

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU**

Decision [2024] NZEnvC 028

IN THE MATTER OF

an appeal under s 120 of the
Resource Management Act 1991

BETWEEN

CLEAR THE AIR TRUST AND
TAURANGA FUMIGANT ACTION
GROUP

(ENV-2023-AKL-182)

Appellant

AND

BAY OF PLENTY REGIONAL
COUNCIL

Respondent

AND

GENERA LIMITED

Applicant

Court: Chief Environment Court Judge D A Kirkpatrick

Hearing: On the papers
Last case event: 6 March 2024

Date of Decision: 7 March 2024

Date of Issue: 7 March 2024

DECISION OF THE ENVIRONMENT COURT

A: The application for waiver is granted.

B: Whareroa Marae is joined as a s 274 party to this appeal.



REASONS

Background

[1] This proceeding is against a decision of the Council to grant resource consent to Genera Limited to discharge contaminants to air for the purpose of fumigation at the Port of Tauranga (discharge permit RM19-0663).

[2] Genera Limited's air discharge permit (62719), allowing the Methyl Bromide and Phosphine as part of its fumigation activities, expired on 30 April 2020.

[3] Resource consent application RM19-0663 was lodged on 30 October 2019 and sought to replace the now expired resource consent. The application sought authorisation for the discharge of the following contaminants to air associated with fumigation activities:

- (a) Methyl Bromide;
- (b) Phosphine; and
- (c) Ethanedinitrile.

[4] The Commissioners' decision granted consent to discharge the contaminants listed above to air from fumigation activities for a term of 10 years.

[5] The Appellants appealed the decision seeking that:

- (a) the resource consent for use of Methyl Bromide for the fumigation of log stacks under tarpaulins at the Port of Tauranga be declined in its entirety;
- (b) use of methyl bromide in containers by limited to a 5-year term.
- (c) the setback buffers, monitoring, reporting and review conditions

of Ethanedinitrile, Phosphine and Methyl Bromide should be more robust given the uncertainty of effects and severity of effects from any occurrences of exceedances.

The application for waiver

[6] On 23 February 2024 Whareroa Marae filed a notice to join the appeal as an interested party under s 274 of the RMA. As its notice was filed out of time it was accompanied by an application for waiver.

[7] Its grounds for seeking a waiver are:

Whareroa Marae made a submission to these proceedings as submitters with an interest greater than the public generally.

Whareroa Marae is an important and sensitive place of cultural and customary significance. The primary hapū for the marae are Ngāi Tukairangi and Ngāti Kuku of Ngāi Te Rangi. Iwi, and all of our customary lands, water, and taonga sit within the or in close proximity to the Port of Tauranga and the Mount Maunganui polluted airshed.

The Respondent's decision was received on or about mid October 2023. A copy of the appeal was apparently emailed to us in Mid November 2023 but it was not picked up due to an overwhelming number of political issues such as a change in Govt, RMA hearings and submissions all going on in the last few months of the year, we were not able to keep up with matters affecting our Marae and our people.

Given that this appeal has not yet gone to mediation and the cultural importance of this issue to us, it is considered that the time delay of filing the Section 274 notice will not prejudice the parties in this matter.

The responses to the application for waiver

[8] The parties to the proceeding were directed to advise the Court of their position in relation to Whareroa Marae's application for waiver by 11 March 2024.

[9] The Appellants, the Council, Genera Limited and KiwiRail Holdings Limited have all advised the Court that they consent to the waiver being granted.

[10] No party has advised the Court that they oppose the application.

Section 281 of the Act

[11] Under s 281(1)(a)(iia) of the RMA a person may apply to the Court for a waiver of the time within which a person must give notice under s 274 to join an appeal as an interested party.

281 Waivers and directions

(1) A person may apply to the Environment Court to—

(a) waive a requirement of this Act or another Act or a regulation about—

...

(iia) the time within which a person must give notice under section 274 that the person wishes to be a party to the proceedings; or

...

(2) The Environment Court shall not grant an application under this section unless it is satisfied that none of the parties to the proceedings will be unduly prejudiced.

(3) Without limiting subsection (2), the Environment Court shall not grant an application under this section to waive a requirement as to the time within which anything shall be lodged with the court (to which subsection (1)(a)(ii) applies) unless it is satisfied that—

(a) the appellant or applicant and the respondent consent to that waiver; or

(b) any of those parties who have not so consented will not be unduly prejudiced.

...

[12] There are two tests to be met by an applicant relying on s 281. The overarching test, derived from s 281(1), is whether the Court should exercise its discretion to grant the waiver or directions sought. What may be described as the threshold test relates to whether there is any undue prejudice to the

parties to the proceeding as set out under s 281(2) and (3).¹

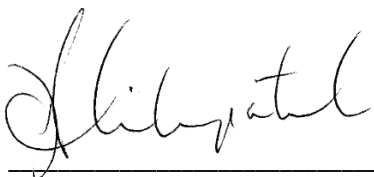
[13] Therefore, the consideration of applications under s 281 is a two-step process. First the Court is required to make a determination as to whether or not the parties to the proceeding will be unduly prejudiced if the waiver is granted. Secondly, if no party is unduly prejudiced, the Court must determine the waiver application on its merits.

Outcome

[14] In this matter the parties do not oppose the waiver. For this reason, I find that the first part of test is satisfied, with no party being unduly prejudiced by the granting of the waiver.

[15] Turning to the second part of the test, whether the waiver should be granted on its merits, I am satisfied that Whareroa Marae was out of time in filing its notice due to an administrative oversight and that it is appropriate for it be joined as a party to this proceeding because of the cultural importance of the issues involved.

[16] For these reasons I grant the application for waiver.



D A Kirkpatrick
Chief Environment Court Judge

1 *Shirtcliff v Banks Peninsula District Council* EnvC C17/99, 19 February 1999.

