BEFORE THE ENVIRONMENT COURT

Decision No [2016] NZEnvC 126

ENV-2015-WLG-000016

IN THE MATTER	of an appeal under s120 of the Resource Management Act 1991
BETWEEN	AVATAR GLEN LIMITED Appellant
AND	NEW PLYMOUTH DISTRICT COUNCIL Respondent
AND	KAREN ANDERSON, DEBORAH BLOOR & FRAYNE BLOOR, STEPHEN BROWN, OWEN CARTER, MARY CARTER, JENNIFER JOHNSTONE, BARNABY PERKINS, BRIAN WESTON & SANDRA WESTON Section 274 Parties

Court: Environment Judge C J Thompson
Environment Commissioner J A Hodges
Environment Commissioner C J Wilkinson

Counsel and parties:
S W A Grieve and I D Matheson for Avatar Glen Limited
L P Wallace for B W and S Weston – s274 parties
K Anderson, D and F Bloor, S B Brown, O & M Carter, J A Johnstone and B Perkins: - s274 parties
A G W Webb for the New Plymouth District Council

DECISION ON APPEAL

Decision issued: 08 JUL 2016

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Introduction

[1] In a decision issued on 5 May 2016 ([2016] NZEnvC 78), expressed to be an interim decision, we outlined our views about aspects of the appeal, and in particular asked the parties to discuss a possible resolution of the practical aspects of avoiding the so-called *reverse sensitivity* issues. This particularly affected the appellant and Mr and Mrs Weston, who were s274 parties to the appeal.

[2] That was attempted, but without result. Ms Wallace for Mr and Mrs Weston, and Mr Grieve for the appellant, lodged submissions outlining their clients' positions. For the Council, Mr Webb noted that it was willing to facilitate any further discussions that might lead to a sound resolution. Having considered the parties' positions after the discussions, we thought it appropriate to indicate that we did not, as the interim decision may have been understood, necessarily believe that only a negotiated resolution about notification of intended spraying events on the Weston orchard would suffice to ensure the safety of residents. Particularly after considering the required notification regime under existing documents, we were minded to think that that regime might suffice. So that it was clear that such a possibility was alive, in a Minute issued on 16 June, we invited further and final submissions from the parties. We now have those.

The required notification regime

[3] The existing notification regime arises from the following documents. First, the provisions of *NZS 8409:2004 – Management of Agrichemicals*

> 5.3 Safe Use of Agricultural Compounds and Plant Protection Products
>
> Section 5.3 sets out the elements of safe use for agricultural compounds and plant protection products including products for turf, amenity and home garden use, and all herbicides, insecticides and fungicides.
>
> **5.3.1** *Notification of use*
>
> Any person who is likely to be directly affected (Appendix M2.2) by the application of agrichemicals has a right to information about the operation. The owner or occupier of the property on which the spraying is to take place **shall** inform, at intervals of no more than once a year, any person who is likely to be directly affected by the application, that a spray plan (see Appendix M4) has been prepared and is available on request. More or less frequent information may be provided where mutually acceptable arrangements have been agreed to, and recorded on the spray plan.

Notification **shall** also be in accordance with any regulatory requirements of the local authority. (emphasis in original)

NOTE – This may include local authority requirements for air quality and discharges into air, and other regulatory requirements.

M4 Spray Plans/Protocols

The development of a spray plan or protocol will assist in addressing the potential off-target application of agrichemicals and identify the measures adopted to avoid or mitigate adverse effects associated with them.

NOTE – Local authorities may also have specific requirements for spray plans or protocols.

To satisfy the requirements of this Standard the plan must be available on request and include:

(a) A plan or map detailing the location of any sensitive areas including but not limited to houses, schools, and roads, especially those used by school children and crops sensitive to the chemical being used, (see also Appendix G4);

(b) The crops to be sprayed, the types of chemical (insecticide, herbicide, fungicide etc.) that are likely to be used during the year and the times of the year that spraying is likely to occur;

(c) Strategies employed to avoid contamination of sensitive areas (for example specific application techniques such as large droplet sizes, hand application, not spraying outside rows, turning machinery off when turning, having no-spray buffer zone areas, only spraying when the wind is in the specified direction, having personnel monitoring boundaries during the application, lists of people (and their contact phone number) who want to get a phone call just prior to any spraying, any other mutually agreed strategies to manage any risk);

NOTE – It is desirable to consult with potentially affected neighbours to establish mutually acceptable measures to avoid or manage effects of drift.

(d) The identity of the person likely to be carrying out agrichemical application and confirmation of their current qualifications;

NOTE - For example – GROWSAFE® certification.

(e) Particular weather conditions which may increase potential drift hazard;

(f) Indication of agrichemicals to be used that may present a specific hazard (eg bee toxicity).

Appendix M2.2 Application on private property

Any person who is likely to be directly affected by the application of agrichemicals has a right to information about the operation. The owner or occupier of the property on which the spraying is to take place **shall** inform, at intervals of no more than once a year, any person who is likely to be directly affected by the application, that a

spray plan (see M4) has been prepared and is available on request. More or less frequent information may be provided where mutually acceptable arrangements have been agreed to, and recorded on the spray plan. Notification **shall** also be in accordance with any regulatory requirements of the local authority. (emphasis in original)

[4] That last provision leads us to the references to notification of intended spraying contained in the local planning provisions. Rule 56 h) of the Regional Air Quality Plan for Taranaki is this:

> Landowner or occupier must give verbal or written notice to all occupied dwellinghouses, owners or occupiers of properties, sensitive crops and farming systems and places of public assembly located within 30 metres of the area to be sprayed (if spraying is by ground application) or within 100 metres of the area to be sprayed (if spraying is by aerial application). Notification is to take place **EITHER** as a general notice before the beginning of a particular spray session **OR** not less than 2 hours and not more than 4 weeks prior to spraying and is to state: (emphasis in original)
>
> - the areas to be sprayed
> - the dates and times of spraying or the factors that will determine when spraying occurs (to the fullest extent possible)
> - the agrichemical(s) to be used
> - the measures to be adopted by the discharger to prevent or minimise spray drift from the target area.
>
> If general notice is given before the beginning of a particular spray season, then such notice shall include an opportunity for those receiving the notice to request and be given further notice of individual applications prior to spraying being carried out. Notification is not required if owners or occupiers of the relevant occupied dwellinghouse, properties or places of public assembly agree in writing that notification is not required or if agrichemicals are applied with hand operated and manually pressurised and pumped spray equipment. (emphasis added)

[5] To summarise, between them the New Zealand Standard (of itself) and the Regional Air Quality Plan (both of itself, and through the NZS requirement to comply with it) require a user of agricultural compounds and plant production products to:

(1) Inform, at least once a year, any person who is likely to be directly affected, that a spray plan has been prepared and is available on request.

(2) If the regulatory requirements of the Local Authority impose further requirements on the notification obligation, they must be complied with.

(3) The spray plan must include:

(a) A plan or map detailing the location of areas likely to be affected.

(b) The crops to be sprayed and the type of chemical likely to be used and the times of year that spraying is likely to occur.

(c) Any strategies employed to avoid contamination of sensitive areas, one example of which is:

Lists of people (and their contact phone number) who want to get a phone call just prior to any spraying ... .

(d) The Regional Air Quality Plan specifically requires the land owner or occupier to give verbal or written notice to owners and occupiers of properties located within 30 metres of the area to be sprayed. This notification is to take place either as a general notice before the beginning of a particular spray session or not less than two hours and not more than four weeks prior to spraying and is to state areas to be sprayed, dates and times of spraying, and factors which will determine when spraying occurs; the chemical to be used and the measures to be adopted to prevent or minimise spray drift. The rule specifically requires that if general notice is given before the beginning of a particular spray season then the ... *notice shall include an opportunity for those receiving the notice to request and be given further notice of individual applications prior to spraying being carried out.*

[6] It is therefore the case that the New Zealand Standard specifically mentions, as part of a spray plan strategy, that people who so wish could be advised by telephone ... *just prior to any spraying.* The Air Quality Plan expressly requires a user of agricultural compounds and plant production products who has given a general pre-season notice, to notify a neighbouring owner or occupier, as and when that occupier requires, of the intended individual spraying applications.

[7] Against that review of what the law already requires of an intending user of agricultural compounds, it will follow that we cannot agree with Ms Wallace's submission that Mr and Mrs Weston are being asked to make ... *a major concession* ... over and above what is already required of them.

[8] Rather, we are inclined to accept the thrust of Mr Grieve's submission for Avatar that:

5. With the reference to paras [105] and [106] of the [interim] Decision the appellant's respectful view is that 24 hours' notice is not required. As outlined below, a perfectly acceptable safety regime can be put in place by the appellant on the basis of existing legal obligations. If the Weston's do not want to take up the opportunity given by the Court to agree on same "augmented arrangements" (para [110]), then that is a matter for them, but it does not mean they can frustrate the outcome of the appeal. It simply means that the other alternative referred to by the Court in para [110] will determine the way forward ie the conditions and other Court requirements relating to safety will need to be imposed on the basis of the existing legal requirements. These existing requirements are comprehensive and more than adequate to meet the Court's concerns regarding safety.

6. The minimum period of not less than 2 hours' notice referred to in the Decision, para [106] would be more than ample time for the appellant to arrange for residents to be kept indoors for the duration of spraying. ...

Conclusions

[9] The managers of the home will know when spraying concludes, and will be well able to keep residents indoors for any period required, or considered wise. Similarly, they will be able to advise staff and visitors of the need to take precautions about being outside the buildings during, or soon after, the spraying operations.

[10] That being the case, we cannot see that *reverse sensitivity* considerations dictate a refusal of resource consent for the establishment and operation of the proposed home. The appellant knows exactly what the spray activities are, and exactly what it may expect of Mr and Mrs Weston by way of the notice they will be required to give of the spraying generally, and on specific occasions, and what they will need to do in response to that notice, to keep residents, staff and visitors safe during and after each spray event.

[11] Equally, Mr and Mrs Weston know what the existing law requires of them, and will not be further burdened by the requirements of giving notice to the care facility.

[12] As we noted at paragraph [127] of the interim decision issued on 5 May 2016 ([2016] NZEnvC 78) there were some issues about the details concerning a source of potable water; and of the proffered no complaints covenants, and of interim arrangements pending completion of all of the proposed pods. We understand from

counsel's memoranda that those are all matters that can readily be addressed when the substantive decision is made.

[13] That being the case, we see no good reason to withhold consent. For the reasons set out, both in this decision and in the interim decision, the appeal is allowed. We look forward to receiving a draft set of conditions for approval by 25 July 2016.

Costs

[14] Costs are reserved. Any application is to be lodged within 15 working days of the approval of conditions, and any response lodged within a further 10 working days.

Dated at Wellington this 8th day of July 2016

For the Court

C J Thompson
Environment Judge