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

Decision No [2018] NZEnvC 210

UNDER	the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal against an abatement notice under s 325 of the Act
BETWEEN	PORT OF TAURANGA LIMITED Appellant
	(ENV-2018-AKL-000225)
AND	BAY OF PLENTY REGIONAL COUNCIL Respondent

Court:	Environment Judge D A Kirkpatrick, sitting alone under s 279(1)(a) of the Act
Hearing:	on the papers
Date of Decision:	19 OCT 2018
Date of Issue:	19 OCT 2018

DETERMINATION ON WITHDRAWAL OF APPEAL AND CANCELLATION OF ABATEMENT NOTICE

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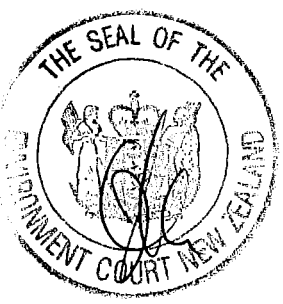
1. On 24 August 2018 the Bay of Plenty Regional Council (**Council**), by its enforcement officer Mr Stuart Standen, issued abatement notice RA18-00055 to Port of Tauranga Limited (**Port**). Clause 1 of the abatement notice required the Port to cease discharging contaminated stormwater from wharf areas into Tauranga Harbour.



2. Under s 15(1)(a) and (b) of the Resource Management Act 1991 (**RMA**):

> No person may discharge any-
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> (a) contaminant or water into water; or
>
> (b) contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; ...
>
> unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

3. According to the Council's records, no resource consent has been issued that allows the discharge of contaminated water from the Port into the Harbour.

4. There is also no operative rule that allows the discharge of contaminated water from the Port into the Harbour. Rule CD 5 of the proposed Regional Coastal Environment Plan provides that the discharge of stormwater to coastal water is a permitted activity provided that, among other things, the concentration of suspended solids in the discharge is not greater than 150 grams per cubic metre except where a 10-minute duration 10% annual exceedance probability storm event (that is, a 10-year return period storm) is exceeded. Rule CD 6 of that Plan provides that any discharge of stormwater to coastal water that is not permitted by Rule CD 5 is a discretionary activity. Section 87A(4) RMA provides that if an activity is described in a proposed plan as a discretionary activity, a resource consent is required for the activity.

5. According to the reasons for the abatement notice, the concentration of suspended solids in the stormwater discharging from the Port at Berth 11 on 14 July 2018 exceeded 150 grams per cubic metre and the rainfall that day did not exceed a 10-minute duration 10% AEP stormwater event

6. The statement of reasons in the abatement notice concludes with the officer's statement:

> Therefore I have reasonable grounds to believe, and am of the opinion, that you are contravening section 15(1)(a) of the Act and/or section 15(1)(b) of the Act and/or Rule CD 6 of the Plan.

7. On 6 September 2018 the Port lodged a notice of appeal against the abatement notice together with an application for a stay of the abatement notice.

8. The notice of appeal challenged:

   a. The requirement to cease discharging contaminated water from wharf areas into the Harbour;

   b. The reasons for the notice, particularly the inclusion of a reference to "a thick brown sludge" and of a sampling result of 1,200 grams per cubic metre of suspended solids.

9. The reasons for the appeal included:

   a. The activity status of discharges under Rule CD 6 is restricted discretionary, not discretionary;

   b. The notice is defective as it requires the Port to cease discharging contaminated stormwater generally, not just stormwater that exceeds the permitted standard, and therefore purports to make a permitted activity a prohibited one;

   c. The description in the original complaint to the Council of "a thick brown sludge" was unsupported by evidence;

   d. The actions of the Council's enforcement officers may have changed the nature of eth discharge and increased the concentration of suspended solids in the discharge, such that the sample collected was not representative of the discharge.

10. The application for a stay of the abatement notice repeated the reasons in the notice of appeal and added that the likely effect on the environment if a stay were granted would be negligible because:

    a. The discharge was a one-off event and unlikely to be repeated;

    b. The Port had taken its own steps to address the discharge including installing corrective actions such as increased sweeping of the area, installing a sediment boom and routine monitoring;

    c. The discharge rate was very slow and there was no conspicuous change in the colour or clarity of the Harbour water;

d. In December 2017 the Port applied to the Council for resource consent under Rule CD 6 and the adverse environmental effects of such discharges were assessed as no more than minor for the purposes of s 95 RMA by the Council's independent commissioner

11. The Port filed an affidavit of Joseph William McKenzie, sworn on 6 September 2018, in support of its application for stay. Mr McKenzie is the environmental manager employed by the Port. He also stated that he was giving his evidence in a manner complying with the Court's Code of Conduct for Expert Witnesses, not omitting material facts known to him, consistent with his duty to express his opinions impartially as an expert and not as an advocate for his employer.

12. Mr McKenzie's affidavit generally provided evidence in support of the reasons for the Port's appeal and application, as summarised above. He attached as exhibits copies of photographs of the site taken by the Council's enforcement officers.

13. It is not necessary for present purposes to traverse the evidence further. One might nonetheless regard certain points as following directly from the information before the Court:

a. It would appear to be straightforward to amend the abatement notice to be consistent with the rules in the Plan so that the notice did not purport to turn a permitted activity into any other class of activity.

b. While the nature of the discharge and its true level of suspended solids may well have been affected by the actions of the Council's officers and so could be less than as alleged in the abatement notice, there would need to be persuasive evidence of the degree of difference before one could conclude that it was an order of magnitude less.

c. The opinion of the Council's commissioner given for the purposes of making decisions under ss 95 – 95G RMA and referred to in bare terms in Mr McKenzie's affidavit is, at best, secondary evidence and may be less probative than the inference to be drawn from the facts that the Port

has no resource consent to exceed the standard in Rule CD 5 and that it is presently applying for one.

14. On receipt of the Notice of Appeal and the Application for Stay, the Court directed that the Council state its position on the application. Counsel for the Council responded that the Council consented to a stay for 1 month so that the parties could discuss the appeal and attempt to resolve matters themselves.

15. On the basis that the Court supports direct negotiations between parties as often being a suitable way to resolve matters or at least narrow issues in dispute, and mindful of the indication in the papers that the Port had made an application for resource consent and that such an application process might be an appropriate way to deal with the issues, the Court determined that a stay should be granted on an interim basis to 10 October 2018, with the parties to report by then.

16. On 8 October 2018 the parties reported that they had agreed to resolve the appeal on the following basis:

    a. The Port seeks leave to discontinue its appeal;

    b. When the appeal has been discontinued, the Council will cancel the abatement notice under s 325A RMA;

    c. Costs to lie where they fall.

17. The parties sought confirmation from the Court that the appeal has been discontinued on the foregoing basis.

18. By a minute issued on 12 October 2018, to be clear about the nature and effect of what the parties proposed and the confirmation they were seeking from the Court, the Court made the following observations about this proposed resolution.

19. Leave is not required to discontinue or withdraw an appeal under the RMA, subject only to the general power of the Court to prevent its processes from

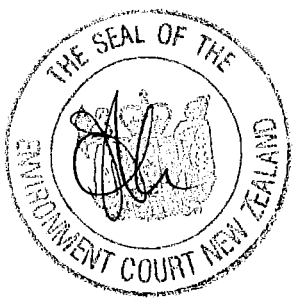
being abused.[1] Typically, the only residual issue on the withdrawal of a proceeding is the issue of costs, but the parties' agreement here addresses that. There is nothing presently before the Court to suggest a need in this case to review the law in relation to abuse of process.

20. Once an appeal against an abatement notice is withdrawn, the stay of that abatement notice must end. While s 325(3G) RMA provides that a stay "remains in force until an order is made otherwise by the Environment Court," s 325(3A) is clear that a stay is made "pending the Environment Court's decision on the appeal." If there is no longer an appeal, there cannot be a decision by the Court. It follows that a stay cannot survive the withdrawal of the appeal to which it relates. On that basis, the withdrawal of the appeal and the consequent end of the stay mean that the abatement notice will then be in full force and effect.

21. Under s 325A RMA, where the Council considers that an abatement notice is no longer required, it may cancel the notice at any time. The breadth of that discretion must, like any other statutory discretion, be exercised in a principled way including by having regard to any other relevant consideration under the RMA. In this case that includes the Council's duty under s 84(1) RMA to observe and, to the extent of its authority, enforce the observance of its plan.

22. The Council's enforcement officer having stated that on 24 August 2018 he had reasonable grounds to believe that there was a contravention of the Act or of a rule in the Plan justifying the service or issuing of an abatement notice to the Port, it is appropriate that the Council should also state any reasonable grounds that it now has for considering that the notice is no longer required.

23. For those reasons, the Council was invited to set out the grounds on which it considers that the abatement notice will no longer be required.



1 *Mullen v Parkbrook Holdings Ltd* [1999] 2 NZLR 312, [1999] NZRMA 23, (1999) 5 ELRNZ 51 (CA); *Hurunui Water Project Ltd v Canterbury Regional Council* [2015] NZHC 3098, [2016] NZRMA 71, (2015) 19 ELRNZ 19.

24. By a memorandum of its counsel dated 18 October 2018, the Council advised as follows in response to that invitation.

1. As requested in the Court's Minute of 12 October 2018, this memorandum sets out the grounds on which the respondent considers that the abatement notice (RA18-00055) is no longer required.

2. The respondent accepts that given the steps taken by the appellant since the abatement notice was issued, the notice is no longer necessary and a formal warning issued by the appellant would be a more appropriate enforcement mechanism in this context.

3. Since the abatement notice was issued to the appellant on 24 August 2018, the respondent is satisfied that the appellant has taken the following steps to ensure that stormwater discharges from the Port of Tauranga will meet permitted activity standards:

3.1 From 1 October 2018 the appellant has engaged a Log Yard Co-Ordinator. The Log Yard Co-Ordinator is a newly created role that will focus on the log yard areas and berths, in particular co-ordinating truck sweeper responses to the log marshallers' operations, identifying priority sweeping areas, ensuring regular cleaning of stormwater bark screen chambers and auditing port users' activities against the Bulk Cargo Handling Procedures.[1] The role will be actively supported by the appellant's Environmental Manager and the appellant's Cargo Services Manager. The appointment of a Log Yard Co-Ordinator means the appellant will have a greater presence in the log yard and will give the appellant a greater degree of visibility over the Port Users' activities. It should also mean there is more proactive engagement between the appellant and ports users about debris and sediment management at the time that loading and unloading operations are underway.

1 The discharge that is the focus of abatement notice RA18-00055 occurred in one of the Port of Tauranga's log yard areas.

3.2 The appellant's Bulk Cargo Handling Procedures (which all port users are required to comply with when operating at the Port of Tauranga) have been amended to make wharf cleaning requirements more prescriptive when port users are loading and unloading cargo. In particular, port users are now required to make more use of vacuum sweeping.

3.3 The appellant has identified a particular log loading method as more prone to bark build-up and has therefore targeted this type of operation in its amended Bulk Cargo Handling Procedures, namely the "bunk" operation. Those procedures (a copy of which attached) were amended on 3 September 2018 to include the following additional requirements:

10.2.2 Sweeping operations must be undertaken by the operators to the standard specified below in order to control bark, dirt and other particulate matter in areas including the wharf apron, preload area, end of wharf and designated roadways (the area) and to prevent this material from entering into the harbour or entering the stormwater network.

Bunk operations

The area shall be cleaned by a suitable vacuum sweeper truck at intervals of no more than four hours throughout the operation to ensure bark, dirt and other particulate matter is successfully removed from the area. This includes ensuring that bark, dirt and particulate accumulations from on and around the bunks are removed.

Trailer operations

The area shall be cleaned by a suitable vacuum sweeper truck as required throughout the operation to ensure bark, dirt and other particulate matter is successfully removed from the area.

10.2.3 During any operations, bark, dirt and other particulate should be prevented, as far as is practicable, from becoming situated outside of the reach of a sweeper truck in areas including, but not limited to, on and around fenders, bollards, nib walls. Any bark, dirt or particulate matter that does accumulate in these areas shall be manually swept into an area accessible to a sweeper truck prior to the next sweeper truck cleaning.

...

10.2.6 Water use for dust suppression is allowed provided that the berth is being regularly cleaned and swept. Water suppression is not to be used in place of proper sweeping practices. Water suppression should be via misting methods and water is not permitted to be used in such quantities that it will cause run off into the storm water or Harbour.

At completion of operations

10.3.1 At the completion of operations the berth must be completely cleaned for the next operation. All cargo, equipment and debris must be removed from the area including fenders and nib wall. The berth must be vacuum swept. ...

3.4 The appellant has instigated weekly meetings for its Mount Maunganui port

managers to discuss environmental actions and issues. The weekly meetings are intended to ensure accountability of the appellant's managers and clarity about what is being done to recognise the appellant's focus on improving environmental compliance at the Port of Tauranga.

3.5 New lease agreements have been entered into between the appellant and port users for the log yard areas at the Port of Tauranga. Those new leases came into force from 1 October 2018. The amended lease agreements now contain express references to lessees' obligations for environmental compliance and express reference to lessees' obligation to comply with the rules and procedures set out in the appellant's Port User Rules, Bulk Cargo Handling Procedures and Spill Prevention and Response Standards.

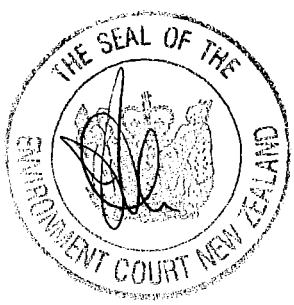
3.6 The appellant has effected the removal of the equipment and portable buildings located in the area that gave rise to the abatement notice. That equipment and those portable buildings (which belonged to port users rather than the appellant) were proving to be obstacles to effective cleaning of the ground in this area and were contributing to the build-up of debris.

Other relevant considerations

4. Since the abatement notice was issued, the respondent has designated a Senior Compliance Officer (John Morris) to focus primarily on environmental monitoring at the Port of Tauranga. That Senior Compliance Officer will undertake regular inspections of activities carried out at the Port of Tauranga to identify potential environmental risks and check compliance with the Resource Management Act and relevant regional plans. These inspections will be carried out any time of the day or night, at least five days per week. The Senior Compliance Officer's role is to encourage and educate the appellant and ports users in relation to environmental compliance and risk management and if necessary, to initiate enforcement action.

5. The appellant is currently actively progressing an application for resource consent in relation to stormwater discharges that will provide clearer parameters for stormwater management, controls and monitoring at the Mount Maunganui wharves at the Port of Tauranga.

6. If the appeal is discontinued and the abatement notice cancelled, the respondent intends to issue the appellant a formal warning stating that if the respondent finds evidence of a stormwater discharge into the harbour from the Mount Maunganui wharves at the Port of Tauranga where the stormwater does not meet the permitted activity standards in Rule CD 5 of the Bay of Plenty Proposed Regional Coastal Environment Plan, and the appellant or a port user has failed to take appropriate preventive steps to avoid that non-compliant discharge, the Council may take enforcement action against POTL and/or any responsible port user.

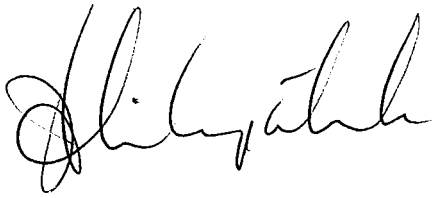


7. The respondent considers the above steps will be sufficient to ensure the Resource Management Act and the Bay of Plenty Proposed Regional Coastal Environment Plan will be complied with at the Mount Maunganui wharves at the Port of Tauranga until the discharges of stormwater are expressly regulated by a resource consent. If the respondent is wrong and there is evidence of non-compliant discharges of stormwater from the Mount Maunganui wharves at the Port of Tauranga at a future date, it is open to the respondent to initiate further enforcement action against the respondent and/or other responsible parties.

8. As stated, by having a Senior Compliance Officer dedicated to monitoring environmental compliance at the Port of Tauranga, the respondent will have greater ability to ensure ongoing compliance in relation to stormwater management at the Port of Tauranga.

9. The respondent respectfully asks the Court to confirm it accepts that the respondent's decision to cancel the abatement notice on the foregoing grounds (once appeal ENV-2018-AKL-000225 has been discontinued) is reasonable.

25. Having reviewed that information, the Court is satisfied that it provides a reasonable basis on which the Council may exercise its discretion and decide to cancel the abatement notice on the withdrawal of the Port's appeal.



D A Kirkpatrick
Environment Judge