Waikato Regional Plan (*Hearing Block 3, PC1*). These legal submissions also relate to the 'PC1 Joint Witness Statement – Expert Conferencing – Table 3.11-1' dated 17 June 2019 (*JWS*).

About Mercury

- 2 As outlined in Mercury's original submission on PC1 and legal submissions on Hearing Block 1, Mercury is a publicly listed company and New Zealand's third largest electricity generator.
- 3 Mercury's generation capacity is one hundred percent renewable, with a significant proportion of its generation assets located in the Waikato Region. These assets include the Waikato Hydroelectric Scheme (nine stations), and four geothermal plants.

Overall position on PC1

- 4 Overall, Mercury's position on PC1 is unchanged, in summary:
 - 4.1 Mercury strongly supports PC1's overall direction and focus on improving water quality, in particular by setting targets for reductions in nitrogen, phosphorous, sediment and microbial pathogens;
 - 4.2 Mercury also broadly supports the objectives, policies, methods and rules contained within PC1 as notified; and
 - 4.3 In Mercury's view, there are limited outstanding matters for resolution through the PC1 hearings process.

Scope of submission

- 5 This submission covers two legal matters:
 - 5.1 the unlawfulness of inserting new provisions into the Waikato Regional Plan (*Regional Plan*) via PC1 that are beyond the scope of PC1 as notified and which result from uncertain direction and statements included in the *JWS*; and
 - 5.2 the appropriateness of PC1 including implementation methods that recognise the additional research, data and information that is needed to provide the foundation for future plan changes and review of the Regional Plan.

- 6 Paragraphs 3.14 to 3.18 of Ms Gillian Crowcroft’s evidence also seek additional consequential amendments to a discrete number of aspects of the Regional Plan. Such changes do not raise material legal issues and are not discussed further in these submissions

JWS ATTRIBUTE PROPOSALS - LEGAL SCOPE

- 7 Mercury’s key legal issue in this Hearing Block 3 remains the lawful scope to insert new attributes into the Regional Plan via changes to Table 3.11-1, PC1. These concerns build on the points raised in Mercury’s legal submissions on Hearing Block 1 of PC1.
- 8 As a starting point, Mercury does not in principle oppose the future inclusion of additional water quality attributes into the Regional Plan. Some of the attributes currently being discussed have clear merit in managing water quality and ecological values.
- 9 However, Mercury is concerned that including new attributes based on the JWS would amount to an unlawful process involving wide-ranging un-notified amendments to PC1, with incomplete analysis of the relevant attributes and provisions, and no opportunity for public input on those provisions.
- 10 In Mercury’s view, such an approach would be:
- 10.1 Beyond the lawful scope of amendments to notified provisions able to be made in the course of a plan change process, in particular as there would be no opportunity for notification and submissions on such provisions; and
 - 10.2 Impractical, as the JWS proposal is not sufficiently clear, developed or agreed to enable ready insertion into the structure of PC1 as notified. Such insertions required considerable interpretation and extensive reworking of the notified PC1 provisions; and
 - 10.3 Inappropriate as the merit and robustness of any additional attributes, and associated provisions, have not been adequately assessed. Section 32AA Resource Management Act 1991 (*RMA*) requires additional analysis to be undertaken in relation to changes made or proposed after the section 32 report for a plan change. That analysis has not been undertaken and is essential given the scale and significance of additional attributes to Table 3.11-1.
- 11 Mercury therefore submits that any further attributes should more appropriately be addressed through the upcoming Regional Plan review or a future plan change process. Those processes would involve notification and opportunities to submit. Indeed, Mercury considers that the JWS is of considerable utility to the Regional Council as a starting point for such future processes.

Adding new attributes is unlawful

- 12 In line with its submissions on Hearing Block 1, Mercury submits that any proposal to include additional attributes based on the JWS is not “on” the plan change, and therefore is out of scope.
- 13 The test for whether a submission is “on” a plan change is the ‘bipartite test’ outlined in *Clearwater Resort Limited v Christchurch City Council*, and examined further in *Palmerston North City Council v Motor Machinists Limited*.¹ Mercury submitted in detail on this position in its submissions on Hearing Block 1,² and in its subsequent memorandum responding to questions from the Panel at the Block 1 hearing.³ In summary, however:
- 13.1 The submission in question must first address the actual change to the status quo being proposed through the plan change, or in other words, “*fall within the ambit of the plan change*”.⁴ An appropriately thorough analysis of the effects of the relevant proposal through the section 32 evaluation is an important component of this test.⁵
- 13.2 The second limb of the test is that the decision maker must consider whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those changes;⁶
- 14 The High Court in *Motor Machinists* took a relatively strict approach⁷ to the above analysis and accepted legal submissions that the submission process in Schedule 1 of the RMA “*is not designed as a vehicle to make significant changes to the management regime applying to a resource not already addressed by the plan change*”.⁸
- 15 PC1 is a relatively discrete and subject-specific plan change. Its ‘ambit’, and therefore the scope of potential changes is limited to managing and reducing the diffuse discharges of four contaminants

¹ *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [66]; *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [80]-[82].

² Opening Legal Submissions on behalf of Mercury NZ Limited in relation to Hearing Block 1 (14 March 2019) at [12]-[17].

³ Memorandum of counsel for Mercury NZ Limited in relation to scope for additional attributes, targets and states in Table 3.11-1 (2 April 2019) at [16]-[22].

⁴ *Clearwater* at [66]; *Motor Machinists* at [81].

⁵ *Motor Machinists* at [75]-[76] and [81].

⁶ *Clearwater* at [66]; *Motor Machinists* at [77] and [82]-[83].

⁷ This strict position can be distinguished from the more liberal approach taken by Whata J in *Albany North Landowners v Auckland Council* [2016] NZHC 138, where the High Court accepted that more wide-ranging changes to the Proposed Auckland Unitary Plan (PAUP) provisions, and flow-on amendments, were within scope of the relevant plan-making process. However, the key distinction was that *Albany North Landowners* concerned an entirely new, comprehensive proposed plan, as opposed to a discrete, limited plan change process (as Whata J made clear in that decision at [129]).

⁸ *Motor Machinists* at [79].

(nitrogen, phosphorous, sediment and microbial pathogens) in the Waikato and Waipa River catchments.

Application to proposed additional attributes

- 16 Based on the above legal principles, Mercury submits that new provisions (including objectives, targets and rules) based on additional water quality attributes, as recommended in the JWS, are not within the lawful scope of amendments able to be made to PC1 as notified.
- 17 These proposed new attributes have not been the subject of robust assessment and evaluation, including through a section 32 process (as outlined in Mercury's legal submissions on Hearing Block 1, and in its memorandum in response to questions from the Panel).⁹ Accordingly, any provisions relating to the additional attributes are not reasonably within the ambit of PC1, and do not meet the first limb of the *Clearwater* and *Motor Machinists* tests.
- 18 For example, Mercury submits that any proposal to include 'Fish',¹⁰ 'Dissolved Oxygen',¹¹ 'Temperature',¹² 'Toxicants'¹³ and 'Riparian Cover'¹⁴ attributes as considered in the JWS would clearly be unlawful as such attributes:
- 18.1 do not directly related to discharges of four contaminants managed by PC1;
 - 18.2 were not included in PC1 as notified; and
 - 18.3 were not assessed in the section 32 evaluation or considered (save to dismiss the possibility of including such attributes) in the various Technical Leaders Group reports that led to PC1.
- 19 As outlined further below, incorporating the additional attributes at this stage in the PC1 process would also require the Panel to draft extensive new provisions based on the JWS. Such provisions would not be subject to the normal notification and submission process under Schedule 1 of the RMA and would have not robust section 32 analysis. Accordingly, such an approach leaves no opportunity for potentially interested parties (who may have submitted had they been aware of the relevant provisions) to provide input. Instead, the only parties able to engage with the relevant provisions are those parties who are already involved in the PC1 hearings process.

⁹ Opening Legal Submissions on behalf of Mercury NZ Limited in relation to Hearing Block 1 (14 March 2019) at [20]-[23]; Memorandum at [8]-[15] and Appendix 1.

¹⁰ JWS, Attachment 10, Waikato Specific Fish IBI Attribute for PC1 (page 84 – noting only an indirect link for all the four contaminants save for sediment).

¹¹ JWS, Attachment 6, Dissolved Oxygen Attribute for PC1 (page 70).

¹² JWS, Attachment 15 Temperature Attribute – Tim Cox (page 119).

¹³ JWS, Attachment 16 Other Toxicants Attribute for PC1 (page 121).

¹⁴ JWS, Attachment 11 Riparian Stream Cover Attribute for PC1 (page 86).

20 Consequently, Mercury submits that any provisions based on new water quality attributes not contemplated in PC1 or the section 32 Report would also not meet the second limb of the *Clearwater* and *Motor Machinists* tests.¹⁵

Adding new attributes as recommended in the JWS is not practical

21 Mercury also submits that adding any new provisions to PC1, in line with the recommendations of the JWS, is not currently practical.

22 The JWS is not a particularly clear or useful document and should be treated with some caution. In relation to most attributes, it does not outline a clear or overwhelmingly supported outcome. It does not (in many instances) propose a mechanism or amendments to incorporate the attribute into PC1. While that is understandable given the JWS is a document prepared by technical experts, the result is that the Panel would be forced to undertake an extensive drafting exercise and apply a great deal of interpretation of statements included in the JWS. Submitters on the other hand are left to guess how the attributes could be brought into PC1.

23 Mercury considers that drafting key operative provisions essentially 'from scratch' is beyond the Panel's remit in terms of considering and making a decision on PC1 (as well as the scope issues raised above). By way of example, the JWS noted that the numerical thresholds for periphyton had not been discussed or agreed and the JWS provided only general guidance regarding standards that could be provided as an interim approach.¹⁶

24 The recommendations of the JWS are also not structurally well-suited for incorporation into PC1. Many of the additional attributes proposed for inclusion via submissions, and as further developed in the JWS, do not fit within this structure. Instead, those attributes are linked to "narrative" objectives, which seek (in very broad terms) "trajectories" of improvement to the relevant attribute (without clear baselines, time periods, or numerical targets to robustly assess whether that trajectory is being met).

25 As an example, the JWS recommends 'narrative' targets for a proposed macroinvertebrate community index (*MCI*) attribute. As the JWS notes, however, "*this Attribute will not fit into the format of Table 3.11-1 and will require a separate table to express the current state and objectives*".¹⁷ This issue illustrates the extent of the 'reworking' of PC1 that the Panel would need to undertake to incorporate the additional attributes.

¹⁵ See also Hearing Block 1 Legal Submissions for Mercury at [24]-[25].

¹⁶ JWS, Attachment 9 – Periphyton Attribute for PC1 (page 81).

¹⁷ JWS, Attachment 7 – Macroinvertebrate Attribute for PC1 (page 74).

26 In addition, Mercury notes that a number of the monitoring locations in Table 3.11-1 are not located in wadeable streams, as required for accurate monitoring of MCI, deposited sediment and periphyton. Adding such locations at this point of PC1 would raise an issue of natural justice to adjoining landowners. Specifically, such parties may have submitted on PC1 had they been aware that monitoring would be undertaken in locations that may suggest a more direct relationship with the use of their land. Again, this point raises issues of natural justice and scope.

Inadequate assessment – section 32AA

27 Moreover, Mercury notes that there has not been a full and proper analysis of the potential changes that could be made to give effect to the JWS.

28 There has been no section 32 RMA evaluation addressing attributes considered by the JWS. Section 32AA of the RMA requires further analysis of any changes made or proposed after the section 32 Report's assessment of a plan or plan change. This further evaluation must examine the benefits and costs anticipated from implementing the changes, along with the other matters referred to in section 32(1) to (4) of the RMA. The further evaluation must be either published and notified or referred to in the decision in sufficient detail to demonstrate that the evaluation was undertaken in accordance with statutory requirements.

29 The Courts have considered the application of section 32AA previously. In *KI Commercial Ltd v Christchurch City Council* [2016] NZHC 1218 the High Court held that an Independent Hearings Panel failed to carry out necessary further evaluation required by section 32AA when it approved the inclusion of new provisions which were more restrictive than those proposed and discussed in evidence.

30 In the present case, it is Mercury's submission that it would be difficult, if not impossible, for the Panel to undertake an appropriate statutory assessment of the benefits and costs of including the new attributes based on the level of detail and information included in the JWS. In many cases, the JWS itself identifies that there is insufficient baseline data to assess the current state of the attribute.¹⁸ That being the case, it becomes impossible to evaluate the costs and benefits of imposing future states in PC1. That would be an involved and wide ranging process which ought instead to be undertaken as part of a new plan change or plan review process.

¹⁸ See for example, JWS, Attachment 6 – Dissolved Oxygen Attribute for PC1 (page 70), Attachment 8 – Macrophyte Nuisance Attribute for PC1 (page 78), Attachment 9 – Periphyton Attribute for PC1 (page 82) and Attachment 11 – Riparian Stream Cover Attribute for PC1 (pages 86 and 92).

Overall view on the additional attributes

- 31 Consequently, Mercury submits that it would be inappropriate and unlawful to include additional attributes in Table 3.11-1 as they would:
- 31.1 not be “on” the plan change as they fall outside the ambit of PC1;
 - 31.2 involve substantial interpretation, drafting and reworking of PC1 by the Panel, to such a degree as to mean that the changes would be unforeseeable and mean that parties would be denied the opportunity to consider and comment on the impact of the changes; and
 - 31.3 not have been subject to the rigorous statutory review and assessment as is required of changes to plans.

IMPLEMENTATION METHODS

Implementation methods to be retained

- 32 The planning evidence of Ms Gillian Crowcroft outlines her view that the Officer’s proposed deletion of implementation methods (*Methods*) in PC1 is inappropriate. Instead, Ms Crowcroft recommends that:
- 32.1 The content and concepts of proposed Policy 7 (which the Officers recommend deleting), is incorporated into a new Method; and
 - 32.2 Specific Methods, which are not currently ‘business-as-usual’ in the Waikato Region, are retained. The specific Methods that Ms Crowcroft recommends retaining include:
 - (a) Method 3.11.4.5 which relates to sub catchment scale planning;
 - (b) Method 3.11.4.7 which relates to the information needed to support any future allocation of diffuse discharges; and
 - (c) Method 3.11.4.10 which relates to making an accounting system and monitoring available publicly for each Freshwater Management Unit, including sub-catchments that are currently unrepresented in the existing monitoring network.

Legal status of Methods

- 33 Methods are an entirely appropriate mechanism for inclusion in a plan and are within the ambit of a regional council’s functions. Section 30(1)(a) of the RMA specifically identifies methods,

alongside objectives and policies, as ways for 'achieving integrated management of the natural and physical resources of the region'.

- 34 Indeed, the Waikato Regional Council uses Methods in a number of other sections of the Regional Plan. For example, the regional and local air management chapter includes Methods relating to monitoring, investigation and reporting and "good practice".¹⁹
- 35 The merit of Methods in general is borne out by the fact that 47 of the 54 submissions on the Methods supported them (in whole or in part)²⁰ and the JWS included numerous recommendations for the use of Methods to ensure current state monitoring was expanded.²¹

Merit of retaining the specific Methods

- 36 The Officers' section 42A Report challenges the utility of Methods over the "10 year plus life" of the Plan, suggesting they may not be relevant or helpful.
- 37 Mercury considers that, while the Officers' view may be true of *some* of the Methods in PC1, the specific Methods identified by Ms Crowcroft for retention will be of continued relevance to ensuring that the Waikato and Waipa River water quality is appropriately managed. The Methods identified by Ms Crowcroft are not currently 'business as usual' for Waikato Regional Council and represent forward looking methods for future development of the Regional Plan.
- 38 Moreover, the expert water quality evidence of Mr Dean Miller (presented in Hearing Block 1 on PC1) identified specific changes that he recommended be included in Method 3.11.4.10.²² Mr Miller's changes sought to ensure that the monitoring undertaken by Waikato Regional Council would, in the future, support the development a finer scale sub-catchment management approach.²³
- 39 The Officer's concern appears to be that such future-looking Methods are not helpful because they may be overtaken by future events and become redundant within the 10 year life of the Plan. In Mercury's submission, the potential lost opportunity to ensure that monitoring is undertaken in a manner to develop a finer scale and more appropriate monitoring regime should override any concern of future redundancy. Furthermore, concerns regarding Methods becoming redundant in the future should be allayed by the fact that the Regional Plan review is currently anticipated for notification in 2021.

¹⁹ Waikato Regional Plan, Implementation Methods 6.1.4.1, 6.1.4.2 and 6.1.4.5.

²⁰ Officers' Report, paragraph 321.

²¹ See for example, JWS, Attachment 9 Periphyton Attribute for PC1 (page 82).

²² Dean Craig Miller, Evidence in Chief, Hearing Block 1, PC1 (15 February 2019), paragraph 4.18 (d)

²³ Ibid, paragraph 4.22.

CONCLUSION

- 40 Mercury supports ongoing development of provisions to manage other attributes. However, Mercury is also concerned that proper planning processes should be followed in doing so. Accordingly, the most appropriate forum for advancing such provisions is via a future plan change process, with appropriate technical assessment to support those provisions.
- 41 For the reasons outlined above, Mercury respectfully submits that PC1 should remain limited to provisions dealing with the four contaminants as identified in PC1 as notified.

EVIDENCE TO BE PRESENTED

- 42 Planning evidence prepared by Gillian Crowcroft, Environmental Lead at Harrison Grierson Consultants Limited in support of Mercury's submission has been pre-circulated and will be addressed at this hearing.
- 43 Given the limited scope of Mercury's interest in this hearing, Mercury has not prepared a statement of corporate evidence for presentation. However, Mr Miles Rowe, Principal Planner and Policy Advisor at Mercury, is present at the hearing as Mercury's representative, and is available to respond to any questions the Commissioners may have.

**Catherine Somerville-Frost / Alana Lampitt
Counsel for Mercury NZ Limited
2 August 2019**