

Decision No: A103/83

IN THE MATTER of the Water and Soil  
Conservation Act 1967

AND

IN THE MATTER of three appeals under  
section 25 of the Act

BETWEEN

ROTORUA DISTRICT COUNCIL  
(Appeals 265-267/83)

Appellant

AND

BAY OF PLENTY REGIONAL WATER  
BOARD

Respondent

BEFORE THE PLANNING TRIBUNAL - NUMBER ONE DIVISION

His Honour Judge Turner - Chairman  
J. Shaw  
T W Smallfield  
R E Hermans

HEARING at ROTORUA on the 19th & 20th days of September 1983.

COUNSEL

L H Moore for appellant  
T S Richardson for respondent

DECISION

Background

These appeals are against terms and conditions imposed upon the grant of rights to discharge treated effluent from the Rotorua District Council's waste water treatment system.

The disposal of the treated effluent from this system has been a matter of public controversy for some years. At the present time effluent is being discharged into Lake Rotorua via the Puarenga Stream pursuant to a right granted in 1979. That right specifies a certain volume and standard of quality, and it expires on 30 June 1986.

Not all the urban area of Rotorua is served by a sewerage system. The first loan proposals for major treatment and reticulation works were approved in 1970. Work commenced the following year and has progressed continuously since then. The treatment plant has been constructed in stages; Stage III was fully commissioned in September 1982. Reticulation of the urban area is now nearing completion.

The existing right to discharge into Lake Rotorua is for a relatively short term. Inter alia it requires that at least 70% of the total phosphorus be removed from the sewage before the effluent is discharged. Experience with the treatment system has shown that it can produce a consistently high standard of effluent with regard to biochemical oxygen demand and suspended solids; but its efficiency in removing phosphorus has deteriorated in the last 3 years. The Council accepts that consistent 70% removals cannot be achieved without major alterations to the present plant.

Some time ago the suggestion was made that the effluent should not be discharged into Lake Rotorua; that it should be carried by pipeline to the Kaituna River and discharged there.

Faced with the foregoing, the Council applied to the respondent Board for rights:-

- (a) to continue to discharge into Lake Rotorua beyond June 1986;
- (b) to discharge into the Kaituna River;

and for certain emergency and ancillary rights.

It anticipated that the right to discharge into the Lake might not be renewed, or might be renewed on more onerous conditions than the present. It sought to ascertain whether a right to discharge into the Kaituna River would be granted and if so on what terms and conditions, anticipating that in respect of phosphorus removal the right if granted would be less onerous than for a discharge into the Lake. Both rights have been granted. On the resolution of these appeals the Council will make a decision whether to continue to discharge into the Lake (and upgrade its present plant) or to discharge into the Kaituna River.

The decisions:

The terms and conditions upon which the rights were granted by the Board, and its reasons for those decisions, are set out in the Appendix hereto (being part of the report of the Special Tribunal which heard the applications).

For reference purposes we record that the rights granted were as follows:-

- Right 904/1: Right to make the main discharge into the Kaituna River.
- Right 904/2: Right to discharge in emergencies into the Puarenga Stream (Lake Rotorua)

- Right 904/3: Right to discharge for maintenance purposes and in emergencies at various points along the pipeline.
- Right 933 : Right to make the main discharge into the Puarenga Stream (Lake Rotorua).
- Right 934 : Right to discharge from experimental ponds.

All rights (except Right 934) were granted for a term expiring on 30 June 1996. Each right was granted subject to the reservation of a power to the respondent to cancel it on the giving of notice to that effect.

The Appeals:

The Council brought 3 appeals from those decisions -

- (i) Appeal 265/83 relating to Rights 904/1-3;
- (ii) Appeal 266/83 relating to Right 933; and
- (iii) Appeal 267/83 relating to Right 934.

By its appeals the Council did not challenge the effluent quality specified.

In respect of Rights 904/1-3 the principal relief sought was (a) that the term of the rights should be until 30 June 2011 and (b) that the clause reserving the power to cancel the right by giving notice (hereinafter terms "the review clause") should be modified.

In respect of Rights 933 and 934 the principal relief sought was modification of the review clause. (The Council did not ask for a longer term for the right to discharge into the Lake.)


The appeals were also brought in respect of certain minor matters, but those matters were resolved by consent, as is recorded hereafter.

The issues which remained for determination by this Tribunal were:-

1. The legality and reasonableness of the form of the review clause, common to all rights.
2. The term of the Kaituna right (904/1), it being accepted by both parties that Rights 904/2-3 should be for the same term as Right 904/1. (At the hearing of the appeals Counsel for the appellant sought an effective term of 21 years.)

The Contentions of the Parties:

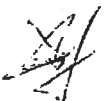
The contentions of the respondent in support of the (effective) 10 year term of the Kaituna right, and the review clause in all rights can be summarised as follows:-

- (a) Both proposals are for a major discharge into a large body of water. Notwithstanding the scientific and technical data and predictions there are uncertainties and vagaries as to the future quality of the receiving waters. Therefore the respondent must retain the power to review the rights.
- 

- (b) Community values on environmental matters may change (and become more restrictive). The Act intends that provision for the use of natural water be ongoing i.e. that its quality and use be promoted and controlled at all times; and that all holders of rights to discharge must be sensitive and responsive to environmental changes and to the needs of future users.
- (c) The Kaituna is an important river, there is the prospect of other important uses of the river water, there is the possibility that the river will be re-diverted back into the Maketu estuary, and there are the uncertainties involved with the introduction of a major waste discharge into the river.
- (d) Lake Rotorua is a highly important lake. It is sensitive to and has already suffered the effects of enrichment; there have been extensive studies of the lake waters, but there is still a large degree of uncertainty over the future quality of the lake water.

(Refer also to the following particular parts of the Appendix hereto - The third paragraph of para 10  
- Paras 13.2, 13.3, 13.4(c)  
- The second paragraph of Para 19.7)

The appellant's contentions can be summarised as follows:-

- (a) Whichever scheme it elects, it is faced with substantial capital costs and annual operating expenses. If it elects to implement the Kaituna scheme, then the capital cost of the pipeline will be about \$M10, and it will not thereafter be possible for it to revert to a Lake discharge (because of the capital cost involved in phosphorus stripping, required for a Lake discharge but not for the Kaituna scheme). The nature and size of the Kaituna Scheme requires that the right to discharge into the Kaituna be for a substantially longer effective term than 10 years.
  - (b) On the other hand because of the greater uncertainties surrounding the water quality of Lake Rotorua and the lower capital cost of the Lake scheme, it accepts the effective term of 10 years for the right to discharge into the Lake.
  - (c) A right should be in such terms that it can be relied upon by the holder. But the review clause imposed is too draconian in its terms; it makes the grantee's position too insecure. The short term of the right for the Kaituna discharge coupled with the review clause, mean that the "right" is no more than a tenancy at the will of the respondent.
  - (d) The review clause imposed could be used to force a discontinuance of the discharge. It could be used to give preference to future applicants for rights affecting the Kaituna River; the Council would not enjoy any priority over such applicants. In effect the respondent is endeavouring to operate a water allocation plan by means of the terms and conditions upon which it grants rights.
- 

- (e) It accepts a review clause in the form settled in Mahuta & Ors v NWSCA (1973) 5 NZTPA 73 to deal with any unexpected consequences of the discharges which in the public interest should be cured.
- (f) In effect the condition fixing the maximum quantity and rate of discharge (that condition having been based on population projections) provides an inbuilt protection and would require the Council to seek a variation of the right if the Council's estimates prove to be too low. (Although the Special Tribunal's report says that: "The flow quantities have been reduced from those applied for, in keeping with the shorter term for the right," the Council did not by its appeal seek any amendment of the flow quantities.)

Evaluation:

The Act is an Act "to make better provision for the conservation, allocation, use and quality of natural water" and "for promoting and controlling multiple uses of natural water." But it achieves its object largely through a system of granting (or refusing) rights to do certain things including rights to dam a river, to take natural water and to discharge waste into natural water. A "right" is just what the word suggests: it is a legal entitlement to do certain things for a specified period provided that those things are done in accordance with its terms and conditions.

The Act requires or infers that before a right is granted, certain things be taken into account. For instance, before granting a right to take water, a regional water board should have regard to the existing and likely future demands on the water resource. Before granting a right to discharge waste into natural water, a regional water board should have regard to the quality of that water, and should grant a right only on such terms and conditions as will ensure that a proper standard of quality is maintained during the term of the right. (Section 21(3A) imposes a specific limitation on the grant of some rights to discharge waste.)

A right to take and use natural water does not confer upon the holder a guarantee that there will be a sufficiency of supply; nor does it protect the holder against the grant of other rights the effect of which might be to make the supply insufficient from time to time. But on the other hand a right to discharge waste into natural water does confer upon the holder a form of priority. His discharge might take up the whole of the assimilative capacity of the receiving waters; in any event the exercise of his right to discharge means that any other applicant for a right must necessarily take or use water of the quality which results from the discharge.

The Act does not empower the grantor of a right to discharge waste to take steps during the term of the right to terminate the right, nor to vary its terms.


No right to discharge should be granted without first taking into account existing and likely future uses of the receiving

waters. But the cost of treating municipal and industrial wastewater and of bringing it to a standard of quality suitable for discharge into natural water is high. Consequently an applicant for a right to discharge waste usually seeks a right for a lengthy term. In holding the balance between an applicant for such a right and the other likely future users of the receiving waters, the regional water board may well have to foreclose some future options for the period that a right to discharge is granted. But if he is to make his capital investment the holder of a right to discharge is entitled to reasonable security of tenure; he should not be granted a right for a short term and be faced from the outset with the need to renew it from time to time, having no priority over other applicants.

On the other hand, despite the recent substantial advances in scientific knowledge, water quality is not entirely predictable; and the exercise of a right to discharge waste may have unforeseen consequences, particularly in the long term. As we have already pointed out, the Act does not confer on the grantor of a right to discharge waste the power to take steps to vary the terms and condition of a right, in particular, in circumstances when a variation is desirable in order to improve the quality of the receiving waters because of some unforeseen consequences of the discharge. We are of the opinion that that is a deficiency in the Act; that the Act should be amended to give regional water boards the power to initiate procedures which will lead to a variation of a right.

In the absence of an express statutory power to that effect, the Town and Country Planning Appeal Board (the predecessor of this Tribunal) devised what is known as the "Mahuta" clause - see the Mahuta decision (supra) - a condition empowering the grantor to cancel the right upon notice, but reserving the grantee's right to re-apply. The rationale behind the clause is that if it is demonstrated that a variation of the terms and conditions is desirable in the public interest, the grantee will himself apply for a variation pursuant to Section 34B; but if he does not, then the grantor will force the issue by giving notice of cancellation, thus compelling the grantee to re-apply. (An ancillary reason is that a right of appeal to this Tribunal cannot be conferred by consent or by a condition imposed upon a right. But the procedures implicit in the Mahuta clause carry statutory rights of appeal.) However the Mahuta clause should not be used to deprive the grantee of his priority over others. In relation to rights to discharge waste, it should be used only in order to maintain a proper standard of quality in the receiving waters.

Applying the foregoing principles to the issues remaining on these appeals, we hold:-

- (1) Having regard to the capital cost of the scheme and the existing and foreseeable demands upon the receiving waters, the effective term of the right to discharge into the Kaituna is unreasonably short. The evidence was that the proposed discharge is within the assimilative capacity of the river, notwithstanding the existing waste discharges into the river. Two possible future uses of the river (which might be adversely
- 

affected by the discharge) were made known to us. One is that there have been proposals to dam the Kaituna River in order to generate electricity. Retention of enriched river water in a hydro dam could result in undesirable effects upon water quality. The other is that request have been made to redivert the river back into the Maketu estuary. If there were a re-diversion, the river water would contain coliforms from existing discharges and the proposed discharge which would be inconsistent with shell-fish gathering in the estuary and with the SA classification of its waters.

Whatever term is fixed for a right to discharge waste, there will be an element of arbitrariness about it. We hold that in this case the term should be 20 years from the time the rights were granted i.e. for a term expiring on 30 June 2003. If exercised, the right to discharge into the Kaituna River might well have the effect of foreclosing other options during that term. But we hold that in all the circumstances, the regime which would exist during the life of the right would be an appropriate one.

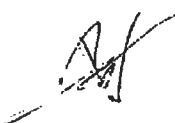
- (2) The "review clause" imposed as a condition of the rights is too wide in its terms. It is not too strong to say that it converts the right into a mere licence, revocable at the will of the respondent. In effect it would enable the respondent to manage the use of the waters of the Kaituna River according to the circumstances arising from time to time. In our opinion, that philosophy is not the philosophy of the Act. The form of the condition reserving the power to cancel a right on notice was settled in the Mahuta decision in the following terms:-

This right may be cancelled by the giving of not less than months' notice in writing by the grantor to the grantee if in the opinion of the grantor the public interest so requires, but without prejudice to the right of the grantee to apply for a further right in respect of the same matter.

That form may still be too wide. In this case "the public interest" is limited to the maintenance of a proper standard of quality in the receiving water notwithstanding the discharge authorised. But it is the form contended for by counsel the appellant. Certainly the "public interest" does not extend to include the interests of other lawful users of water - their interests must be considered before the right is granted; nor the interests of future applicants for water rights - their interests may have to remain foreclosed. But, subject to that expression of opinion, it is appropriate that Mahuta clause be adopted in this case.

Determinations:

- A. For the foregoing reasons this Tribunal hereby makes the following determinations:-



## (i) On Appeal 265/83 -

- (a) It is ordered that Rights 904/1, 904/2, and 904/3 shall each be for a term ending on 30 June 2003.
- (b) It is ordered that in respect of Right 904/1 Condition 11, in respect of Right 904/2 Condition 12, and in respect of Right 904/3 Condition 11 be amended to read -

"This right may be cancelled by the giving of not less than 12 months' notice in writing by the Regional Water Board to the Grantee, if in the opinion of the Regional Water Board the public interest so requires, but without prejudice to the right of the Grantee to apply for a further right in respect of the same matter."

- (ii) On Appeal 266/83 and on Appeal 267/83 it is ordered that in respect of Rights 933 and 934 Condition 10 be in each case amended to read -

"This right may be cancelled by the giving of not less than 12 months' notice in writing by the Regional Water Board to the Grantee, if in the opinion of the Regional Water Board the public interest so requires, but without prejudice to the right of the Grantee to apply for a further right in respect of the same matter."

B. By consent this Tribunal hereby makes the following further determinations:-

- (iii) On Appeal 265/83, it is ordered that the conditions of Right 904/1 be amended in the following respects -
  - (a) Delete the second sentence of Condition 4 and substitute the following:-

"Plans of the discharge works and of any associated energy dissipation works shall be submitted to the Regional Water Board engineer for his written approval which shall be obtained before construction of those works commences."

- (b) Delete the present condition 7.6 and replace it with the following:-


"The grantee shall take and make available to the Regional Water Board such additional samples of effluent (as may reasonably be requested by the Board) from the pipeline at the Kaituna River outfall and/or from the waste water treatment plant at the point of inflow to the Kaituna pipeline system."

- (c) Delete Condition 8.



- (d) Consequentially renumber the subsequent conditions to the right.
- (iv) On Appeal 265/83 it is ordered that the Conditions of Right 904/3 be amended in the following respect -
- Delete the present condition 6 and replace it with the following:-
- "Plans of the discharge works and any associated energy dissipation works shall be submitted to the Regional Water Board engineer for his written approval which shall be obtained before construction of those works commences."
- (v) On Appeal 266/83 it is ordered that the conditions of Right 933 be amended in the following respects -
- (a) Amend condition 4.2 by deleting the words "the treatment plant" and substituting therefor the words "the existing waste water treatment plant and systems".
- (b) Deleting the present condition 6.7 and replace it with the same condition as is to be new condition 7.6 in water right 904/1.
- (vi) On Appeal 267/83 it is ordered that the conditions of Right 934 be amended in the following respects -
- (a) Delete present condition 6.6 and replace it with the same condition as is to be the new condition 7.6 in water right 904/1.
- (b) Delete condition 7.
- (c) Consequentially renumber the remaining conditions.
- C. It is ordered that the decisions appealed against be amended in accordance with the foregoing.

DATED at AUCKLAND this 2<sup>ND</sup> day of December 1983.

  
District Court Judge Turner  
Chairman  
Number One Division  
Planning Tribunal.

