

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 1, Topic B

between: **Mercury NZ Limited**
Submitter 73182

and: **Waikato Regional Council**
Consent Authority

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

Dated: 14 March 2019

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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 1 of Proposed Plan Change 1 to the Waikato Regional Plan (*Hearing Block 1, PC1*).

About Mercury

2 As outlined in Mercury's submission on PC1, Mercury is a publicly listed company and New Zealand's third largest electricity generator. Mercury's generation capacity is one hundred percent renewable, with a significant proportion of its generation assets located in the Waikato Region.

3 These assets include the Waikato Hydroelectric Scheme, consisting of nine power stations along the Waikato River, which together generate approximately 10% of New Zealand's electricity. In addition, Mercury operates five geothermal power stations, four of which are in the Waikato Region. Mercury relies on the Waikato River for its operations, both as the primary energy source for its hydro stations, and as a source of freshwater for its geothermal plants. Mercury is likely to provide further details on its hydro operations in Hearing Block 2.

Scope of submission

4 Mercury strongly supports PC1's overall direction and focus on improving water quality through:

4.1 Reducing the amount of nitrogen, phosphorous, sediment and microbial pathogens entering the Waikato and Waipā River catchments from land use activities;

4.2 Taking a staged approach to reducing contaminant losses and the setting of short-term and long-term numerical water quality targets; and

4.3 Giving effect to the Vision and Strategy for the Waikato River/Te Ture Whaimana o Te Awa o Waikato and the National Policy Statement for Freshwater Management 2014 (*NPS FM*).

5 Mercury also broadly supports the objectives, policies, methods and rules contained within PC1 as notified. Mercury seeks some particular amendments to those provisions, as recorded in the table in the "Specific Submissions" section of Mercury's submission.

- 6 Accordingly, in Mercury’s view, there are limited outstanding matters for resolution at this hearing concerning the overall direction of PC1. That said, Mercury does seek some changes to ensure that PC1 provides for an equitable, fair and accountable mechanism to meet the PC1 targets, including through further sub-catchment delineation and monitoring. These matters are set out in more detail below.
- 7 Aside from the specific matters set out below, the key legal issue to be addressed in these submissions is the need to ensure that, at this stage of PC1, the water quality attributes and targets to be imposed are limited to those proposed in PC1 as notified – both due to concerns regarding the lawfulness of extending those matters beyond the scope of PC1, and due to the practical concerns regarding the merit and robustness of including such attributes at this stage. Again, this issue is addressed in more detail below.

SPECIFIC AMENDMENTS SOUGHT

- 8 The more granular matters in respect of which Mercury is seeking amendments are discussed in the planning evidence of Gillian Crowcroft and the technical water quality evidence of Dean Miller. These include:
- 8.1 Further amending section 3.11.1 to acknowledge input from the regional community input and guidance from NPS FM when describing the development of PC1;¹
 - 8.2 Retaining the values and uses section in 3.11.1.1 and 3.11.1.2;²
 - 8.3 Amending Objective 2 to refer to the benefit to regional and national communities and economies from the restoration and protection of the Waikato and Waipā rivers;³
 - 8.4 Retaining Objective 4 and ensuring that this objective refers to “values and uses”;⁴
 - 8.5 Establishing a monitoring site for the Upper Waikato Freshwater Management Unit (*FMU*) that is congruent with the FMU boundary;⁵
 - 8.6 Implementing sub-catchment boundaries and monitoring points that allow for accurate reconciliation and evaluation of

¹ Primary Evidence of Gillian Crowcroft (15 February 2019), paragraph 4.3 (*Crowcroft*).

² Crowcroft, paragraph 4.6.

³ Crowcroft, paragraph 5.5.

⁴ Crowcroft, paragraph 5.9-5.12.

⁵ Primary Evidence of Dean Miller (15 February 2019), paragraph 4.1-4.7 (*Miller*).

actions in those sub-catchments against desired future state water targets;⁶

- 8.7 Commencing monitoring as soon as possible to facilitate finer scale sub-catchment target development, including in tributaries;⁷ and
- 8.8 Not prioritising management of one nutrient over another on a global basis, and recognising that nitrogen and phosphorous both need to be managed appropriately.⁸

NEW ATTRIBUTES PROPOSED

- 9 A number of submitters have sought, through primary submissions or evidence, to include further targets and rules in PC1, based on a number of additional water quality attributes. These submitters include (based on the relief supported in the statements of evidence adduced for this hearing):
 - 9.1 The Department of Conservation, which seeks the addition of targets for the following attributes:⁹
 - (a) Periphyton biomass;
 - (b) Dissolved inorganic nitrogen (*DIN*);
 - (c) Dissolved reactive phosphorous (*DRP*);
 - (d) Cyanobacteria;
 - (e) Fine deposited sediment
 - (f) Dissolved oxygen;
 - (g) Temperature;
 - (h) pH range;
 - (i) Toxicants/metals; and
 - (j) Macroinvertebrate community index (MCI);

⁶ Miller, paragraph 4.8-4.18.

⁷ Miller, paragraph 4.19-4.27.

⁸ Rebuttal Evidence of Dean Miller (26 February 2019), paragraph 3.1-3.7 (*Miller Rebuttal*).

⁹ As recorded in Appendix 2 to the Primary Evidence of Kathryn McArthur (15 February 2019).

- 9.2 Auckland/Waikato Fish and Game Council and Eastern Region Fish and Game Council (*Fish and Game*), which seek the addition of targets for the following attributes:¹⁰
- (a) DRP;
 - (b) MCI;
 - (c) Fish Index of Biotic Integrity (Q-IBI);
 - (d) Dissolved oxygen; and
 - (e) Deposited sediment;
- 9.3 The Waikato and Waipā River Iwi, which seek the addition of targets for planktonic cyanobacteria.¹¹
- 10 Mercury submits that these proposals:
- 10.1 Are not “on” the plan change, and are therefore not a legitimate submission for the purposes of clause 5 of schedule 1 of the RMA; and
 - 10.2 In any event, the proposed attributes are not sufficiently developed for incorporation into the plan at this stage.
- 11 Accordingly, Mercury submits that if targets based on these additional attributes are to be enshrined in the Waikato Regional Plan the only appropriate mechanism to do so is through a separate, future plan change process. While PC1 *could* include methods for the development and monitoring of those attributes it would be inappropriate for them to be added to PC1 through submissions and submitters’ subsequent expert evidence.

Submissions calling for additional attributes are not “on” the plan change

- 12 Mercury submits that the additional attributes sought for inclusion in the plan are not “on” PC1, and accordingly are not within the lawful scope of a submission for the purposes of Schedule 1 of the RMA.
- 13 The test for whether a submission is “on” a plan change is that outlined in *Clearwater Resort Limited v Christchurch City Council*,¹² and examined further in *Palmerston North City Council v Motor Machinists Limited*.¹³ The High Court in those cases outlined a

¹⁰ As recorded in Table A4 of Appendix 1 to the Primary Evidence of Adam Canning (15 February 2019).

¹¹ Primary Evidence of Olivier Ausseil, paragraph 40(b).

¹² *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

¹³ *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290.

“bipartite test” for assessing the validity of submissions, as follows:¹⁴

- 13.1 First, the submission in question must fall within the ambit of the plan change; and
 - 13.2 Second, 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.
- 14 The High Court in *Motor Machinists* took a relatively strict approach to the above analysis, and expressly rejected a more liberal position accepted by the Environment Court in an earlier decision, *Naturally Best New Zealand Limited v Queenstown Lakes District Council*.¹⁵ The High Court 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”.¹⁶
- Submission must be within the ambit of the plan change*
- 15 The High Court in *Motor Machinists* identified that an appropriately thorough analysis of the effects of a proposal is a “fundamental” component of the RMA framework.¹⁷
- 16 In the plan change context, the relevant avenue for this analysis is the s32 evaluation and report. Further variations proposed by way of submission, to be “on” the plan change, should be adequately assessed in the s32 evaluation. If not, they are unlikely to meet the first limb of the *Clearwater* assessment.¹⁸ On this point, the High Court specifically noted:¹⁹

One way of analysing that is to ask whether the submissions raises matters that should have been addressed in the s32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change.

- Reasonable opportunity to respond*
- 17 The second limb of the *Clearwater* test focuses on ensuring there is an adequate opportunity for public information, participation and input in the plan change process. The High Court held:²⁰

¹⁴ *Clearwater* at [66]; *Motor Machinists* at [80]-[82].

¹⁵ *Naturally Best New Zealand Limited v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004; see *Motor Machinists* at [73].

¹⁶ *Motor Machinists* at [79].

¹⁷ *Motor Machinists* at [75]-[76].

¹⁸ At [76].

¹⁹ *Motor Machinists* at [81].

²⁰ At [77].

It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as not to have received notification initially [...] might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.

18 *Submissions seeking further attributes are not "on" the plan change*
Mercury acknowledges that the proposed additional attributes are, on a cursory analysis, connected to the subject matter of the plan change, namely targets and associated provisions to improve water quality within the Waikato and Waipā catchments.

19 However, based on the above caselaw principles, Mercury maintains that the submissions in question are not "on" the plan change, for the following reasons.

20 *Proposed attributes not within the ambit of PC1*
The water quality attributes proposed through PC1 were identified through a robust and iterative process, involving inputs from the Waikato Expert Panel, Technical Leaders Group (TLG) and Collaborative Stakeholder Group (CSG). This process considered the National Objectives Framework (NOF) contained in the NPS FM, as relevant for the Waikato regional context.²¹

21 As a result of the above analysis, the additional attributes now being sought by submitters did not form part of PC1 as notified.

22 For the same reason, the potential for these attributes to be added to PC1, and the implications of such an addition, was not assessed in depth through the s32 report. For example:

22.1 DIN, DRP, fine deposited sediment, pH range and toxicants/metals were not discussed as potential attributes in the s32 report;

22.2 The s32 report records that MCI was not considered appropriate as an attribute in information presented to the CSG;²² and

22.3 The s32 report records that dissolved oxygen was advised as being indirectly related to the "four contaminants" contemplated in PC1 (being nitrogen, phosphorous, sediment

²¹ See *Water Quality Attributes for Healthy Rivers: Wai Ora Plan Change Waikato Regional Council Technical Report 2018/66 (June 2016) (Technical Report 2018/66)*.

²² Section 32 Report, page 67, section C.2.2.8.

and microbial pathogens), and it was considered out of scope for PC1.²³

23 Accordingly, Mercury submits that those matters are not reasonably within the ambit of PC1, and do not meet the first limb of the *Clearwater* test.

No reasonable opportunity for affected persons to respond
24 Regarding the second limb of the *Clearwater* test, there was no indication in PC1 as notified that additional attributes could be added to the plan, or were even being contemplated as possible additions. Consequently, there was no indication to potentially affected parties that they should lodge submissions opposing incorporation of those further attributes.

25 Seeking to incorporate those further attributes via the submission process means there is limited opportunity for all but the most well-resourced parties to consider and respond to those proposals. This position runs contrary to the imperative to safeguard public participation and input as emphasised in *Clearwater* and *Motor Machinists*.

Scope of submissions restricted to notified attributes
26 For the above reasons, Mercury submits that the lawful scope of submissions on PC1 is restricted to details about the attributes contained in PC1 as notified, and the associated targets, objectives, policies, methods and rules to achieve those particular outcomes.

27 This position accords with the strict and careful approach to valid submissions that the High Court articulated in *Motor Machinists*, as discussed above.

Appropriate avenue for new attributes is a separate plan change
28 As the High Court identified in *Motor Machinists*, other processes are available to submitters seeking to amend planning provisions. Relevantly to the present case, those avenues include engaging with the appropriate council to promulgate a plan change, or else initiating a private plan change.²⁴ Those options require an independent s32 analysis, and provide for notification, submissions and substantive assessment of the merits of any such proposals.

29 As Mr Miller notes in his rebuttal evidence, and as is consistent with the evidence presented for other parties,²⁵ the additional proposed attributes may reasonably form part of a future plan change process. However, significant technical work is necessary to bring

²³ Ibid.

²⁴ At [78].

²⁵ Statement of Rebuttal Evidence of Garrett Hall (26 February 2019), paragraph 5.4.

those targets to an appropriate standard for a further plan change process (as discussed further below).²⁶

Proposed attributes are not sufficiently developed for implementation via PC1

- 30 Even if the Commissioners are minded to consider the proposed additional attributes as being within the scope of a legitimate submission, Mercury submits that these points are not sufficiently well developed as to form part of the PC1 process.
- 31 As Mr Miller identifies in his rebuttal evidence, and as noted above, significant further technical work is needed to develop suitable targets for the other attributes sought, particularly in the absence of current state data.²⁷ For example:
- 31.1 In relation to deposited sediment, the TLG concluded that there was insufficient monitoring data to describe the current state and accordingly this attribute remains in the development stage;²⁸ and
- 31.2 In relation to MCI, the TLG also concluded that it is not possible to predict the effectiveness of controls on nitrogen, phosphorous, sediment and E. coli on this attribute, which severely limited the TLG's ability to assess the costs and benefits of using MCI as an attribute.²⁹ Accordingly, as Mr Miller concludes in his rebuttal evidence, applying this metric to non-wadeable rivers without further assessment is not appropriate.³⁰
- 32 Overall, Mr Miller agrees with the statement of Dr Ausseil engaged by the Waikato and Waipā River Iwi, namely that there is little to be gained by inserting further attributes to the plan without clearly understanding what issue they seek to manage and the implications of setting additional freshwater objectives/ states.³¹
- 33 For these reasons, leaving aside the lawfulness of amending PC1 based on submissions that are not "on" the plan change, Mercury submits that the additional attributes and provisions are not sufficiently well-developed to be incorporated into the plan at this stage.

²⁶ Miller Rebuttal, paragraph 6.3.

²⁷ Miller Rebuttal, paragraph 6.3.

²⁸ Technical Report 2018/66, page 13.

²⁹ Ibid.

³⁰ Miller Rebuttal, paragraph 5.1-5.5.

³¹ Primary Evidence of Dr Olivier Ausseil (15 February 2019), paragraph 50; see Miller Rebuttal at paragraph 6.3.

- 34 Instead, additional technical work on each of those attributes is necessary, which may form the basis of future amendments to the plan.
- 35 Mercury accepts that PC1 could include *methods* that support the development of future attributes and future state targets based on them (and indeed proposed Method 3.11.4.10(c) already does so, to a degree³²). This approach is consistent with Mr Miller's expert view.³³
- 36 Nevertheless, Mercury submits that it would be premature and inappropriate at this point to seek to include new attributes and provisions through amendments to PC1.

EXPERT EVIDENCE TO BE PRESENTED

- 37 The following evidence in support of Mercury's submission has been pre-circulated and will be addressed at this hearing:
- 37.1 Planning evidence prepared by Gillian Crowcroft, Environmental Lead at Harrison Grierson Consultants Limited; and
- 37.2 Water quality and ecological evidence prepared by Dean Miller, Principal Environmental Scientist at Tonkin & Taylor Limited.
- 38 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
14 March 2019**

³² This method provides for "[u]sing state of the environment monitoring data including biological monitoring tools such as the Macroinvertebrate Community Index to provide the basis for identifying and reporting on long-term trends".

³³ Miller, paragraph 4.25-4.27; Miller rebuttal, paragraph 6.4.