

**BEFORE THE ENVIRONMENT COURT  
AT AUCKLAND**

**ENV-2017-AKL-**

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

**AND**

**IN THE MATTER OF** an appeal pursuant to clause 14 of the First  
Schedule to the Act

**BETWEEN** **TRUSTPOWER LIMITED**

Appellant

**AND**

**BAY OF PLENTY REGIONAL COUNCIL**

Respondent

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**NOTICE OF APPEAL**

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**TO:** The Registrar  
Environment Court  
**AUCKLAND**

1. **TRUSTPOWER LIMITED** (the **Appellant**) appeals against decisions of the Bay of Plenty Regional Council (the **Respondent**) on Proposed Change 3 (Rangitāiki River) to the Bay of Plenty Regional Policy Statement (the **Proposed Change**).
2. The Appellant made submissions and further submissions on the Proposed Change.
3. The Appellant is not a trade competitor for the purposes of section 308D of the Act.
4. The Appellant received notice of the decision on 17 October 2017.
5. The decisions were made by the Respondent.
6. The decisions appealed, reasons for the appeal and relief sought are grouped together in relevant topics for convenience.

#### **Decisions appealed**

7. The decisions appealed are as follows:
  - (a) **Tuna passage**
    - (i) **Objective 32**
    - (ii) **Policy RR 1B**
    - (iii) **Method 23D**
  - (b) **Water quality**
    - (i) **Policy RR 3B**
    - (ii) **Method 23I**
    - (iii) **Method 23L**
  - (c) Cultural and recreational access
    - (i) **Method 23S**

#### **Reasons for the appeal**

8. The reasons for the appeal are set out below.

## Tuna passage

### *Objective 32*

9. Objective 1 of the Te Ara Whānui O Rangitāiki – Pathways of the Rangitāiki River document February 2015 (**the Rangitāiki River Document**) is that “Tuna within the Rangitāiki catchment are protected, through measures including enhancement and restoration of their habitat and migration paths”. The objective relates to the protection of tuna, to be achieved through various measures.
10. The notified version of Proposed Change 3 originally repeated Objective 1 of the Rangitāiki River Document (Objective 1 of Proposed Change 3 as notified), and the Appellant sought in its submission that the objective be re-worded to “Tuna within the Rangitāiki River catchment are protected” which is more reflective of an objective.
11. The Respondent’s staff recommendation and decision changed the relevant objective (now numbered Objective 32) so that it no longer relates to the protection of tuna, but to the restoration and enhancement of the habitat and migration paths of tuna. The Appellant’s evidence suggested that the staff recommendation would be appropriate if the objective referred to restoration *or* enhancement.
12. The Appellant therefore seeks that Objective 32 be re-worded as sought in its submission or as suggested in its evidence at the hearing. It notes that the Respondent’s decision on Objective 32 is deficient in the following respects:
  - (a) It is questionable whether the objective recognises and provides for Objective 1 of the Rangitāiki River Document, as required by s 119(1) of the Ngāti Manawa Claims Settlement Act 2012, because the objective no longer relates to the protection of tuna, but to the restoration and enhancement of the habitat and migration paths of tuna;
  - (b) It is similarly worded to and repetitive of the introductory wording to Policy RR 1B which does not set the objective sufficiently apart from the policy, which is the course of action to achieve the objective;
  - (c) It suggests the possibility of both restoration *and* enhancement when restoration *or* enhancement is more appropriate. This is because in some

cases (such as at the Matahina Dam) enhancement of migration paths rather than restoration to their previous state will be appropriate;

- (d) The s 32AA evaluation does not consider the changes made to Objective 32, and although the s 32AA evaluation does defer to and rely on staff recommendations, those do not in any way examine the changes to the objective in accordance with s 32(1) to (4) of the Act.

*Policy RR 1B and Method 23D*

- 13. Whilst the Appellant does not take issue with the principle of enhancing or restoring tuna passage in the Rangitāiki River catchment, it considers that Policy RR 1B and Method 23D would benefit from some changes so that they are more in keeping with the Rangitāiki River Document and less prescriptive in terms of the methods by which the policy is to be implemented. In particular:

- (a) The Rangitāiki River Document seeks the *protection* of tuna, through measures including *enhancement and restoration* of habitat and migration paths. Policy RR 1B should therefore seek *enhancement or restoration*.
- (b) Policy RR 1B(c) and (d), and Method 23D, should be modified so that they are not focussed *only* on structural modification to enable tuna passage. The narrow focus on structural modification to enable tuna passage is not supported by the Rangitāiki River Document, including particularly the strategic and contributing actions which support Objective 1, or by the expert ecological assessments which the Appellant has obtained on the issue of tuna passage in the Rangitāiki River catchment.

- 14. The Respondent's decisions on Policy RR 1B and Method 23D are also deficient in the following respects:

- (a) Parts (c) and (d) of Policy RR 1B and Method 23D are unreasonably focussed on structural modification and do not have regard to other methods for providing for tuna passage – which can have additional benefits in the form of providing an integrated approach to passage past multiple impediments, providing data to improve understanding of tuna populations in the catchment and to inform quota management. This is particularly important

when dealing with existing hydro-electricity generation schemes which either have limited ability to implement structural modifications and/or where the value, effectiveness and success of structural modifications are indeterminate;

- (b) The Respondent's decision does not have regard to the expert evidence provided to the Respondent outlining the practical constraints for tuna passage at the Matahina Dam, including that tuna passage through the use of the trap and transfer programme (as opposed to structural modifications to the dam) is the most practicable and proven means of providing for migration up and down the Rangitāiki River;
- (c) The Respondent's decision does not appear to have regard to Policy C1 of the National Policy Statement for Renewable Electricity Generation 2011 (**NPSREG**), which requires decision makers to have regard to (amongst other things) technical practicalities with upgrading renewable electricity generation activity, and to that extent the Respondent has failed to take into account a relevant consideration;
- (d) The Respondent's decision fails to give effect to the NPSREG, despite the requirement of s 62(3) of the Act;
- (e) The s 32 evaluation and the s 32AA evaluation do not properly consider the impact of Policy RR 1B(c) and (d) and Method 23D as to the economic effects on the owners of the hydro-electricity generation schemes in the Rangitāiki River catchment, nor the relevant technical engineering and operational matters associated with the establishment of migration structures. The Supplementary Staff Report on Submissions dated 12 July 2017 (which is relied on by the Respondent in its s 32AA evaluation) simply dismisses economic considerations in a cursory manner by saying "Whilst I acknowledge there is a considerable cost involved in constructive a two way tuna migration structure it should not be a prohibitive factor" with no further analysis. Further, the s 32 evaluation and the s 32AA evaluation do not properly consider the impact of Policy RR 1B(c) and (d) and Method 23D as to their efficiency and effectiveness as provisions to achieve the objective.

## **Water quality**

### *Policy RR 3B*

15. The Appellant submitted on Policy RR 3B and sought the deletion of part (d) of the policy which, as notified, referred to the provision of safe drinking water sources. The Appellant was concerned that the provision of safe drinking water was not an appropriate water quality standard for the Rangitāiki River catchment.
16. In its decision, the Respondent has amended part (d) of Policy RR 3B by adding the words “where the water is used for that purpose”. Whilst this provides some clarity, the Appellant remains concerned at the potential for uncertainty to arise if the policy is intended to apply to as yet undefined sources in the future. It is not clear from the Respondent’s decision whether this is the intention.
17. The Appellant considers that if Policy RR 3B(d) is to remain, it should be clarified that this applies to existing sources of drinking water. The term “safe drinking water” should also be clarified as it is not clear whether this means that water quality is to meet a particular standard (and if so, what standard).

### *Method 23I*

18. The Respondent’s decision on Method 23I of Proposed Change 3 has inappropriately included flow variability in the method. The decision to include flow variability is deficient in a number of respects including the following:
  - (a) The insertion of flow variability was sought by the Rangitāiki-Tarawera Rivers Scheme Liaison Group and Rivers and Drainage Staff. It appears that their intention is to revisit the consented regime (including ramping rates) applying to the Matahina Hydro-Electric Power Scheme. To the extent that the Respondent’s decision concludes at paragraph 388 that the Appellant’s concerns are addressed because its consent application for the Matahina Hydro-Electric Power Scheme was lodged before 1 July 2017, the decision is incorrect as an existing consent is open to possible review under its review conditions or s 128 of the Act;

- (b) The Respondent has concluded that the inclusion of flow variability is consistent with the National Policy Statement for Freshwater Management (**NPSFM**), but this is not the only frame of reference. Although a change must give effect to a national policy statement, the s 32 report for Proposed Change 3 clearly stated that “It is important to note that the purpose of Change 3 is to fulfil requirements under Treaty Claim legislation and not to implement the NPSFM”;
  - (c) The inclusion of flow variability is not necessary and is inappropriate to give effect to the Rangitāiki River Document. In particular, Strategic Action B (3.1) to Objective 3 of the Rangitāiki River Document is clear that it seeks to develop environmental flow and Rangitāiki catchment load limits (e.g. nutrients, sediments and bacteria) and does not address flow variability;
  - (d) The inclusion of flow variability has not been adequately considered in the wider context of the Bay of Plenty Regional Policy Statement’s policies regarding water quantity and water quality which do not address flow variability. Accordingly there is a lack of policy direction within the Bay of Plenty Regional Policy Statement to inform the implementation of the method;
  - (e) The s 32AA evaluation does not properly consider whether the inclusion of flow variability is the most appropriate way to achieve the objectives of Proposed Change 3 as is required by s 32AA and s 32(1)-(4) of the Act;
  - (f) To the extent that the Respondent’s decision introduces a new concept to Proposed Change 3, including a new definition of “flow variability”, being one that is not included within the Bay of Plenty Regional Policy statement or Proposed Change 3, the decision may be outside the scope of Proposed Change 3 and therefore *ultra vires*.
19. The Appellant also considers that rather than simply referring to the “Rangitāiki River catchment” it would be more appropriate to reference freshwater management units which is more in keeping with Policy CA2 of the NPSFM.

*Method 23L*

20. The Appellant sought in its submission that the reference to “targets” be deleted from Method 23L to improve the clarity of drafting, as the establishment of water quality limits is already addressed by Method 23L. Furthermore it is not clear whether the word “target” is used in the same sense as that term is used in the NPSFM or not.
21. The Appellant acknowledges that targets for restoring water quality may be an appropriate planning tool, but considers these it should be limited to circumstances where established water quality limits are not being met. As an alternative to the relief sought in its submission, it suggested through its planning evidence at the hearing that Method 23L(b) could be amended to read:
  - (b) Opportunities and targets for restoring water quality where established water quality limits are not being achieved.
22. The Appellant continues to be concerned about the uncertainty surrounding the use of the word “target” in the context of Proposed Change 3 and seeks that it either be deleted or qualified as set out above.

**Cultural and recreational access – Method 23S**

23. Method 23S is to remove or adapt structures impeding cultural and recreational access in the Rangitāiki River catchment. The Appellant sought amendments to clarify the mechanism by which the removal of structures could be required under Method 23S and when removal might be considered “impracticable”.
24. Neither the Respondent’s decision nor the s 42A report which the Respondent’s decision refers to and relies on, provides any reasoning for rejecting the Appellant’s submission on this point.
25. Neither the Rangitāiki River Document, nor the s 32 report for Proposed Change 3, shed any light on this. Under the Rangitāiki River Document, Objective 8 seeks to maintain and enhance access to the Rangitāiki River and its tributaries but the contributing actions to that objective are aligned with Method 23T of Proposed Change 3 rather than Method 23S.

26. The Appellant remains concerned about the practical implications of Method 23S including:

- (a) What sort of structures the method refers to;
- (b) What sorts of cultural and recreational access the method might contemplate;
- (c) In what sorts of circumstances removal might be considered impracticable. For example, will consideration be given to the operational or safety reasons for structures being located in the river.

### **Relief sought**

27. The Appellant seeks the following relief:

#### **Tuna passage**

- (a) Delete Objective 32 and replace it with the following text:

Tuna within the Rangitāiki River catchment are protected.

- (b) In the alternative to the relief set out at paragraph 27(a) above, amend Objective 32 so that it reads:

The habitat and migration paths of tuna are restored or enhanced in the Rangitāiki River catchment.

- (c) Amend Policy RR 1B so that it reads as follows:

**Policy RR 1B: Restoring or enhancing tuna (eel) habitat and migration pathways within the Rangitāiki River catchment**

Enhance or restore the habitat, migration pathways and population of tuna within the Rangitāiki River catchment by:

- (a) Promoting a better understanding of tuna life cycles and the current state of tuna habitat within the catchment;
- (b) Working with river users to enhance tuna habitat and two-way migration pathways;

- (c) Requiring new structures to allow two way tuna access;
- (d) Requiring existing structures, or the owners of existing structures, to provide tuna access upstream and downstream past the structure;
- (e) Encouraging research into new and innovative methods of providing or enhancing tuna access;
- (f) Advocating for the restoration of wetlands, coastal lagoons and retired oxbows for tuna habitats; and
- (g) Advocating rahui and restrictions on commercial harvesting of tuna.

- (d) Amend paragraph 6 of the explanation to Policy RR 1B so that it reads:

Protecting two-way migratory pathways requires new structures located in the bed of rivers to be designed to allow for tuna migration. Existing structures should also be required to allow tuna access.

- (e) Insert a new clause into Policy RR 1B which requires the investigation and introduction of measures to protect the health of tuna populations in the Rangitāiki River catchment (e.g. the effects of discharges and land uses).

- (f) Amend Method 23D so that it reads:

Require all new structures to facilitate two way tuna access, through the imposition of conditions on permitted activity rules and on resource consents.

- (g) Insert a new method which reads:

Require owners of existing structures to facilitate two way tuna access through the imposition of conditions on resource consents at the time of renewal.

### **Water quality**

- (h) Delete Policy RR 3B or, in the alternative, amend it so that:

- (i) It is clear that it applies to existing sources of drinking water; and

- (ii) The term “safe drinking water” is clarified (e.g. is this to a particular standard, and if so, what standard).
- (i) Delete the reference to “flow variability” from Method 23I and amend it so that it reads:

Environmental flows/levels and water quality limits for freshwater management units in the Rangitāiki River catchment shall be developed in accordance with the National Policy Statement for Freshwater Management framework.

- (j) Delete the definition of “flow variability” from Proposed Change 3.
- (k) Delete the words “and targets” from Method 23L or alternative re-word Method 23L so that it reads:

(b) Opportunities and targets for restoring water quality where established water quality limits are not being achieved.

#### **Cultural and recreational access**

- (l) Amend Method 23S to:
  - (i) Specify the mechanism for requiring the removal of structures;
  - (ii) Specify the types of structures that will be targeted for removal; and
  - (iii) Provide guidance as to the circumstances where removal would be considered “impracticable”.

#### **Further Reasons for the Appeal**

- 28. In addition to the matters set out above, the further reasons for the appeal are that the Respondent's decision:
  - (a) Will not promote the sustainable management of natural and physical resources and is contrary to Part 2 and other provisions of the Act;
  - (b) Will not avoid, remedy or mitigate adverse effects on the environment;

- (c) Introduces ambiguity and inconsistencies into the provisions of the Bay of Plenty Regional Policy Statement;
- (d) Is inconsistent with and contrary to the relevant provisions of policy statements and plans, including the NPSFM, the Rangitāiki River Document, and the Bay of Plenty Regional Policy Statement; and
- (e) Does not represent the most appropriate means of exercising the Respondent's functions, having regard to the efficiency and effectiveness of other available means and therefore is inappropriate in terms of section 32 and other provisions of the Act.

#### **Further relief sought**

29. In addition to the matters set out in paragraphs 8-28 above, the Appellant seeks the following relief:
- (a) Similar and / or consequential amendments to the Proposed Change that would satisfactorily address the matters raised in this appeal; and
  - (b) Such other relief as the Court considers appropriate.

#### **Attachments**

30. Copies of the following documents are attached to this appeal:
- (a) The Appellant's submission and further submission (**Annexure A**);
  - (b) The relevant parts of the Respondent's decision (excluding appendices) (**Annexure B**); and
  - (c) A list of the names and addresses of the persons to be served with a copy of this Notice of Appeal (**Annexure C**).

**Signature:** TRUSTPOWER LIMITED by its duly authorised agent:



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**Vanessa Hamm**  
Counsel for the Appellant

**Date:** 27 November 2017

**Address for service of Appellant:**

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**Advice to recipients of copy of notice of appeal**

*How to become party to proceedings*

You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal and you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court within 15 working days after the period for lodging a notice of appeal ends.

Your right to be a party to the proceedings in the Court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (*see* form 38).

*\*How to obtain copies of documents relating to appeal*

The copy of this notice served on you does not attach a copy of the appellant's submission or the decision appealed. These documents may be obtained, on request, from the appellant.

*Advice*

If you have any questions about this notice, contact the Environment Court Unit of the Department for Courts in Auckland, Wellington or Christchurch.

**Annexure A**

**A copy of the Appellant's submission and further submission**

**Annexure B**

**A copy of the relevant parts of the Respondent's decision**

## Annexure C

## Names and addresses of the persons to be served with a copy of this appeal

The Chief Executive Bay of Plenty Regional Council PO Box 364 Whakatāne 3158 <a href="mailto:Fiona.McTavish@boprc.govt.nz">Fiona.McTavish@boprc.govt.nz</a>	Ngai Tamawera Hapu Uiraroa Marae C/- PO Te Teko Whakatāne <a href="mailto:Monte.aranga@wananga.ac.nz">Monte.aranga@wananga.ac.nz</a>	Whakatāne District Council Private Bag 1002 Whakatāne 3158 <a href="mailto:shane.mcghie@whakatane.govt.nz">shane.mcghie@whakatane.govt.nz</a>
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