

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

Decision No. [2020] NZEnvC 051

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 applications for a waiver under section
281 of the Act to extend the timeframe for
filing notices of appeal

BY WAIKATO REGIONAL COUNCIL

(ENV-2020-AKL-000036)

AND FEDERATED FARMERS OF NEW
ZEALAND INCORPORATED

(ENV-2020-AKL-000040)

Applicants

Court: Environment Judge M Harland, sitting alone pursuant to s 279, on
the papers

Date of Decision: 30 April 2020

Date of Issue: 1 May 2020

**DECISION OF THE ENVIRONMENT COURT ON APPLICATIONS FOR WAIVERS TO
EXTEND THE TIMEFRAME FOR FILING NOTICES OF APPEAL**



- A: The time for filing any appeal on PC1 by submitters who are individual farmers or growers as defined in paragraph [59] of this decision and entities that solely represent their interests apart from those referred to in the exclusion below, shall be 70 working days from 11 May 2020. This excludes those who have already agreed to the timeframe covered by the Council's application for waiver of time for filing any appeal (50 working days from Level 4) being those entities referred in paragraph [54] of this decision.
- B: The time for filing any appeal on PC1 by all submitters apart from those referred to in A above but including those entities referred to in paragraph [54] of this decision shall be 50 working days from 28 April 2020.

REASONS

Introduction

[1] This decision determines two ex parte applications seeking waivers of time to file appeals in respect of Proposed Waikato Regional Plan Change 1 – Waikato and Waipā River Catchments (**PC1**) to the Waikato Regional Plan. It has been made in unusual times (the COVID-19 emergency) and under urgency.

[2] Broadly speaking, the issue on both applications was how long the timeframe to file appeals to the Environment Court should be, to whom the nominated timeframes should apply and when they should start. Both seek an extension to the time frame provided for in the Act (30 working days from the date of notification of the decision on the plan change), with Waikato Regional Council (**the Council**) now seeking 50 working days from the end of Level 4 for all prospective appellants and Federated Farmers of New Zealand Incorporated (**Federated Farmers**) now seeking 80 working days from Level 2 for "individual farmers or growers, and entities that solely represent their interests."¹ For clarity, I determine that individual farmers and growers include individual persons and companies engaged in farming and growing enterprises.

[3] I have decided to determine both applications on the papers, despite the Council's submission that the Federated Farmers application should be served on other submitters with responses directed by 4 May 2020 and the need for a hearing on that application being reviewed after 4 May 2020.

¹ Letter of Federated Farmers to Mr Webb dated 24 April 2020, paragraph [4](a)



[4] I have granted both applications to the extent outlined and for the reasons explained in this decision.

Overview

[5] PC1 was notified by the Council in October 2016 and seeks to give effect, in part, to obligations to restore and protect the Waikato and Waipā Rivers by reducing the presence of four key contaminants: nitrogen, phosphorus, sediment and microbacterial pathogens. PC1 seeks to do this by imposing additional controls on land use in the Waikato and Waipā River Catchments, including on farming activities. It has been promulgated to address significant freshwater quality issues in accordance with the National Policy Statement – Freshwater Management and is intended (and required) to give effect to Te Ture Whaimana o Te Awa Waikato Vision and Strategy for the Waikato River, which is part of the Regional Policy Statement. This is required by the Act and the legislation enacted to settle raupatu claims of the River Iwi.

[6] Given the importance of these rivers to the cultural, social and economic health and wellbeing of the community the Council serves, it was inevitable that there would be significant interest in PC1, in fact 1,063 submissions were made on PC1.

[7] The Council decided to delegate the task of hearing submissions to Independent Hearings Commissioners. Submissions were heard by them in three stages between March-September 2019, occupying some 59 hearing days (almost 12 weeks). Many individual farmer and grower submitters appeared before and presented to the Hearing Panel, as did many (if not all) industry groups, smaller groups representing farmer and grower interests, catchment care groups, NGOs, District Councils and iwi.

[8] Recommendations from the Independent Hearings Commissioners for PC1 were provided to the Council in February 2020. On 18 March 2020 the Council decided to accept their recommendations. The Council's decision was made available on its website.

[9] The next step was for the Council to notify its decision, a task it had to undertake by 22 April 2020² unless it sought an extension to the statutory timeframe.

² Under clause 10(5) Schedule 1 of the Act a decision on a plan change must be notified no later than 2 years after the plan change was notified.



[10] By the time the Council decided to accept the decision of the Commissioners, the worldwide COVID-19 public health emergency had burgeoned. Its impact was being felt in New Zealand. A four-level alert system was introduced into New Zealand to plan for its impact on 21 March 2020, with Alert Level 4 being the most restrictive (effectively a “lockdown” apart from essential services of which farming is one). Alert Level 3 was declared on 23 March 2020 and the country was told to prepare to operate at Alert Level 4 from midnight 25 March 2020. A state of national emergency was declared by the Minister of Civil Defence on 25 March 2020.

[11] Understanding that, after notifying its decision rights of appeal would be triggered under clause 14 of Schedule 1 to the Act, the Council responsibly decided to apply to the Court for a waiver, on an ex parte basis, of the timeframe for filing appeals (30 working days from the date of service of the Council’s decision),³ and sought directions in relation to service to ease the administrative burden on submitters who might want to appeal its decision. More will be said of this shortly, but there is no dispute that the law permits such an application to be made in anticipation of public notification of a decision in respect of a plan change. In fact, the Council filed two ex parte applications seeking waivers, as I outline below, however both were filed prior to the Council publicly notifying its decision. I appointed Mr Alan Webb as counsel to assist the Court, and he filed a report in respect of the Council’s application on 21 April 2020.

[12] The Council publicly notified its decision on PC1 under clauses 10(4)(b) and 11 of Schedule 1 to the Act on 22 April 2020. This document is referred to as the “decisions version” and it comprised two volumes; volume 1 being the Hearing Panels Recommendation Report (416 pages) and volume 2 being the decisions version of the plan change (74 pages). As a result, rights of appeal under clause 14 of Schedule 1 to the Act have been triggered.

[13] Because of Mr Webb’s enquiries, on 22 April 2020 Federated Farmers filed an application for waiver of the timeframe for filing any appeal beyond that which is sought by the Council to apply to it and individual farmers or growers and entities that solely represent their interests.

[14] On 28 April 2020 the country moved to Alert Level 3, with a further decision to be made about its continuation or otherwise on 11 May 2020.

³ Clause 14(4), Schedule 1.



[15] There are therefore two applications before the Court filed on an ex parte basis, which everyone agrees ought to be dealt with as a matter of urgency given that the Council has notified its decision and the timeframe for the filing of appeals has commenced.

Procedural Background

[16] I have decided, somewhat unusually, to set out the procedural background associated with the two applications to provide some transparency to the processes that have operated, and in order to provide a greater understanding of the reasoning behind my decision to determine the Federated Farmers application on the papers.

The Council's first application for waiver

[17] The Council's filed its first ex parte application on 30 March 2020 seeking waivers and directions to:⁴

- (a) Extend the appeal period from 30 working days to 50 working days; and
- (b) Reduce the administrative burden on the parties associated with the filing and service of any notices of appeal, s 274 notices, and any other subsequent Court documents, by waiving certain requirements to provide documents with appeals and allowing service to be affected on the Environment Court's website.

The Court's Minute of 9 April 2020 and the withdrawal of the original application for waiver

[18] Having considered the application for waiver, the Court issued a Minute dated 9 April 2020 addressing its concerns about granting the waiver as sought. In summary these were outlined as follows: that:

- (a) We are currently facing a national emergency due to the COVID-19 situation, and the country has been at Alert Level 4 since 25 March 2020. The Level 4 Alert means that there are significant restrictions placed upon people's ability to conduct their everyday life and in terms of the operation of the Courts, proceedings in the Environment Court do not currently have priority. Furthermore, it is uncertain how long

⁴ Waikato Regional Council ENV-2020-AKL-000030.



Alert Level 4 will remain in place or what a return to Alert Level 3 or even Alert Level 2 might look like.

- (b) Most of the submitters to PC1 are likely to be rural people involved in farming operations of some sort. Many are likely to be involved in operating their businesses as an essential service with the challenges that this brings in these extraordinary times. Reading what is likely to be a lengthy decision and considering whether to appeal it is likely to be well down the list of priorities.
- (c) Without being able to identify the parties to any future PC1 proceedings filed with the Court with any degree of certainty it is difficult to assess whether any party would be unduly prejudiced if the Court granted the waiver application.
- (d) With the Court working remotely it has reduced capacity to appropriately manage what could be a very extensive number of appeals through its website as sought in the Council's application.

[19] The Council withdrew this application for waiver on 14 April 2020. A new application for waiver was filed in its place on Tuesday 15 April 2020, a week before the date the Council's decision was to be notified (22 April 2020).

The Council's second application for waiver

[20] The Council's second application is the application now before the Court, however events have overtaken the second option referred to below.

[21] The Council's second application seeks a waiver under s 281(1)(a)(ii) of the Act to extend the time within which appeals are to be lodged within by:

- (a) 50 working days of service of the notice of the Council's decision on submissions under clause 11 of Schedule 1 to the Act; or
- (b) 30 working days after Alert Level 4 restrictions are lifted by the New Zealand Government in the Waikato River Catchment (being the land within the Freshwater Management Units shown on Map 3.11-1 in PC1);

whichever is the later date.



[22] There were aspects of the Council's second application that were unclear. Accordingly, the Registry was asked to contact counsel to clarify:

- (a) whether the application was made on an ex parte basis and if not, what the approach should be to serve it on others;
- (b) whether counsels' consent on behalf of their clients to the first application could also apply and be considered by the Court in relation to the second application; and
- (c) whether the Council would consent to the application being amended to include "any other order in relation to the timeframe for filing an appeal that the Court considers just."

[23] Counsel confirmed that the application was sought on an ex parte basis, and that if the Court considered it appropriate to do so, counsels' consent on behalf of their clients to the first application could be considered. Counsel also confirmed that the Council did not wish to amend its application to provide the Court with the ability to amend the timeframe it had sought. It must be noted this response is entirely proper as it is for the party to an application to decide what it is asking the Court to determine.

[24] The above was recorded in my Minute of 17 April 2020 following which I directed that Mr Alan Webb be appointed as counsel to assist the Court in this matter. Mr Webb was asked to address the following issues:

[14] ...

- (a) Whether there is any undue prejudice to the submitters that are not legally represented in the timeframes suggested by the applicant. In this regard, he can make what enquiries he considers it is appropriate to make but given that many of the submitters are likely to be farmers he may consider seeking the input of Federated Farmers and their legal counsel at a national and regional level. There may also be practical matters associated with the farming year e.g. 31 May change of ownership, as well as the Covid Alert levels in place or soon to be in place that are relevant considerations;
- (b) The Court's jurisdiction to make an order as to a timeframe that does not accord with what is sought by the applicant, if it finds that there is undue prejudice to some of the submitters because of the timeframe suggested;
- (c) Suggestions as to how the Court's determination is best to be brought to the attention of all the submitters.
- (d) Any other matter he considers to be relevant to the issues before the Court in relation to the current application.

[15] Mr Webb is asked to report to the Court no later than **5 pm 22 April 2020** and earlier if he can. A copy of his report can be provided to counsel for the applicant at the same time, given



the timeframes involved and the possibility that counsel for the applicant may wish to respond to it.

Counsel to assist the Court's report

Mr Webb's memorandum

[25] Mr Webb filed his report early on 21 April 2020. This was because I had made an error in recording that the date by which the Council had to notify its decision was 24 April, when in fact it was 22 April 2020. Mr Webb's report covers matters of jurisdiction. It records his discussions with counsel for the Council and outlines the enquiries he had made with representatives from Federated Farmers. Mr Webb then addressed legal issues concerning the test of undue prejudice, and whether the Court has an overriding discretion to grant or decline such an application if it finds there is no undue prejudice. Mr Webb outlined the factors he considered might be relevant to the exercise of such a discretion.

[26] Importantly, Mr Webb's memorandum attached a letter from the Chief Executive Officer (Mr Copeland) and Principal Advisor/Resource Management Solicitor (Ms Edwards) employed by Federated Farmers. Ms Edwards is based in the Federated Farmers Hamilton office and was identified by general counsel for Federated Farmers as one of the people who would likely be able to assist.

Letter from Federated Farmers

[27] The letter comprises some seven pages. The contents of it have largely been included and elaborated upon in an affidavit filed by Mr Copeland late on 28 April 2020. The letter outlined the practical issues for farmers and growers who submitted on PC1 with the timeframes proposed by the Council in its application and set out what Federated Farmers considered to be a reasonable and appropriate timeframe for appeals to be lodged. In paragraph five of the letter, Federated Farmers' position was summarised as follows:

In summary, Federated Farmers considers that the proposed timeframes would create significant prejudice to farmer and grower submitters and that a timeframe of 80 working days from the date of the commencement of Level 2 restrictions (with any movement back to Level 3 or 4 restrictions not being counted as working days) would be appropriate in the circumstances.



[28] In relation to the Decisions Version of PC1, the letter outlined the following:

6. PC1 introduces new rules that will fundamentally change how almost all farming activities within the 1,100,000ha PC1 catchment are managed. The submission period for the notified version of PC1 was 80 working days, in recognition of the significant change for farming activities and the significant numbers of farmers and growers affected.

7. Over 1,000 submissions were received on PC1 and the Council hearings were conducted in three stages, over a six-month period (taking 59 hearing days). A large number of individual farmer and grower submitters appeared before and presented to the Hearing Panel, as did many (if not all) industry groups, smaller groups representing farmer and grower interests, catchment care groups, NGOs, district councils and iwi.

8. The decisions version of PC1 has made some significant changes to the notified version of PC1, such that it will likely change how many farming activities are regulated. For example:

- (a) For drystock farmers PC1 introduces some different minimum standards, a different threshold for determining the activity status (primarily based on winter stock units) and different Farm Environment Plan (**FEP**) standards (primarily based on non-tailored standards).
- (b) For dairy farmers, PC1 removes the nitrogen reference point and introduces nitrogen leaching loss thresholds (low, medium and high) that farmers need to assess their nitrogen leaching against to determine their activity status. PC1 also introduces different FEP standards (based on tailored actions resulting from the application of Good Farming Practice principles).
- (c) For farmers that carry out their farming activity over more than one property (such as dairy farmers with a run off block) it changes the activity status from controlled to discretionary.
- (d) For drystock farmers (they are the ones mostly affected by this) it changes the application of the stock exclusion rules by introducing a slope threshold (the application of which to individual properties is uncertain) and by requiring intermittent streams to be fenced.

9. There is a lot for farmers and growers to understand, and the implications will depend on their farm type, farm system and location. They will need individual and specific advice.

10. Federated Farmers has sent out a member advisory to our members about the decisions version of PC1 and has developed a list of Frequently Asked Questions (**FAQs**) for our website. Other industry bodies (including DairyNZ, Beef+Lamb and Horticulture NZ) have done the same. WRC has also published fact sheets on its website.

11. However, a fundamental issue for affected farmers and growers is that the release of the decision's version of PC1 coincided with a significant and extended drought, and then the Government announcing Level 4 lockdown restrictions. Not only has this created uncertainty (and as a consequence is the sole focus for most if not all farmers and growers) but also it makes it very difficult for industry groups to engage with farmers and growers (to obtain a mandate for appeals) and for farmers and growers to obtain advice (to understand the implications of PC1 for their farms and their options to participate in the Environment Court process).

[29] The letter then addressed what Federated Farmers consider the restrictions in relation to Level 4 and beyond mean for farmers and growers.

[30] Noting that during Level 4, farmers operated as an essential service, it was highlighted that this was not "operating as normal" in the sense of being able to undertake normal farming operations. The writers of the letter expressed the view that there was



likely to be little change to this under Level 3, namely there would not be a return to normal farming operations under Level 3. They highlighted that their concerns about ongoing issues to do with:

- (a) the supply of stock feed;
- (b) potential difficulties with employment and immigration given that the agricultural industry is heavily reliant on migrant workers at this time of year;
- (c) how excess stock can be effectively disposed of - a matter initially caused by drought, the slowing of the supply chain to China and the closure of sale yards and significant reductions in the capacity of meat processing plants during the Level 4 restriction;
- (d) the ability of commercial vegetable growers to supply their markets;
- (e) the annual farm changeover date on 31 May/1 June when the settlement of farm sales, movement to new milking jobs or commencement of new share milking contracts occurs;
- (f) the mental health of farmers and growers during this time.

[31] In summary, the letter asserted that farmers and growers were not in the right “headspace” to consider how the Decisions Version of PC1 would impact on their farms, let alone to consider whether they should appeal or join with like-minded farmers and growers to appeal or provide a mandate to appeal points proposed by industry groups.

[32] The letter also outlined Federated Farmers’ concern about its ability as an organisation to engage with farmers and growers during the restrictions given that in their experience face to face meetings are the most effective way to engage with them. It was noted that the area covered by PC1 includes farmers situated within Auckland, Waikato and Rotorua/Taupō provinces, thereby highlighting the extent of the area that would need to be covered by such meetings. Reference was also made to the difficulty some farms have with rural internet connections within the PC1 area.

[33] For these reasons, Federated Farmers outlined its concern that the appeal period proposed by the Council would be likely to cause significant prejudice to many farmer or grower submitters. It outlined the period it considered would ameliorate its concerns to be:



40. ... Federated Farmers considers that an appeal period of 80 working days would be appropriate. This would provide a reasonable opportunity for WRC and industry groups to engage with farmers and growers, for farmers and growers to understand the implications and their options, and for farmer or grower submitters to make informed decisions.

41. While it would result in a delay to the filing of notices of appeal, Federated Farmers considers that it would potentially avoid delay down the track by providing an opportunity for farmers and growers to consider joint appeals (with other individual farmers or growers affected by PC1), or to consider supporting industry groups (as opposed to bringing appeals in their own names).

[34] Federated Farmers noted that the Council had extended the time for farmers to file submissions in relation to the PC1 to 80 days.

[35] The letter from Federated Farmers indicated that it would file its own application for waiver extending the time period.

Federated Farmers' application for waiver of time

[36] On 22 April 2020 Federated Farmers filed its own ex parte application for waiver in relation to the time for lodging an appeal.⁵ The waiver it seeks is:

Under s 281(1)(a)(ii) of the Act, the time for lodging any appeal against decisions on submissions on PC1 is extended so that any such appeal must be lodged with the Environment Court within 80 working days from the date that the COVID-19 restrictions that apply to the Waikato River Catchment (being land within the Freshwater Management Units shown on Map 3.11-1 in PC1) are reduced to Alert Level 2 by the New Zealand Government, with any time during which the COVID-19 restrictions are raised to Alert Level 3 or Alert Level 4 not being counted as working days; and any other order in relation to the timeframe for filing an appeal that the Court considers just...

3. ...

- c. The period sought by the Council in its application will create undue prejudice to farmer and grower submitters in circumstances where strict COVID-19 restrictions are in place (and are likely to be ongoing).
- d. A longer period of time than within 50 working days of notification the decision (as sought by WRC) is required for submitters to decide whether to appeal (particularly farmer or grower submitters who are not legally represented) and the period of time should recognise the severe limitations Alert Level 3 restrictions will continue to place on the capacity and capability of farmers and growers to engage in obtaining advice about PC1.
- e. There is unlikely to be any undue prejudice to WRC or any other party...

[37] The memorandum of counsel accompanying Federated Farmers' application attached the letter that had been provided to Mr Webb and attached to his memorandum (as outlined above).

⁵ The application and memorandum were served on the Council and Mr Webb



[38] The following matters were, however, updated:

- It was noted that the Ministry for Primary Industries (**MPI**) had released, on 22 April 2020, guidelines so that “farm moving day” could go ahead on 31 May/1 June subject to strict controls, however Federated Farmers noted that the controls will make the task much more difficult and require more planning than normal.
- Reference was made to the parameters that have been set for Alert Level 3 (2 weeks to 11 May 2020) with the prospect of moving back to Alert Level 4 if needed. It was reiterated that farmer and grower submitters would have no greater opportunity to obtain advice about PC1 under Alert Level 3 than had been available to them under Alert Level 4 because face to face meetings cannot occur until Alert Level 2.

[39] Counsel’s memorandum made submissions about the merits of the application, which I address in my analysis below.

[40] I appointed Mr Webb as counsel to assist on the Federated Farmers application as well.

Minute of the Court 23 April 2020

[41] Counsel (including Mr Webb) were asked to address the following matters:

- (5) ...
- (a) whether they agree the applications can be dealt with together (both in an administrative and substantive sense);
 - (b) whether further timetable directions are required for the filing of further documentation by any party or Mr Webb, and if so what they propose;
 - (c) whether they consider that my substantive decision on both applications can be dealt with on the papers or whether a hearing is required. If a hearing is required, that may be able to be done remotely (either by telephone or AVLA). If a hearing in person is required, it would be helpful for the Court to be advised of any practical difficulties that counsel might face in that event, bearing in mind that the applicant’s counsel are based in Hamilton and counsel to assist is based in Auckland); and
 - (d) an indication of the timeframe counsel would consider most helpful within which the Court’s decision on the application/applications should be made, understanding that the earlier any decision can issue the better it will be for everyone, but recognising there are options including issuing a full decision, issuing an outcome with reasons to follow shortly and/or issuing a decision in part in relation to the Council’s application for those submitters not affected by the application by Federated Farmers.



Counsels' response

[42] Counsel for the Council, Federated Farmers and Mr Webb filed memoranda on 24 April 2020. By way of summary, there appeared to be agreement that the Council's application could be dealt with on the papers without prejudice to the Federated Farmers' application, but there was a difference of opinion between whether the Federated Farmers' application should proceed on an ex parte basis or whether it should be directed to be on notice and served on other parties to PC1 before being determined by the Court. I note that this was not a course of action followed by the Council in respect of its ex parte applications apart from in relation to those parties that had been represented by counsel during the hearings before the Independent commissioners. Counsel for the Council also submitted that the Federated Farmers position should be set out in an affidavit.

Federated Farmers Memorandum and Affidavit – 28 April 2020

[43] Mr Copeland, the Chief Executive Officer of Federated Farmers, has now filed an affidavit⁶ supporting Federated Farmers' application. Ms Edwards' memorandum accompanying the affidavit outlined that it has been filed in response to counsel for the Council's submission that Federated Farmers ought to file such an affidavit.

[44] The affidavit is largely based on the letter from Federated Farmers provided to Mr Webb and referred to above. However, it notes some other matters that are relevant and worthy of mention:

- (a) Federated Farmers is a not-for-profit member-funded organisation which represents the needs and interests of New Zealand farmers involved in a range of rural businesses including dairy, dry stock, arable cropping and horticulture;⁷
- (b) It is a pan-sector organisation that works with farmers to ensure practical and workable outcomes that does not pit one sector against another;⁸
- (c) In relation to PC1, Federated Farmers held "many, many meetings with members, industry groups, groups representing farmers, catchment care groups and district councils (as well as the Regional Council) to try to understand the concerns and to come up with an approach for their

⁶ Dated 28 April 2020.

⁷ Affidavit, paragraph 5.

⁸ Affidavit, paragraph 6.



submission on PC1 that achieves the Vision and Strategy for the rivers but also provides for all farming (not just one sector) to carry on in a way that is reasonable, practical and affordable”;⁹

- (d) Waikato Federated Farmers, the province most affected by PC1, has over 2,000 members who engage in a broad range of land use activities within the Waikato region such as dairying, sheep and beef rearing for meat and wool production, deer rearing, commercial vegetable growing and intensive farming activities such as pig farming;¹⁰
- (e) As a member-funded organisation, Federated Farmers relies on a mandate from its members, but considers it cannot get this in relation to PC1 if it cannot meet with its members. The uncertainty about when meetings will be able to commence was referred to, but the fact that they are not able to occur at Alert Levels 3 and 4 was highlighted.¹¹

[45] While referring to the changes PC1 will likely have on how many farming activities regulated (referred to above in paragraph 28.8), Mr Copeland added a further example relevant to commercial vegetable growers. He deposed that PC1 introduces a new discretionary activity rule that would allow them to increase land area in certain circumstances and in certain catchments, which had been a non-complying activity in the notified version of PC1.¹²

[46] Mr Copeland’s affidavit then deposes to the matters included in paragraph 28, 9-11 and addresses the matters also referred to above in paragraphs 29 to 33.

[47] Mr Copeland’s affidavit added detail about the difficulties some farmers in the Waikato region have in relation to internet access¹³ in relation to internet speed, data caps and cell phone reception. ¹⁴

⁹ Affidavit, paragraph 6.

¹⁰ Affidavit, paragraph 11.

¹¹ Affidavit, paragraph 18.

¹² Affidavit, paragraph 23(e).

¹³ Affidavit, paragraphs 47-49.

¹⁴ This information was obtained from a survey undertaken by Federated Farmers. Mr Copeland observed that only 44 responses were received from farmers in the Waikato region but that this might not provide a full picture of the issues because an internet connection was needed to answer the survey questions.



[48] Mr Copeland's affidavit also updated what steps have been taken by Federated Farmers to discuss the decisions version of PC1 with its Auckland, Waikato and Rotorua/Taupō provincial presidents. Reference was made to a one-hour Zoom meeting of the Waikato Dairy Leaders Group being held on 16 April 2020 and the decision that Auckland and Waikato provinces and branches will hold their AGMs (held during April and May and timed to occur before the start of calving) via Zoom, however the Rotorua/Taupō province has decided to postpone its AGM until it is able to have a face-to-face meeting due to significant limitations on its members attending by Zoom either online or dialling in. The AGMs are noted as an opportunity to engage with farmers about the implications of the Decisions Version of PC1.¹⁵ Mr Copeland deposed that¹⁶

...while there is an ability to engage at a leadership level, at an individual or even community level there is prejudice to those who lack the skills, technology or capacity to engage during this time (and this will continue under Level 3 restrictions).

[49] In relation to the ability to meet to obtain a mandate from its members, Mr Copeland said this:

54. It is clear to me that the reality is that there will be no reasonable opportunity for us to engage with our members (and obtain a mandate), or for individual farmers and growers to understand their options to participate in the Environment Court process, until the restrictions are reduced to Alert Level 2.
55. Even in Alert Level 2, engagement with farmers and growers is likely to be difficult due to the likely restrictions on public gatherings. For example, while the Government's guidelines currently say that gatherings of up to 100 people indoors are possible during Alert Level 2, the last time we were under Alert Level 2 restrictions Federated Farmers' policy was that our staff could not attend meetings of more than 25 people (many other companies, including Fonterra, had the same policy). However, I acknowledge that any prejudice to farmers and growers is significantly less during Alert Level 2 restrictions.

[50] In relation to the 80 working day time period sought, Mr Copeland further deposed:

58. In light of the 80 working day time period provided for the PC1 submission period, the significant changes to the decisions version of PC1, the significant COVID-19 related issues likely to require farmers' and growers' full attention over the next couple of months, and the technical limitations on online or virtual engagement, Federated Farmers considers that an appeal period of 80 working days from commencement of Alert Level 2 would be appropriate. This would provide a reasonable opportunity for WRC and industry groups to engage with farmers and growers, for farmers and growers to understand the implications and their options, and for farmer or grower submitters to make informed decision.
59. While it would result in a delay to the filing of notices of appeal, it would potentially avoid delay down the track by providing an opportunity for farmers and growers to consider joint appeals (with other individual farmers or growers affected by PC1), or to consider supporting industry groups (as opposed to bringing appeals in their own names).

¹⁵ Affidavit, paragraphs 50-52.

¹⁶ Affidavit, paragraph 50.



60. Federate Farmers also proposes that should COVID-19 restrictions move back to Level 3 or Level 4, any days within which those restrictions apply should not be counted as working days. This would recognise the significant limitations those restrictions place on the ability of farmers and growers to engage.

Analysis

[51] The key issue for the Court in considering whether to grant applications for waiver is whether, in granting such an application, it will result in undue prejudice on any party under s 281(2) of the Act.

[52] 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*¹⁷ as follows:

[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.¹⁸ The qualifier “undue” connotes something more than what is merely incidental.¹⁹ 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.²⁰ The Court will also take into account whether a waiver would adversely affect other interests of the parties, such as contractual commitments.²¹

The Council’s application

[53] Because the Council’s application seeks to extend the timeframe for the filing of appeals, and because that now means that appellants will have 50 working days from 28 April (the end of Level 4) to lodge an appeal, it is hard to see how there would be undue prejudice to any submitter who wished to file an appeal against the Council’s decision apart from those for whom the Federated Farmers application is sought to apply, who Federated Farmers contend need more time.

[54] In my view it is appropriate for the Council’s application to be granted on the papers, and I note no party contended that it should not. In addition, most of the parties who were represented by counsel have agreed to the timeframe sought. These include Fonterra, Horticulture NZ, Federated Farmers, Auckland / Waikato Region Fish & Game

¹⁷ [2017] NZEnvC 207 at [38].

¹⁸ For example, *Pukekohe HIAB Transport Ltd v Auckland Council* [2012] NZEnvC 142 at [7]-[8].

¹⁹ *Noel Leeming Appliances Ltd v North Shore CC* (1992) 2 NZRMA 113; *Reilly v Northland RC* (1993) 2 NZRMA 414.

²⁰ For example, *Robinsons Bay Trust v Christchurch CC* C128/07; *Omaha Park Ltd v Rodney DC* A120/09; *Hedley v Wellington RC* W048/99.

²¹ For example, *Harris v Tasman DC* W099/00.



Council, Eastern Region Fish & Game Council, Wairakei Pastoral Limited, Director-General of Conservation, Miraka Limited, Beef & Lamb NZ Limited, Waikato River Iwi, Waipa River Iwi, DairyNZ, Mercury NZ Limited, Oji Fibre Solutions (NZ) Ltd, Hancock Forest Management (NZ) Ltd, Genesis Energy Ltd, BT Mining Ltd, Royal Forest & Bird Protection Society of NZ Inc, WARTA (Waikato Region Territorial Authorities), Hamilton City Council, Ata Rangi 2015 Limited Partnership, Theland Tahī Farm Group Limited, Southern Pastures Limited Partnership, Waikato River Authority and Watercare Services Ltd.

[55] In my view, the application made by the Council should be granted in relation to all submitters apart from those to whom the Federated Farmers' application relates.

The Federated Farmers' application

[56] Counsel for the Council submitted that the Federated Farmers' application should not be granted on an ex parte basis but should rather be placed on notice, with submissions sought from other submitters to be filed by 4 May 2020. It submitted that:

- (a) the extent of time sought by the Federated Farmers' application (tripling of the statutory appeal period assuming that COVID-19 Level 3 restrictions will be lifted around mid-May) would create a precedent;
- (b) there is a high degree of uncertainty about the application because the way in which it is framed, both in relation to who it covers and when it starts; and
- (c) there could be undue prejudice to other submitters who may wish to progress PC1 for a range of reasons, including statutory obligations.

[57] The Federated Farmers' response to the Court's Minute provided a definition of farmer or grower submitters and noted that its application "is made expressly without prejudice to the rights of any farmer submitter that is not included in the definition of who the application applies to". I am satisfied in making the orders set out in this decision that no party will be prejudiced, as those parties that are not covered by Federated Farmers' waiver are encompassed by the Council's waiver. All parties are also able to apply for, and pursue, individual waivers if they wish.

[58] Mr Webb's submissions will be dealt with in relation to the questions that now need to be answered.



Is the Federated Farmers' application highly uncertain in relation to who it covers?

[59] Counsel for the Council submitted that it is highly uncertain what “individual farmers or growers, and entities that solely represent their interests” means and how one would determine who was in this group. With respect, I disagree. In relation to “individual farmers and growers”, it should easily be able to be identified from the submissions filed and from those submitters who appeared either themselves or through a representative farmers or growers association, who these individuals are. A common-sense approach should be taken to this issue, and if it is, in my view there should be no difficulty or uncertainty identifying this group of people, however to also provide greater clarity I determine that individual farmers and growers include individual persons and companies engaged in farming and growing enterprises. In relation to “entities that solely represent their interests” I agree that this needs to be better clarified. This is because Horticulture NZ for example has agreed to the Council’s appeal timeframe and it may represent some growers. If the wording was amended to add “... and entities that solely represent their interests. This excludes those entities who have agreed to the timeframe (50 working days from Level 4) covered by the Councils application for waiver of time for filing any appeal”, any uncertainty would be resolved.

[60] I conclude that with the above amendments the Federated Farmers application is not highly uncertain in relation to whom it covers.

Will different appeal periods create “a broad range of policy and practical issues”?

[61] In relation to the topic of uncertainty, however, the fact of different time periods for appeals to be filed was a concern for the Council. Its concern was that this could raise “a broad range of policy and practical issues”. Again, with respect to counsel, it is not unusual for there to be different appeal periods for different submitters if waivers for appeal timeframes are granted. Often the issue is more related to when the application for waiver is made and what other steps have been taken by other appellants during that period which might mean that they are unduly prejudiced, for example, by needing to revisit issues that have been settled by agreement thereby adding extra cost to the process. Given that this application has been made at a very early stage of the proceeding, any issues to do with different timeframes can be dealt with during judicial case management, which for a plan change of this nature will be robust.

[62] Another relevant consideration is that, given the COVID-19 situation, the Court’s resources are likely to be stretched over the next 2-3 months and possibly longer. This



will not prevent judicially-led case management processes being undertaken, but it may delay the allocation of resources for mediation and expert conferencing. Because of this any extension of time for the filing of appeals is not likely of itself to create any additional delay.

[63] No detailed submissions were made about what kind of policy issues might arise that would create difficulties.

[64] I am not persuaded that there will be any issues, either of a policy or practical nature, that will arise if there are different appeal periods applied for in these two applications that would cause any uncertainty or undue prejudice to anyone in relation to the case management of these appeals.

Is the Federated Farmers' application uncertain in relation to date?

[65] The Council submitted that there is a high degree of uncertainty with an appeal period that commences from the point the Government makes a decision on COVID-19 restrictions. Even though the same complaint could have been made about the Council's applications when they were filed, the Council now submits that in relation to its application this aspect is "academic given the Government's decision to lift the Level 4 restrictions [on 28 April]".

[66] Mr Webb's submissions on this point were practical and helpful. He agreed that there would be uncertainty about what any appeal period linked to the commencement of Alert Level 2 would actually be and that there is further uncertainty because Alert Level 3 or Alert Level 4 could be reinstated, however he did not agree that the Federated Farmers' application would be void for uncertainty as to the Alert Level 2 date.

[67] Mr Webb's submission was that the Court could set a certain date "come what may" now. He suggested that 11 May 2020 could be used as the starting point for any period the Court decided should apply, if it decided to grant the Federated Farmers' application.



[68] The affidavit from Mr Copeland still asks for the date to be triggered by Alert Level 2. He also reiterates the request by Federated Farmers to exclude any working days that might be included should restrictions move back to Level 3 or Level 4.²²

[69] While understanding the practical difficulties Federated Farmers face with obtaining a mandate from their members until Alert Level 2, I agree with counsel for the Council and Mr Webb's submissions that there could be a degree of uncertainty if the appeal period was at this stage linked to Alert Level 2. I therefore agree with Mr Webb's practical submission that 11 May would be the appropriate date to use. If for any reason the situation remains unclear, and it is considered that undue prejudice might arise thereafter, another application for waiver of the appeal period can be made to the Court.

Should the Federated Farmers affidavit be served on other submitters?

[70] Counsel for the Council submitted other submitters should be heard in relation to it to enable the factual basis for the application to be tested.

[71] Again, Mr Webb's submissions were helpful. As he said:

... it is not clear what is meant when the WRC says at paragraph 2.4(b) that it wants the "... factual basis for the [FF] application to be tested. However, if that involves obtaining information from farmer submitters to confirm the prejudice, then it serves to defeat the purpose of the FF application in the first place.

[72] I am not persuaded that it is necessary or, indeed desirable, for the factual basis for the application to be tested in an evidential way. Many of the matters referred to by Federated Farmers, such as those relating to the farming calendar and the impact of COVID-19 are matters of public record or common knowledge. Furthermore, the difficulties that the COVID-19 situation has created, as they relate to the farming calendar or farming generally, are easily able to be inferred from those matters.

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

[73] The Council submitted that there could be undue prejudice to other submitters if the application by Federated Farmers is granted for the time period sought.

[74] Again, Mr Webb's submissions in response were practical and helpful. He submitted that potential prejudice to other submitters is obvious now, but the relevant

²² Affidavit, paragraph 60.



question was whether an undue prejudice could be established via further information. In paragraph 12 of his memorandum he submitted:

...If the Court is confident that its processes can be managed to align the proceedings as soon as possible (even with different appeal and s 274 notice dates) then that prejudice can be addressed. Whereas it is difficult to see how the undue prejudice on submitter farmers could be addressed without granting the FF application.

[75] As outlined above, the case management of PC1 will be robust to ensure a timely outcome, bearing in mind that the COVID-19 emergency will inevitably result in some delay. Given the importance of the subject matter of it, however, it will receive significant case management attention and can be granted priority if that is warranted.

[76] By a narrow margin I am persuaded that service of the application on other submitters is not warranted at this time. Counsel for the Council submitted, "WRC is aware of submitters that are concerned to progress PC1 for a range of reasons (including statutory obligations noted in our 23 April memorandum)".²³ Counsel did not develop this point beyond the statement in their memorandum that Federated Farmers does not represent the views of all parties and that there are other parties who have an interest in PC1.²⁴ I have already outlined the kind of case management that will be put in place for PC1 and I have noted that inevitably there will be delays (not through the fault of any potential parties to PC1 appeal but due to the COVID-19 situation) and the fact that the Court's resources are likely, in any event, to be stretched during the next 2-3 months. When considered against the practical effect of the timeframe proposed and granted (as outlined below) I conclude that it is not necessary for this application to be served on any other submitters.

Are those covered by the Federated Farmers' application unduly prejudiced by a 50 working day appeal period from 28 April?

[77] The affidavit by Federated Farmers in my view clearly establishes undue prejudice on behalf of those it seeks to cover by its application if the timeframe is not extended beyond that which the Council suggests. The reasons for this are outlined in detail above and need not be repeated in full, however two compelling reasons are:

- (a) the efficiencies and practicalities associated with disseminating information to groups of farmers at face to face meetings, and

²³ Memorandum 24 April 2020, paragraph 2.2(b).

²⁴ Memorandum 23 April 2020, paragraph 13.3(c).



- (b) the overall benefit to the Court and other parties if the number and extent of appeals are reduced by this process.

[78] I give considerable weight to Federated Farmers views about what time is needed to achieve these objectives, given that it is specialist representative body and it has significant experience around the country in plan change appeal processes affecting its members. It also has drawn on its experience of representing its members during PC1. Adding COVID-19 into the mix, I am satisfied that these will not to be able to be fully achieved within the Council's nominated timeframe of 50 working days after 28 April 2020.

[79] I conclude that those covered by the Federated Farmers' application would be unduly prejudiced by a 50 working day appeal period starting from 28 April and that a lengthier period is required for that undue prejudice to be rectified. I address what that should be next.

Is 80 days justified?

[80] The application by the Council for a 50 working day appeal period was not accompanied by reasoning to explain why that timeframe had been adopted. Equally, the 80 working day appeal period has not been particularly well reasoned, apart from being linked to the period allowed by the Council for the filing of submissions in relation to PC1, however the Federated Farmers' application, while applying for 80 working days, has also allowed the Court to amend this timeframe if it considers that to be just.

[81] I have already outlined my view that Mr Webb's suggestion of the extended time for filing the appeal should commence on 11 May 2020. The practical effect of this would mean that if I granted the application as sought, 80 working days would take the timeframe for filing appeals to 1 September 2020. By way of comparison, in granting the Council's application, 50 working days from 28 April 2020 would mean that the appeals for everyone apart from those covered by the Federated Farmers' application would expire on 8 July 2020. By way of further comparison, 60 working days from 11 May would mean that appeal needed to be filed by 4 August 2020, and 70 working days from 11 May 2020 would result in appeals being filed by 18 August 2020. Under these scenarios, 60 working days would amount to an additional month (less one day), 70 days would amount to an additional 6 weeks (less one day) and 80 working days would amount to an additional eight weeks (less one day) from the 50 working day appeal



timeframe the Council proposed.

[82] Considering all the matters to which I have referred, I have reached the view that a 70 working day appeal period from 11 May 2020 is the appropriate response to the Federated Farmers' application. This means that the difference between the two timeframes for the filing of appeals is 6 weeks less one day. In the context of the likely impact of COVID-19 on the Court's resources, assuming that the alert levels will reduce and not increase, this is not significant.

[83] I therefore conclude that a 70 working day period from 11 May 2020 rather than 80 working days from Level 2 with reductions should there be a reversion to Levels 3 or 4 should be ordered. In my view, certainty is required at this time, and if the COVID-19 situation means a reversion is necessary, a further application can be filed to look at the situation then.

Will there be a precedent effect if Federated Farmers' application is granted?

[84] I do not agree that any precedent effect arises from this decision. I have set out in detail the matters that have been relayed to me through the various memoranda to highlight the unusual and unprecedented times in which this application has been made. There have been other applications granted during this period to extend appeal timeframes, and some in relation to plan changes. Each have been determined on their own facts. This case is by far the most unusual in terms of its scale (the number of submitters and therefore potential appeals and s 274 notices), the length of the decision under appeal, and generally the scale of the litigation that is likely to arise from the subject matter of the decision.

[85] In short, this case should not be used as a precedent for any future cases.

Decision

[86] I grant the Federated Farmers' application for waiver for the timeframe for filing an appeal as follows:

- (a) The time for filing any appeal on PC1 by submitters who are individual farmers or growers as defined in paragraph [59] of this decision, and entities that solely represent their interests apart from those referred to in the exclusion below, shall be 70 working days from 11 May 2020. This excludes



those who have already agreed to the timeframe covered by the Council's application for waiver of time for filing any appeal (50 working days from Level 4) being those entities referred in paragraph [54] of this decision.

[87] I grant the Council's application for waiver for the timeframe for filing an appeal for all submitters follows:

- (a) The time for filing any appeal on PC1 by all submitters apart from those referred to in [86] above but including those entities referred to in paragraph [54] of this decision shall be 50 working days from 28 April 2020.



A handwritten signature in black ink, appearing to read "M Harland".

M Harland
Environment Judge