Water wash up

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Introduction

After a year which has been described as "the year it didn't stop raining"[1], water remains a hot topic this spring. The general election is now over with a change of government for the first time in nine years. The new Labour and New Zealand First coalition government is likely to bring a number of changes – including to the water sector.

The recently released Labour and New Zealand First Coalition agreement has signalled a number of priorities for the water sector. These include a commitment to higher water quality standards for urban and rural areas and a requirement for water bottling operations to pay royalties. A general water usage tax is however off the table – at least for the next three years. The Labour and Greens' confidence and supply agreement likewise prioritises water quality but also mentions funding for freshwater enhancement and winding down government support for irrigation.

Outside of those big-ticket items exactly what changes will be wrought and the impacts on water policy rules and regulations will only become clear once the new government has its feet firmly under the table.

In this article, we therefore take a slightly more retrospective view in focusing on matters that have already occurred or are in train. We commence with a brief overview of the changes to consenting provisions under the Resource Management Act 1991 (RMA) that recently came into force. We then move on to outline the Ngarururo Water Conservation Order application and its current status. We conclude with commentary on two recent cases which are of interest as they discuss sentencing principles for undertaking works in water bodies without consent, and the need for clear wording in district plan rules to exclude activities from notification.

Finally, as this is our last article for the year, we would like to take the opportunity to thank you for reading our articles this year and to wish you all a safe, happy and relaxing festive season and a happy and prosperous New Year.

Recent changes to RMA consenting provisions

On 18 October 2017 a raft of changes to the consenting provisions in the RMA came into force. The changes were enacted as part of Resource Legislation Amendment Act (which was passed in April this year) but their implementation was delayed to allow time for councils (and others) to make necessary changes to forms and processes and to enable guidance materials to be produced. The Ministry for the Environment has now produced a number of guidance materials and fact sheets detailing the effect of the various changes.[2]

Some of the key changes to the consenting provisions include:

- exemptions from consent being required for "boundary activities" (such as minor setback breaches), and certain marginal or temporary rule breaches;
- new fast track (10 day consent) processes for non-notified controlled activity consents and other activities specified in regulations;
- a new step by step process to determine whether to notify consent applications;
- confirmation that certain consent applications cannot be notified – those prescribed by regulations and most controlled activities;
- a requirement for decision makers to expressly consider positive effects and measures proposed to offset or compensate for any adverse effects;
- the ability for regulations to be made to require councils to fix charges for certain consent decisions, commissioners and hearings;
- the ability for an applicant to require that its objection be heard by an independent commissioner for certain consent applications; and
- limited appeal rights in relation to residential and boundary activities.

While the intention of these changes is to reduce red tape and speed up consenting for certain (mostly residential type) activities, such changes may also indirectly impact other consent activities. This is because councils only have limited resources to process consents. So while it may result in more specialist staff and fit for purpose processes being developed, it may also (particularly where resources are stretched) result in priority being given to the fast track activities, over non-fast track or more complex activities. Only time will tell what impact the flow on effects of the changes will have for other non-fast track activities.

Water Conservation Order

Ngarururo River Water Conservation Order Application to be heard before Special Tribunal

A Special Tribunal has been appointed by the Environmental Protection Authority to hear a Water Conservation Order (WCO) application in respect of:

1. the entire length of the Ngarururo River;
2. the tributaries and hydraulically connected groundwater to the Lower Ngarururo River; and
3. the seven-kilometre-long Clive River.

The WCO is sought by the New Zealand Fish and Game Council, the Hawke's Bay Fish and Game Council, Ngati Hori ki Kohupatiki, Whitewater New Zealand, Jet Boating New Zealand, and the Royal Forest and Bird Protection Society of New Zealand. Their application states that the rivers have certain outstanding values including:

1. significance in accordance with tikanga Maori;
2. cultural and spiritual purposes;
3. habitat for rainbow trout;
4. angling, amenity and recreation;
5. habitat for avifauna;
6. habitat for native fish;
7. boating amenity and recreation;
8. wild, scenic and natural characteristics; and
9. scientific and ecological values.

The applicants seek protection of these values through a number of prohibitions and restrictions. These include rules to maintain flow rates in the waterbody by limiting abstraction and precluding the grant of resource consents for discharges of contaminants that would cause water quality criteria to be breached.

The WCO application has proven controversial as it is being heard while the TANK (Tutaekuri, Ahuriri, Ngarururo and Karamu catchments) process is proceeding. TANK is a collaborative stakeholder group which was established in 2012 to recommend water quantity and quality limits for the Greater Heretaunga and Ahuriri catchment, in order to give effect to the National Policy Statement for Freshwater Management. The group is made

1 *http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11925217*
2 *http://www.mfe.govt.nz/publications/rma/resource-legislation-amendments-2017-fact-sheet-series#fseight*

up of approximately 30 representatives from agricultural, horticultural, and public health sectors; environmental and community interest groups; regional and district councils, and tangata whenua. Some water users see the WCO application as cutting across the collaborative TANK process.[3]

The WCO application has also been controversial as it includes "hydraulically connected groundwater". When the application was lodged in December 2015 the extent of the hydraulically connected groundwater was not known. The science developed through the TANK process has indicated that the extent of the groundwater hydraulically connected to the lower river groundwater is greater than first thought and also affects the lower river. This means that the WCO application is likely to affect more users and industries than first thought. There is therefore potential for the application to be re-notified as it applies to the lower river.

The Special Tribunal has issued directions for a hearing to commence with respect to the upper river in December 2017. This split hearing is intended to enable TANK science to catch up with the WCO process so that the Tribunal has a verified authoritative hydrological model of the river.

Recent cases

In this section we profile a case on prosecutions for unlawful works in relation to a wetland which is a timely reminder of the need to ensure consents are obtained, prior to undertaking works, and of the sentencing principles that apply if a prosecution is brought. We also summarise a notification case that is of interest as the court makes findings on the wording of plan rules which purport to exclude notification of certain activities.

Marlborough District Council v Gill Construction Company Limited and Anthony Charles Gill [2017] NZDC 20237

The defendant, Gill, diverted a water course that fed a high value wetland on its property in order to develop a vineyard. The work was undertaken prior to securing consent. A report undertaken for the Council showed that if remediation was not undertaken the works would have very significant long-term adverse effects on the wetland.

The defendant undertook some restorative work immediately and obtained a resource consent to carry out additional site works including remediation and enhancement of the wetland.

Council prosecuted Gill for undertaking the work without consent and Gill pleaded guilty to the charges. The issues in this case were therefore around the application of the relevant sentencing principles. The court confirmed that the principles to consider in sentencing were:

- the nature of the environment affected and the environmental damage inflicted;
- the degree of culpability or deliberateness in the offending;
- the gravity or seriousness of the offences committed;
- the size and nature of the defendant's operations, financial position and other circumstances;
- deterrence both personal and general; and
- the defendant's attitude.

In considering these principles the court found that Gill made a deliberate choice to undertake unlawful work and deal with the consequences later. Gill was a well-established local contractor that deliberately flouted its legal responsibilities for commercial gain and in doing so compromised the capacity of the Council to fulfil its statutory functions (under s 6(a) of the RMA) to preserve the natural character of the wetland. Gill set a bad example by its actions and it was important to show others that crime does not pay. The court determined a fine and an enforcement order to be an appropriate penalty.

In terms of quantum the court considered fines imposed in other cases, but noted that it was always difficult to find a case that is on all fours with another. The court decided on $50,000 as a starting point, and then reduced that amount by 25 percent for an early guilty plea, 20 percent for extraordinary remorse, five percent for the defendant's clean record, and a further small reduction to produce a final figure of $25,000 (or half the starting point). The Council sought a reparations order to cover the cost of the report it had commissioned on the wetland. However, the court refused this on the basis of the extent that the defendant had and would be going to restore and enhance the wetland.

Sydney St Substation Limited v Wellington City Council [2017] NZHC 2849

To notify, or not to notify, that was the question at issue in this case. Equinox Capital Limited (ECL) applied to Wellington City Council for consent to construct a 10 storey (39.5 metres tall) building to be used for residential and hotel purposes. The site was directly next to the Sydney St Substation – a two storey heritage building that had recently been restored.

Prior to the consent being granted the owners of the substation expressed concerns to Council and indicated that they considered the proposal would have significant adverse effects on their building.

The Council considered the proposal and concluded that the effects were minor and no-one would be affected – including the owners of the substation. The Council recognised the owners' interest but indicated that such an interest did not amount to an adverse effect and was not a special circumstance requiring notification. Also as the proposal was a restricted discretionary consent the Council considered it was precluded from notifying the consent due to rules in the District Plan which stated that such applications "do not need to be publicly notified" and "do not need to be served on affected persons". The Council therefore granted the consent non-notified. This decision was judicially reviewed.

The High Court disagreed with the Council and found that the wording of the District Plan rules did not preclude notification:

> "[86] In any event, on a straightforward and literal approach the idea that something 'need not' or 'does not need to' be done is not the same as 'precluding' the doing of that thing. Something that is precluded is prohibited. Not being required to do something is not the same as being prohibited from doing it.
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> "[87] The view I have formed based on the plain meaning of the word 'precludes' is fortified by the fact that the effect of any preclusion in the rules would be to limit (and in fact obliterate) natural justice rights otherwise conferred by the statute (albeit contingent ones). While I accept that that is what the new ss 95A and 95B contemplate (a matter which is, in itself, somewhat objectionable), I consider that the relevant wording would need to be much stronger and more unequivocal in order for it to have that (preclusionary) effect."

This is an important finding as councils commonly word their non-notification rules in this manner. That practice will now need to change if notification is to be precluded for certain activities.

The court also queried the wisdom of the relatively widespread practice of issuing notification decisions which depend on the substantive decision:

> "[66] ... Because the reasoning in relation to the notification decision is dependent on the reasoning in relation to the substantive (s 104) decision (and I must confess I have some doubts as to the wisdom of this conflationary practice) it is necessary to consider the substantive decision first."

The High Court set aside the both Council's notification and substantive decision and granted costs to the owners of the heritage building. **WNZ**

3. http://www2.nzherald.co.nz/the-country/news/article.cfm?c_id=16&objectid=11917567