

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

IN THE MATTER of the Resource Management Act 1991 (**the Act**)

IN THE MATTER of appeals under clause 14(1) of the Schedule 1 of the Act

BETWEEN TRUSTPOWER LIMITED
(ENV-2019-AKL-000074)
Appellant

AND BAY OF PLENTY REGIONAL COUNCIL
Respondent

Environment Judge M J L Dickey sitting alone under s 279 of the Act

IN CHAMBERS at Auckland

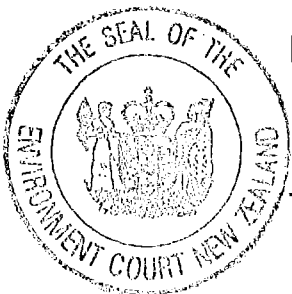
CONSENT ORDER

[A] Under s 279(1)(b) of the Resource Management Act 1991, the Environment Court, by consent, orders that:

(a) Rule AQ R23 in Plan Change 13 (Air Quality) to the Bay of Plenty Natural Resources Plan is amended as shown in **Appendix A** and **Appendix B** to this order.

(b) the appeal is otherwise dismissed.

[B] Under s 285 of the Resource Management Act 1991, there is no order as to costs.



REASONS

Introduction

- [1] These appeals concern the Bay of Plenty Regional Council's decisions on Proposed Plan Change 13 (Air Quality) to the Bay of Plenty Natural Resource Plan (**Plan Change 13**).

Mobile or emergency diesel generators and pumps

- [2] The appellant owns and operates the Matahina, Kaimai and Wheao hydro-electric power schemes (**HEPS**) in the Bay of Plenty. The appellant also operates a 0.8MW (1000 kVa) diesel generator at its head office in Tauranga (**the Generator**) and a number of small generators at its HEPs, which are critical for maintaining safe operations in the event of a power failure including by being able to operate spillway gates. All of these generators are permitted under the operative rules.
- [3] Rule AQ R18 of the Plan Change sets permitted activity standards for fuel burning equipment, which the appellant considered under the notified version of the Plan Change would include diesel generators.
- [4] In its submissions the appellant submitted that the definition of "fuel burning equipment" inferred that a diesel generator would be considered to be fuel burning because these devices combust diesel to produce power. If that drafting was retained then AQ R18 would apply to the appellant's generators.
- [5] The appellant therefore proposed an amendment to the definition of fuel burning equipment to make it clearer that its generators are not classified as fuel burning equipment and caught by AQ R18.¹ This would mean that the appellant's diesel generators would be a permitted activity under Rule AQ R1. This submission was accepted, and the appellant understood that the Regional Council intended for diesel generators to be a permitted activity under Rule AQ R1.
- [6] However, the decisions version of the Plan Change included a new part to Rule AQ R23, which sets permitted activity standards for mobile or emergency diesel generators and pumps, which the appellant considers would apply to its generators.



¹ Trustpower's submission to the Bay of Plenty Regional Council dated 18 April 2018 at page 9.

- [7] The appellant acknowledges that it lodged a further submission² supporting the original submission of Port of Tauranga Limited, which proposed a new rule for mobile or emergency generators and a 600 kVa limit.³ This submission resulted in the amendments to Rule AQ R23 in the Regional Council's decision.
- [8] At 1000 kVa, the Generator does not meet the permitted standards in Rule AQ R23, which would make it a discretionary activity under Rule AQ R2 (the smaller HEPS generators would meet the permitted standards under Rule AQ R23).
- [9] The appellant, on reflection, has realised that the 600 kVa limit would result in the Generator requiring consent as a discretionary activity under Rule AQ R2, which was not the intent of its original submission. The appellant considers that while it could revert to the relief sought in its original submission (i.e. that its mobile or emergency diesel generators be permitted activities under Rule AQ R1) it considers it is preferable to amend Rule AQ R23.
- [10] Accordingly, the appellant's appeal sought an amendment to Rule AQ R23 to delete reference to 'with a maximum load of 600 kilovolt amperes', to include reference to discharges not occurring for more than 48 hours 'consecutively', and for the reference to 'geothermal' electricity generation activities to be deleted,⁴ or such other relief as appropriate having regard to the appellant's submission and further submission and the reasons for the appeal.⁵

The agreement reached

- [11] The parties have agreed that this appeal can be resolved by making the following amendments to Plan Change 13:
- (a) Amending permitted activity rule AQ R23 to increase the size of mobile or emergency generator or pump, a clarification around operating time limits, and to remove unnecessary reference to 'geothermal' electricity generation.

² Trustpower's further submission to the Bay of Plenty Regional Council dated 30 July at page 3.
³ Port of Tauranga Limited's submission to the Bay of Plenty Regional Council dated 18 April 2018.
⁴ Notice of Appeal dated 26 April 2019 at [8](a).
⁵ Notice of Appeal dated 26 April 2019 at [8](b).



Consideration

- [12] In making this order the Court has read and considered the appeal and the joint memorandum of the parties.⁶
- [13] There are two s 274 parties to the appeal. Mercury NZ Limited joined as a s 274 party in support of the appeal, and Port of Tauranga Limited joined as a s 274 party neither supporting nor opposing the relief but sought to remain involved as a result of its earlier (accepted) submission on Rule AQ R23, and to ensure that any amendments are consistent with that earlier submission. Both parties have signed the memorandum seeking this order dated 21 November 2019.
- [14] The Court is making this order under s 279(1)(b) of the Act, such order being by consent, rather than representing a decision or determination on the merits pursuant to s 297 of the Act. The Court understands for all present purposes that:
- (a) all parties to the proceedings have executed the memorandum requesting this order;
 - (b) all parties are satisfied that all matters proposed for the Court's endorsement fall within the Court's jurisdiction, and conform to relevant requirements and objectives of the Resource Management Act 1991, including in particular Part 2; and

Scope

- [15] The test to be applied as to whether the amendments are sought are in scope is that set out in *Toomey v Thames-Coromandel District Council*,⁷ which is as follows:

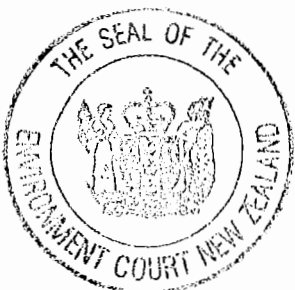
An appeal from a decision on a submission on a proposed plan must be on a provision or matter referred to in that submission.⁸ The scope of the relief sought on appeal must be fairly and reasonably within the scope of the original submission or the proposed plan provisions or somewhere in between.⁹

⁶ Joint memorandum of the parties in support of draft consent orders dated 21 November 2019.

⁷ [2017] NZEnvC 199.

⁸ Clause 14(2), Schedule 1 to the RMA.

⁹ *Re Vivid Holdings Limited* [1999] NZRMA 467.



[16] I am satisfied that the amendment sought to Rule AQ R23 is within the scope of the appellant's submissions and further submissions. The appellant's submission on the definition of fuel burning equipment makes it clear that the outcome sought by the appellant was that its diesel generators be a permitted activity. The appellant also made a further submission supporting Port of Tauranga Limited's submission seeking a new rule. This submission by Port of Tauranga Limited was the basis for the amendments made to Rule AQ R23 in the Regional Council's decision.

[17] I am also satisfied that there is no prejudice to any party in granting the relief sought, as Port of Tauranga Limited has consented to the amendments proposed by this order.

Order

[18] In the circumstances of this case I am prepared to grant the amendments sought by the parties on the grounds that an agreement has been reached between them. Accordingly, this order does not represent a reasoned decision of the Court, but confirms the agreement reached between the parties by consent.

[19] Therefore, the Court orders, by consent, that Rule AQ R23 in Plan Change 13 (Air Quality) to the Bay of Plenty Natural Resources Plan is amended as shown in **Appendix A** of this order.

[20] A clean version is included in **Appendix B**.

[21] There is no order for costs.

DATED at Auckland this *5th* day of *December* 2019


M J L Dickey
Environment Judge



APPENDIX A – tracking in underline and ~~strikethrough~~

1. Amend Rule AQ R23 of Plan Change 13 (Air Quality) to the Bay of Plenty Natural Resources Plan (Plan Change 13) as follows:

AQ R23 Mobile or emergency diesel generators and pumps – Permitted – (tba) – E whakaaehia ana

- (1) The discharge of *contaminants* to air from the internal combustion of diesel in any mobile or emergency generator or pump with a maximum load of ~~600~~ 1000 kilovolt-amperes is a permitted activity provided the following conditions are met:
- (a) the discharge must not occur for more than 48 hours during any single event within 50 metres of a **sensitive area**, and
 - (b) fuel used in the generator or pump must comply with the Engine Fuel Specifications Regulations 2011, and
 - (c) the discharge must not be noxious or dangerous, offensive or objectionable beyond the boundary of the **subject property**.
- (2) For the internal combustion of diesel in any mobile or emergency generator or pump with a total combined output of less than 5000 kilovolt-amperes, the discharge is a permitted activity provided:
- (a) the discharge is associated with ~~geothermal~~ electricity generation activities, including geothermal drilling, and
 - (b) the discharge must not occur for a period of more than 3 months per wellhead or generation site, and
 - (c) the discharge must not occur within 200 metres of a **sensitive area**, excluding discharges to air from pumps which may be located adjacent to *water bodies* and buildings that are defined as a **sensitive area** and are uninhabited for the duration of the discharge, and
 - (d) fuel used in the generator or pump must comply with the Engine Fuel Specifications Regulations 2011, and
 - (e) the discharge must not be noxious or dangerous, offensive or objectionable beyond the boundary of the **subject property**.



APPENDIX B – clean

1. Amend Rule AQ R23 of Plan Change 13 (Air Quality) to the Bay of Plenty Natural Resources Plan (Plan Change 13) as follows:

AQ R23 Mobile or emergency diesel generators and pumps – Permitted – (tba) – E whakaaehia ana

- (1) The discharge of *contaminants* to air from the internal combustion of diesel in any mobile or emergency generator or pump with a maximum load of 1000 kilovolt-amperes is a permitted activity provided the following conditions are met:
 - (a) the discharge must not occur for more than 48 hours during any single event within 50 metres of a **sensitive area**, and
 - (b) fuel used in the generator or pump must comply with the Engine Fuel Specifications Regulations 2011, and
 - (c) the discharge must not be noxious or dangerous, offensive or objectionable beyond the boundary of the **subject property**.
- (2) For the internal combustion of diesel in any mobile or emergency generator or pump with a total combined output of less than 5000 kilovolt-amperes, the discharge is a permitted activity provided:
 - (a) the discharge is associated with electricity generation activities, including geothermal drilling, and
 - (b) the discharge must not occur for a period of more than 3 months per wellhead or generation site, and
 - (c) the discharge must not occur within 200 metres of a **sensitive area**, excluding discharges to air from pumps which may be located adjacent to *water bodies* and buildings that are defined as a **sensitive area** and are uninhabited for the duration of the discharge, and
 - (d) fuel used in the generator or pump must comply with the Engine Fuel Specifications Regulations 2011, and
 - (e) the discharge must not be noxious or dangerous, offensive or objectionable beyond the boundary of the **subject property**.

