

**IN THE ENVIRONMENT COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI TAIAO O AOTEAROA
ŌTUATAHI ROHE**

ENV-2020-CHC-127

UNDER

the Resource Management Act 1991

IN THE MATTER

of the Water Permits Plan Change – Plan Change
7, being part of a proposal of national
significance directed by the Minister for the
Environment to be referred to the Environment
Court under section 142(2)(b) of the RMA

AND

IN THE MATTER

of an application under section 149T of the RMA

OTAGO REGIONAL COUNCIL

Applicant

FURTHER MEMORANDUM OF AMICUS CURIAE

28 June 2021

Judicial Officer: Her Honour Judge Borthwick

R J Somerville QC
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May it Please the Court

Introduction

1. The Court has asked me to reconsider question 2 in light of the submissions of counsel filed in response to my first memorandum.

2. Question 2 asks:

In accordance with s 124 RMA, on an application for resource consent to replace a deemed permit, can the right of priority continue to be exercised until a decision is made either granting or refusing consent?

3. These submissions address the following questions that arise out of counsels' submissions regarding question 2:

Does section 124 apply to deemed permits up until 1 October 2021?

Can the right of priority continue to be exercised after 1 October 2021 pursuant to section 124(3)?

Is section 413(3) "subject to" section 413(7)?

4. I confirm my submission that section 124 of the Resource Management Act 1991 (**RMA or the Act**) does not permit the continued operation of the right of priority under deemed permits which have finally expired.

5. I submit that deemed permits cannot continue to be exercised under section 124 after 1 October 2021, even if an application for a replacement consent were made within the necessary timeframe.¹ I agree with counsel that section 124(3) applies to deemed permits, but I disagree with the submissions that section 124(3) can lawfully be used beyond 1 October 2021. However, in the objectives, policies, and rules, the status of the applicant as a former deemed permit holder could be recognised.

¹ Submissions of counsel for Otago Water Resources User Group dated 19 May 2021, at [18]; submissions of counsel for Trustpower Ltd dated 14 June 2021, at [7].

Does section 124 apply to deemed permits up until 1 October 2021?

6. It appears that all counsel agree that there is no difficulty with using section 124 to permit the continued exercise of rights of priority up until 1 October 2021. This is because of section 413(1) of the RMA, which provides that “the provisions of the Act” apply other than sections 128 to 133. Clearly, section 124 can apply to deemed permits.
7. In addition, section 413(7) provides that the holder of a deemed permit may replace that permit with a water permit granted under Part 6. Section 124 is in Part 6.
8. Thus, section 124 is a procedural tool to manage the transition between expired deemed permits and applications for replacements.

Can the right of priority continue to be exercised after 1 October 2021 pursuant to section 124(3)?

9. The argument of counsel is that a deemed permit is no different to any other resource consent with an expiry date and that a deemed permit holder may continue to operate under the deemed permit in accordance with section 124(3) of the RMA, even though it will “finally expire” on 1 October 2021.²
10. Counsel note that section 124 itself explicitly provides that section 124 does not apply to an application to which section 165ZH applies and submit that if Parliament had intended that section 124 was not to apply to deemed permits after 1 October 2021, it could have included those as another exception.³
11. It is submitted, however, that a deemed water permit is not like any other resource consent with an expiry date. A deemed water permit is a creature of statute. Section 413(3) states that it will finally expire on 1 October 2021. It has a statutory expiry date after which it no longer exists in law.

² See submissions of counsel for Trustpower Ltd dated 14 June 2021, at [5e]; submissions of counsel for the Minister for the Environment dated 15 June 2021, at [14]-[17]; and submissions of counsel for the Otago Regional Council dated 15 June 2021, at [20]-[21].

³ See submissions of counsel for Trustpower Ltd dated 14 June 2021, at [10] and [13] and submissions of counsel for the Otago Regional Council dated 15 June 2021, at [3(i)] and [36]. Section 165ZH deals with existing coastal permits.

12. There was no need for Parliament to explicitly state that deemed permit holders could not rely on section 124, as suggested by some counsel. As a matter of law, deemed water permits ceased to exist after 1 October 2021. However, an explicit limitation on the application of section 124 in relation to section 165ZH is needed because, unlike deemed permits resulting from mining privileges after 1 October 2021, they exist in law.
13. It is, therefore, submitted that section 124 cannot be used to permit the continued exercise of the right of priority after the permit has finally expired on 1 October 2021. In terms of section 124(3), after that date there is no longer an “existing consent” under which the holder may operate.
14. Counsel submit that their interpretation is supported by caselaw on the applicability of section 124 to deemed permits that have “finally expired” under sections 386 and 387 of the RMA.
15. Counsel refer to three Environment Court cases in particular,⁴ namely **Re Contact Energy Ltd**,⁵ **Rider v Manawatu-Wanganui Regional Council**,⁶ and **Rotokawa Joint Venture Ltd v Waikato Regional Council**.⁷
16. It is submitted that in at least the first two cases the Regional Council had essentially acquiesced in the deemed permit continuing to be operated as if it were lawful, notwithstanding that it had finally expired on 1 October 2001.
17. It does not appear from any of these cases that there was any discussion about whether or not a holder of a deemed permit could lawfully continue to operate under that deemed permit after its final expiry date. Rather, it seems to have been accepted by all parties that section 124 rights could apply.

⁴ The submissions of counsel for the Minister for the Environment dated 15 June 2021, at [20]-[23] also refer to the Clutha Hydro Scheme replacement consents. Query whether this case, if it concerns existing rights, should be governed by section 386(2), rather than section 386(3), as suggested by counsel.

⁵ **Re Contact Energy Ltd** (C81/2003 EC Christchurch, 23 June 2003).

⁶ **Rider v Manawatu-Wanganui Regional Council** (2009) 16 ELRNZ 13 (EC).

⁷ **Rotokawa Joint Venture Ltd v Waikato Regional Council** (A41/2007, EC Auckland, 18 May 2007).

18. It is submitted that to the extent that the Environment Court has held that deemed permits can lawfully continue to be exercised beyond their final expiry date, such an approach does not withstand a close analysis pursuant to statutory interpretation principles. The cases cited by counsel in my submission do not establish that the right of priority condition, deemed to be part of a water permit, can lawfully continue to be exercised after the permit has finally expired on 1 October 2021.

Is section 413(3) “subject to” section 413(7)?

19. Counsel for the Otago Water Resources User Group (**OWRUG**) submits that the term “finally expires” in section 413(3) must be read “subject to” section 413(7),⁸ so that deemed permits can continue to be exercised while replacement consents are determined after 1 October 2021.
20. In support of that submission, counsel relies on the text following section 413(1)(e), which provides that “the provisions of this Act” apply other than to sections 128 to 133.
21. Counsel for OWRUG describes this text and section 413(7) as “savings provisions” keeping alive mining privileges granted before the new regime, including rights of priority.
22. In my submission there is no basis for reading section 413(3) as subject to section 413(7). I submit that the effect of the text following section 413(1)(e) is to ensure that the provisions of the RMA (other than sections 128 to 133) apply to deemed permits during the transition period and until they finally expire on 1 October 2021 in accordance with section 413(3).
23. The interpretation advanced by OWRUG effectively reads into the beginning of section 413(3) the additional words “Subject to section 413(7) ...”, so that, as a general rule, section 413(3) would always be overridden by section 413(7). It is submitted that there is no basis for doing so.

⁸ Submissions of counsel for Otago Water Resources User Group dated 19 May 2021, at [16]-[18].

24. The general rule is that reading words into a statute that are not there is generally impermissible. This is not a case of “reading in” words to give effect to certain implications in section 413.⁹
25. It is noted that in the transitional provisions, Parliament has clearly indicated the rights that are to continue in effect and those that are not.¹⁰
26. It is further noted that Parliament has used the words “subject to” elsewhere in section 413 itself, but chose not to do so in subsection (3).¹¹ It is submitted that this was a deliberate omission by Parliament, and that there is no justification for reading words into the subsection.¹²
27. It is submitted that OWRUG’s interpretation is a strained one involving the reading of words into section 413(3) which are not justified by the scheme of the Act or on a contextual and purposive interpretation. OWRUG’s interpretation suggests that the only reason for the words “finally expire” in section 413(3) is to establish the time frame for a qualifying application under section 124.
28. The provisions of the Act, including section 124, already apply by virtue of the text following section 413(1)(e). Further, section 413(1) starts with the words “Except as provided in subsections (2) to (10), ...”, which clearly includes subsection (3). Thus, section 124 (along with the other provisions of the Act, except sections 128 to 133) shall apply to deemed permits except as provided in subsection (3), which provides for a final expiry date of 1 October 2021.
29. There is an interpretative presumption that Parliament intends to legislate in a way that produces a practicable, workable, and sensible result.¹³

⁹ See the discussion in **Burrows and Carter Statute Law in New Zealand** (5th ed, Lexis Nexis, Wellington 2015) at 319-320.

¹⁰ See, for example, sections 418 and 420 of the RMA.

¹¹ See section 413(3A) and (8).


¹² See **R v Steigrad** [2011] NZCA 304, (2011) 10 NZCLC 264,862 at [61], where the Court of Appeal stated that adding words into a statute is “very rarely legitimate”.

¹³ **Re Watercare Services Ltd** [2018] NZHC 294 at [64], citing **R v Salmond** [1992] 3 NZLR 8 (CA) at 13. See also the discussion in **Burrows and Carter Statute Law in New Zealand** (5th ed, Lexis Nexis, Wellington 2015) at 344.

30. OWRUG's interpretation is that section 413 contains savings provisions that would "save" deemed permits beyond 1 October 2021. Read literally, the legal consequence of OWRUG's interpretation would mean that deemed permits might never expire, which would make it very difficult to address applications for resource consent by non-deemed permit holders.
31. It is submitted that an interpretation that section 124 cannot lawfully be used to permit the continued exercise of a consent that the RMA has deemed to have finally expired avoids these concerns. That interpretation does not read words into section 413 that are not there and it gives the term "existing consent" in section 124(3) its proper meaning in context, which includes that as a matter of law, deemed permits are creatures of statute that finally expire on 1 October 2021.
32. Importantly, this interpretation promotes the legislative purpose of section 413, which is to bring deemed permits resulting from mining privileges completely to an end by 1 October 2021.

Conclusion

33. It remains my submission that, on a qualifying application to replace a deemed permit, the priorities under the deemed permits cannot continue to be exercised under section 124 after the deemed permit has finally expired on 1 October 2021.



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R J Somerville QC
Amicus Curiae
28 June 2021

