

**BEFORE THE ENVIRONMENT COURT
AUCKLAND REGISTRY**

ENV-2020-

**I TE KŌTI TAIAO O AOTEAROA
TĀMAKI MAKAURAU ROHE**

IN THE MATTER of the Resource Management Act 1991 (the Act)

AND

IN THE MATTER of an appeal 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

BETWEEN **HAMILTON CITY COUNCIL**

Appellant

AND **WAIKATO REGIONAL COUNCIL**

Respondent

NOTICE OF APPEAL BY HAMILTON CITY COUNCIL

7 July 2020

TOMPKINS | WAKE

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TO: The Registrar
 Environment Court
 AUCKLAND

1. **HAMILTON CITY COUNCIL** (“HCC”) appeals against parts of a decision of Waikato Regional Council (“WRC”) on Proposed Waikato Regional Plan Change 1 – Waikato and Waipā River Catchments (“PC1”), “the Decision”.

2. HCC has a right to appeal the Decision to the Environment Court under clause 14 of Schedule 1 to the Resource Management Act 1991 (“RMA”) because HCC made submissions on PC1 seeking relief, including consequential relief, in relation to the matters which are now being appealed, being:
 - (a) Objective 1, regarding its application to infrastructure wetlands;
 - (b) Policy 13 d, in relation to staging offset measures;
 - (c) Policy 13 i, concerning reasonable mixing;
 - (d) Policy 17, regarding its application to infrastructure wetlands;
 - (e) Implementation Method 3.11.3.2, about implementing sub-catchment scale planning;
 - (f) Schedule C - Minimum farming standards, Exclusion II, in relation to pig and deer wallows; and
 - (g) Additions to the Glossary of Terms – “Point source discharge”.

3. Through this appeal, HCC seeks the addition of 2 new definitions to PC1, i.e. for:
 - (a) “Infrastructure wetland”; and
 - (b) “Overland flow path”.

4. HCC supports the achievement of Te Ture Whaimana (the Vision and Strategy for the Waikato River) and the basis for PC1. The amendments to PC1 that HCC seeks through this appeal aim to make the affected provisions clear and thereby enhance the certainty of their interpretation and application.
5. HCC provides further details for its appeal below.
6. HCC is not a trade competitor for the purposes of s308D of the RMA. In any event, HCC is directly affected by the subject of the appeal that:
 - (a) Adversely affects the environment; and
 - (b) Does not relate to trade competition or the effects of trade competition.
7. HCC received notice of the Decision on 22 April 2020.
8. On 15 May 2020, the Environment Court granted waivers¹ of the requirements to provide the following with a Notice of Appeal, when it is lodged with the Environment Court:
 - (a) A copy of the appellant's submission and/or further submissions;
 - (b) A copy of the Decision; and
 - (c) A list of the parties to be served with a copy of this Appeal.
9. Accordingly, this information is not included with this Notice of Appeal.

¹ Decision No. [2020] NZEnvC 063

REASONS FOR THE APPEAL

Provisions relating to wetlands

10. PC1 has multiple provisions relating to “wetlands” or “constructed wetlands”.
11. “Constructed wetlands” can be divided into two groups that could be characterised as “infrastructure wetlands” and “enhancement wetlands”.
12. Infrastructure wetlands are artificial, constructed wetlands, but are not part of the receiving environment. In accordance with technical guidelines, they are located “off line” but close to the receiving environment - land, stream, river or coast. They are built to treat stormwater or wastewater before it is discharged to land or water. Typically, they are planted. The plants provide water treatment, shading and habitat. An established infrastructure wetland appears natural, adds amenity to its surroundings, and enhances the area’s biodiversity. Sometimes, infrastructure wetlands will support aquatic species that are contaminant-tolerant.
13. Enhancement wetlands are also artificial, constructed wetlands, but, unlike infrastructure wetlands, they will be part of the receiving environment. The purpose of these wetlands is to improve biodiversity and surface water quality within the receiving environment. They have the potential to be used as an offset measure.
14. A third type of wetlands are naturally occurring wetlands.
15. The Operative Regional Plan includes the following definition of wetland:

Wetland: Includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions.*

16. This definition does not distinguish between the three different types of wetland discussed above.
17. HCC expects that extensive use will be made of infrastructure wetlands in the future to treat stormwater runoff from urban and rural development and land use prior to the treated stormwater being discharged from the constructed wetland to the Waikato or Waipā Rivers or one of their tributaries. Infrastructure wetlands will be an important method for reducing contaminants discharged to the rivers and helping achieve the water quality attribute states identified in PC1 and Te Ture Whaimana.
18. While infrastructure wetlands are built to mimic natural wetlands and rely on natural processes to function, they will need to be actively managed from time-to-time and maintained. Maintenance and operation could include, for example, accessing all parts of the wetland for inspection and maintenance, including with earth-moving and other equipment, removing material or vegetation from inlets and outlets, remedying any slope instability or scour, periodically removing accumulated sediments from the forebay, removal of gross pollutants², pest management (including weed control) and vegetation control and replacement. Occasionally, reconstruction of the entire wetland may be necessary.
19. Relevantly, the ongoing maintenance of infrastructure wetlands for treating stormwater is ordinarily required through conditions of resource consent for stormwater discharge, issued by WRC, or are controlled by permitted activity standards in the Waikato Regional Plan³.

² Gross pollutants include litter such as plastics, paper, cans, pieces of wood and other detritus that gets dropped or discarded in road corridors or carparks and becomes entrained in the stormwater runoff from these areas.

³ Rules 3.2.4.2 and 4.2.5.1

20. Two PC1 provisions have the potential to adversely affect the operation of infrastructure wetlands:
- (a) Objective 1; and
 - (b) Policy 17.

Objective 1

21. Objective 1 includes to restore and protect wetlands so that they will be safe for people to swim in and take food from.
22. Because of the risks to human health, wetlands constructed to treat contaminated stormwater or wastewater should not be expected to be places suitable for swimming or collecting food.
23. Amendments are required to ensure this objective is not applied to infrastructure wetlands constructed to manage or treat stormwater or wastewater.

Relief sought

24. HCC seeks the following:
- (a) Inclusion in PC1 of a new definition as follows:

Infrastructure wetland: means a wetland that is built to treat stormwater or wastewater before it is discharged to land or water.

- (b) Amendment of Objective 1 as follows:

Objective 1

In relation to the effects of nitrogen, phosphorus, sediment and microbial pathogens on water quality, the health and wellbeing of the Waikato and Waipā Rivers, including all springs, lakes and wetlands, other than infrastructure wetlands, within their catchments, is-are both restored over time and protected, with the

result that, in particular, they are safe for people to swim in and take food from at the latest by 2096.

Policy 17

25. This policy is to take actions to help restore and protect the significant values and uses of wetlands and their ecosystems. The actions intended are those that will maintain “the values of wetlands in relation to the effects of nitrogen, phosphorus, sediment or microbial pathogen discharges”, or, if those values are degraded, actions that will improve them. The policy does not apply to the Whangamarino Wetland.
26. The meaning of “the values of wetlands in relation to the effects of nitrogen, phosphorus, sediment or microbial pathogen discharges” is unclear; the policy should be amended to clarify its meaning.
27. This policy could be applied in a manner that could undermine the efficient and effective management and operation of infrastructure wetlands. This could happen, for example, if the policy’s direction to restore and protect values of a wetland’s ecosystems should prevent or make more difficult necessary maintenance of the wetland.
28. HCC seeks for infrastructure wetlands to be excluded from Policy 17.

Relief sought

29. In addition to the new definition for infrastructure wetland that is discussed above in paragraph 24, HCC seeks amendment of Policy 17 as follows:

Policy 17

Contribute to restoration and protection of the significant values and uses of wetlands, other than Whangamarino and infrastructure wetlands, and their ecosystems by maintaining, and where degraded, improving the values of wetlands in relation to

~~the~~their effects ~~of~~on nitrogen, phosphorus, sediment or microbial pathogen discharges.

Policy 13d – staging offset measures

30. Policy 13 d states:

Policy 13

When considering a resource consent application for point source discharges of nitrogen, phosphorus, sediment or microbial pathogens to water or onto or into land in the Waikato or Waipā River catchments, and subject to Policy 12, consider the contribution made to the nitrogen, phosphorus, sediment and microbial pathogen catchment loads in the Waikato River or Waipā River catchments and the impact of that contribution on the achievement of the short-term numeric water quality values in Table 3.11-1 and, where applicable, the steady progression towards the 80-year water quality attribute states in Table 3.11-1, taking into account the following:

d. Whether it is appropriate to stage future mitigation actions to allow investment costs to be spread over time to contribute to the achievement of the water quality attribute values and states specified above;

31. It is neither clear nor certain that “offset measures” are included within the term “mitigation actions”.
32. HCC is faced with managing urban growth and intensification and their effects on the environment. This growth will result in an increasing load of some contaminants that will need to be managed over the life of the relevant point source discharge consent.

33. In addition, it is expected that future plan-changes will require further contaminant reductions to meet the 80-year water quality attribute states.
34. In some circumstances, it may be possible to postpone investment in mitigation or offset measures until just before the predicted contaminant load increases, or the required water quality standards change, to the extent that additional contaminant reduction capacity is needed.
35. Policy 13 d provides for staging future mitigation actions to allow investment costs to be spread over time to contribute to water quality improvement. An amendment is required to the policy to make it clear and certain that offset measures can be staged as well.

Relief sought

36. To provide such clarity and certainty, HCC seeks for Policy 13d to be amended as follows:
 - d. *Whether it is appropriate to stage future mitigation actions or offsets to allow investment costs to be spread over time to contribute to the achievement of the water quality attribute values and states specified above;*

Policy 13 i

37. Policy 13 i states [emphasis added]:

Policy 13

When considering a resource consent application for point source discharges of nitrogen, phosphorus, sediment or microbial pathogens to water or onto or into land in the Waikato or Waipā River catchments, and subject to Policy 12, consider the contribution made to the nitrogen, phosphorus, sediment and microbial pathogen catchment loads in the Waikato River or Waipā River catchments and the impact of that contribution on the achievement of the short-term numeric water quality values in

Table 3.11-1 and, where applicable, the steady progression towards the 80-year water quality attribute states in Table 3.11-1, taking into account the following:

*i. The application of **reasonable mixing** (in accordance with Policy 3.2.3.8) may be acceptable as a transitional measure during the life of this Chapter;*

38. The Hearing Panel concluded that the concept of “reasonable mixing”, as provided for in Policy 3.2.3.8 of the operative Waikato Regional Plan, is not necessarily consistent with Te Ture Whaimana.⁴ Consistency may depend, for example, on whether water quality within the mixing zone is safe for swimming or food gathering⁵. The Commissioners thought that each proposal relying on reasonable mixing needs to be analysed and justified.⁶
39. However, PC1 provides no guidance or criteria for determining under what conditions a mixing zone would be acceptable.
40. While the use of the word “may” implies a degree of flexibility, the lack of certainty as to when this will be appropriate has implications for consenting, or review of, existing resource consents for critical municipal discharges. In that regard, there is no guarantee that HCC could rely on mixing zones being acceptable for its discharge from the Pukete Wastewater Treatment Plant.
41. Currently, HCC’s existing point source discharge from the Pukete Wastewater Treatment Plant relies on the provision in the Operative Regional Plan for reasonable mixing. If a mixing zone downstream of this discharge were unacceptable in the future, then additional treatment

⁴ Waikato Regional Council, 2020. *Proposed Waikato Regional Plan Change 1: Waikato and Waipā River Catchments: The Hearing Panel’s Recommendation Report* (p290, para 1362).

⁵ *Ibid* (p65, para 245).

⁶ *Ibid* (p290, para 1362).

would be required to achieve the required water quality at the point of discharge. Any need to provide additional treatment would occur following a review or renewal of the discharge consent. For the Pukete Wastewater Treatment Plant, the cost of the additional treatment is estimated to be of the order of millions of dollars.

42. Policy 13i has introduced significant uncertainty regarding the management of the discharge from HCC's Pukete Wastewater Treatment Plant.
43. The second half of Policy 13i, "*as a transitional measure during the life of this Chapter*", is unnecessary and has no effect.
44. All provisions in PC1 apply during the life of the Chapter 13.1, that is, until Chapter 13.1 is reviewed or changed. This does not need to be stated in the plan.
45. Furthermore, a provision in an operative plan cannot predetermine the outcome of a plan review or plan change.

Relief sought

46. To provide clarity and certainty as to how the acceptability of a proposed mixing zone would be assessed, HCC seeks for Policy 13i to be amended as follows:

Policy 13

When considering a resource consent application for point source discharges ..., consider ... taking into account the following:

- i. The application of **reasonable mixing** (in accordance with Policy 3.2.3.8) ~~may be is~~ acceptable as part of a transitional measure during the life of this Chapter staged approach to implementing Te Ture Whaimana in accordance with Policy 13d.*

Implementation Method 3.11.3.2 – Sub-catchment scale planning

47. This method states:

Waikato Regional Council will work with relevant stakeholders to develop sub-catchment scale plans (where a catchment plan does not already exist) where it has been shown to be required. Sub-catchment scale planning will:

48. Sub-catchment scale plans will achieve nothing if the plans, themselves, are not implemented. The method should be amended to require the WRC to work with relevant stakeholders to “develop **and implement**” sub-catchment scale plans.

49. Such an amendment would make Method 3.11.3.2 consistent with Method 3.11.3.1, which states [emphasis added]:

3.11.3.1 Lakes and Whangamarino Wetland

Waikato Regional Council, working with others, will:

*b. Prepare **and implement** Lake Catchment Plans ...*

Relief sought

50. HCC seeks for Implementation Method 3.11.3.2 to be amended as follows:

Waikato Regional Council will work with relevant stakeholders to develop and implement sub-catchment scale plans (where a catchment plan does not already exist) where it has been shown to be required. Sub-catchment scale planning will:

Schedule C – Minimum farming standards, Exclusion II

51. This provision is as follows:

Exclusions:

The following situations are excluded from Clauses 1, 2 and 3:

II. Deer or pig wallows in constructed ponds or constructed wetlands that are located at least 10 metres away from the bed of a water body and which are not connected by an overland flow path to a water body.

52. The Block 2 s42A Report recommended the addition of this exclusion, and this was addressed in HCC's evidence to the Block 2 hearing.

53. There are several problems with this provision.

54. Problems arise from the definition of "water body" in the operative Waikato Regional Plan, namely:

Water body*: *Fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof, that is not located within the coastal marine area*

55. Therefore, a constructed pond, or a constructed wetland, in which a deer or pig wallow is located is itself a "water body", as is any aquifer underlying it.

56. It is understood the conditions on the exclusion relate to protecting surface water, not ground water. For clarity, the provision should clarify this.

57. Another problem with this provision is the second condition for this exclusion, namely, that the wallows "are not connected by an overland flow path to a water body". As the term "overland flow path" is not defined in PC1 or the Operative Waikato Regional Plan, there is a risk that it could be interpreted in a way that nullifies the exclusion. This could

occur, for example, if it were considered that every point in a catchment is connected by an overland flow path to a water body.

58. A further deficiency with the provision is that, provided the stated conditions are satisfied, Exclusion II would apply, even if a pipe or channel (other than an “overland flow path”) connected the constructed ponds or constructed wetland containing a wallow to another surface water body that does not include a wallow.

Relief sought

59. To provide clarity and certainty, HCC seeks the following:

- (a) Amendment to Exclusion II as follows:

Exclusions:

The following situations are excluded from Clauses 1, 2 and 3:

- II. Deer or pig wallows in constructed ponds or constructed wetlands that are located at least 10 metres away from the bed of any other surface water body that does not include a wallow, and which are not connected to the latter by an overland flow path, pipe or channel ~~to a water body.~~*

- (b) Inclusion of the following definition in PC1:

Overland flow path: For the purposes of Chapter 3.11, is a succession of localised low points on land that form a path along which stormwater concentrates and flows downhill during and after a rainfall event. Unlike a stream or an ephemeral stream, the flow in an overland flow path is temporary and will cease after it has stopped raining and the accumulated surface water has drained away.

Additions to the Glossary of Terms – “Point source discharge”

60. WRC has decided that the definition of “point source discharge” in the Operative Waikato Regional Plan will apply to PC1, that is:

***Point source discharges:** A stationary or fixed facility from which contaminants are discharged or emitted.*

61. The Operative Waikato Regional Plan includes the following definitions:

***“Culvert#:** Channel or conduit carrying water across or under a road, canal etc.”;*

***“Surface water:** Water in all its physical forms which is over the ground, whether flowing or not, including water within cave systems, but excludes coastal water and geothermal water”.*

62. Any culvert conveying surface water is not a source of contaminants; it is merely conveying and discharging contaminants that are already within the water.
63. However, as a culvert is “a stationary or fixed facility” and will discharge contaminants, it falls within the definition of “point source discharge”.
64. Consequently, PC1 would require HCC and other road controlling authorities to treat culvert discharges to help achieve the relevant water quality attribute states listed in the tables in section 3.11.6 of PC1.
65. This would be an unreasonable requirement as these authorities are unlikely to be the source of the contaminants discharged from the culverts.
66. To avoid this unreasonable and unacceptable outcome, the definition of point source discharge needs to be amended.

Relief sought

67. To provide clarity that culverts are not point source discharges, HCC seeks for the definition of “point source discharges” to be amended as follows:

***Point source discharges:** A stationary or fixed facility from which contaminants are discharged or emitted. For the purpose of Chapter 3.11, excludes culverts.*

RELIEF SOUGHT

68. Unless and until the PC1 provisions listed in paragraph 2 above are amended in accordance with the relief sought by HCC above, they will not:

- (a) Promote the sustainable management of resources;
- (b) Otherwise be consistent with Part 2 of the RMA;
- (c) Be appropriate in terms of s 32 of the RMA.

69. HCC seeks the relief set out above and such other orders, relief or other consequential amendments as are considered appropriate or necessary by the Court to address the concerns set out in this appeal.

DATED at Hamilton this 7th day of July 2020



M Mackintosh / L Muldowney

HCC reference: D-3317391