



AHM News

UNDERS AND OVERS: MANAGING WATER QUALITY IN NEW ZEALAND

INTRODUCTION

Freshwater management is an issue that has been hotly debated in New Zealand over the past few years. While great strides have been made, most notably the introduction of an updated National Policy Statement for Freshwater Management in 2014 (“NPSFM”), not all of the potential fishhooks have been ironed out.

One such issue which has been occupying the Environment Court and Parliamentary Commissioner for the Environment (“PCE”) of late is to what extent the NPSFM permits an “overs and unders” approach to freshwater management. In particular, can a regional council permit a particular waterbody to degrade provided that degradation is matched by an improvement in another waterbody within the region?

Recent decisions of the Environment Court indicate that the answer to this question is no, essentially on the basis that such an approach does not align with regional council obligations under the Resource Management Act 1991 (“RMA”). The PCE also considers that the answer to this should be ‘no’ for policy reasons, and she therefore recommends that the NPSFM be amended to delete the word “overall”.

In this article we set out a brief background to this issue and then provide summaries of the recent Environment Court cases and PCE report which comment on this issue. We also note a change to the Ministry for the Environment (“MfE”) Implementation Guidelines for the NPSFM which signal the changing legal landscape in relation to this issue.

BACKGROUND

The genesis of this issue arises from the use of the word ‘overall’ in Objective A2 of the NPSFM which reads:

“The overall quality of fresh water within a region is maintained or improved while:

- a) protecting the significant values of outstanding freshwater bodies;*
- b) protecting the significant values of wetlands; and*
- c) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated.”*

[Emphasis added]

Exactly what “overall” means in this context, and whether it can permit degradation, is the nub of the issue.

ENVIRONMENT COURT CASES

There have been three Environment Court cases to date which have specifically considered this issue. These are:

[*Puke Coal Ltd v Waikato Regional Council* \[2014\] NZEnvC 223;](#)

[*Nqāti Kahungunu Iwi Inc v Hawke’s Bay Regional Council* \[2015\] NZEnvC 50;](#) and

[*Sustainable Matatā v Bay of Plenty Regional Council* \[2015\] NZEnvC 90.](#)



PUKE COAL LTD v WAIKATO REGIONAL COUNCIL

In *Puke Coal*, the degradation issue arose in the context of an appeal by a neighbour's group to the grant of consents to Puke Coal to construct and operate a new landfill on its site. The appeal particularly opposed the proposed use of an unnamed tributary, which ultimately ran into the Waikato River, to treat the stormwater running off the new landfill. The tributary was already showing signs of degradation, and the concern was that the added effects from the stormwater or groundwater leachate from the landfill would add to that degradation. While the Court ultimately found that further degradation was likely to be minimal (paras [59] and [60]), it did consider the issue of whether (any) further degradation was permissible.



Here, because the waterbody was within the Waikato catchment, the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (“**the Waikato-Tainui Act**”) took precedence over National Policy Statements including the NPSFM.

The Court found that, looking at the Waikato-Tainui Act and the Regional and District Plans as a whole, the intention of the legislation had to be the improvement of the catchment over several decades to a condition *where it is safe for swimming and food gathering over its entire length* (para [87]).

However, the Environment Court was convinced by matters of ‘workable practicality’ and proportionality in reaching this goal, principles which it considered to be implicit in the decision of the Supreme Court in *King Salmon* (para [92]). The Court therefore ultimately held that the Waikato-Tainui Act, and the Vision and Strategy, did not require total avoidance of any degradation, but rather required that “wherever possible” each application shows real benefit to the river in proportion to the impact of the proposal (para [139]). Applications affecting the river catchment were acceptable so long as they demonstrated ways in which they could protect and restore the river in proportion to the activity to be undertaken; any historical adverse effects; and the state of degradation of the environment (para [134]).

NGĀTI KAHUNGUNU IWI INC v HAWKE’S BAY REGIONAL COUNCIL

The issue in this case arose as a result of an appeal by Ngāti Kahungunu to the Council’s Proposed Change 5 to the Hawke’s Bay Regional Resource Management Plan – Land Use and Freshwater Management (“**PC5**”).

PC5 sought to set (what on one view could be seen as) a pragmatic and practical objective based on water quality thought to be achievable, in light of the previous land uses and time lag of contaminants passing through the groundwater system – “the load to come”. In particular, the Council noted that in the 14 years between the operative plan being notified and PC5, there had been increases of nitrate-nitrogen at 18% of monitoring sites in the region.

The Council was concerned that enforcing ‘no degradation’ “would mean a prohibition on all farms, all horticulture, and taken to an extreme level, even native bush because it too leaches nitrogen into the soil and that nitrogen inevitably reaches groundwater” (Decision, para [24]). The Council therefore sought through PC5 to delete Objective 21 and amend Objective 22 of its operative Regional Policy Statement as follows:

~~Objective 21: No degradation of existing groundwater quality in the Heretaunga Plains and Ruataniwha Plains aquifers systems.~~

~~Objective 22: The maintenance or enhancement of groundwater quality in aquifers in order that it~~The groundwater quality in the Heretaunga Plains and Ruataniwha Plains aquifer systems and in unconfined or semi-confined productive aquifers is suitable for human consumption and irrigation without treatment, or after treatment where this is necessary because of the natural water quality.

Ngāti Kahungunu’s primary water quality argument was that as PC5 “allowed for degradation”, it would create internal inconsistency as it did not amend Policy 17 of the Regional Resource Management Plan, a policy which “requires maintenance” of existing quality in aquifers.

Ngāti Kahungunu also raised an argument in relation to the term ‘productive aquifers’, and ran a successful line of argument in relation to the implementation of section 6(e) - the relationship of the iwi to natural resources. The Court concluded that s6(e) required “nothing less” than the absolute prevention of further degradation, and improvement over time (para [102]).

In rejecting PC5, the Court considered that “the overall thesis of Change 5 is the acceptance of a lower water quality than that which can be measured today. It is working down rather than up” (para [65]). While the Court acknowledged the Council’s argument in terms of balancing quality between water bodies, it considered that practical difficulties in implementing an overs and unders approach meant that it could not have been the intention of the NPSFM (para [61]).

The Court also considered that using “suitable for human consumption” as a water quality standard “carries with it a risk that there is acceptance of a general degradation of the water quality potentially below what the load to come might bring” particularly due to the generally high quality of the Heretaunga Aquifer (para [41]).

The Court concluded that the Council’s “approach to the interpretation of overall quality [was] fundamentally flawed, and that drafting and/or interpreting the Change 5 objectives in [the way submitted by Council] could result in a more degraded and unacceptable water outcome” (para [65]). The Council had “fail[ed] to even aspire, let alone improve, the quality of the water” in the aquifers (para [104]). This was held to abdicate the functions of a regional council, in particular the s30(1)(c)(iii) function to control “the use of land for the purpose of...the maintenance and enhancement of the quality of water in water bodies”. It was also found to breach the prohibition in s69 of the RMA on including standards in plans which may result in a reduction of water quality, as well as Objective A2 of the NPSFM which (on the Court’s interpretation) requires no degradation of water quality. The Environment Court therefore declined to allow PC5, and ordered the retention of operative Objectives 21 and 22.



SUSTAINABLE MATATĀ v BAY OF PLENTY REGIONAL COUNCIL

This was an appeal against a decision of the Bay of Plenty Regional Council to grant consents and designations to the Whakatāne District Council for a wastewater treatment plant near Matatā, and a related land application field.

In regards to water issues, the Applicant and Respondent case was that the Old Rangitaiki Channel, the stream into which the discharge was proposed, “is so ecologically compromised that the further addition of nutrients to certain limits will not make the ecological situation significantly worse”.

The Court however considered that this position did not align with the NPSFM, particularly when considered in concert with NPSFM Policy A4(1) (which requires Regional Councils to avoid adverse effects from contamination in the interim period before the limit setting process is undertaken) and, as in *Ngāti Kahungunu*, the functions of a Regional Council as set out in s30 of the RMA to support the interpretation of Objective A2.

Ultimately, the Environment Court held that the word ‘overall’ in Objective A2 of the NPSFM must be interpreted in light of section 5 of the RMA, and further that “[i]t would be contrary to the Act for the National Freshwater Policy to mean that individual catchments could fail to meet [RMA s5(2)] (a), (b), or (c).” The Environment Court concluded:

“Once we consider the primary objective to safeguard the life supporting capacity and sheet this home to Part 2 and the Regional Council’s functions, we conclude that maintenance at least must be assumed. Adding to an existing background level albeit degraded, will not achieve maintenance.”

MFE GUIDANCE

To assist regional councils to implement the NPSFM, MfE developed a (non-statutory) Implementation Guide for the NPSFM. The draft version of this Guide, published prior to the *Ngāti Kahungunu* and *Sustainable Matatā* cases, stated:

“Objective A2 allows for some variability in water quality as long as the overall water quality is maintained in a region. ...If a freshwater objective is set that allows for degradation from the current state, it must be offset by objectives to achieve a commensurate improvement within the region.”

In the final version of the Guide, which was published last year, the commentary on Objective A2 had been amended to read as follows:

*“Objective A2 allows for some variability in water quality as long as the overall water quality is maintained or improved. **Due to recent case law any council considering setting a freshwater objective below current water quality levels should seek independent legal advice. The Ministry for the Environment intends to update this guidance as needed, and provide additional guidance on the requirement to maintain or improve overall quality of freshwater.**”*

CONCLUDING COMMENTS

Aside from the flexibility provided within attribute bands, the latest case law is clear that the NPSFM as currently worded does not permit an ‘overs and unders’ approach to water quality; and according to the PCE nor should it. The difficulty of such a position is that it essentially ignores or discounts the practical issues such as the effects of the load to come and the effects on the economic and social wellbeing of water users.

While no one would dispute the importance or desirability of the end goal – improved water quality – in our view, the most appropriate method of achieving that goal must factor in the practical, economic and social impacts of the chosen method as well as timing. We consider that providing a longer and perhaps stepped lead in time to a no degradation approach would better align with the practical considerations such as the load to come, as well as ensure that water users are given the time they need to change systems and procedures to ensure their continued operation and viability.

QUESTIONS, COMMENTS AND FURTHER INFORMATION

If you would like to discuss the NPSFM and how it may affect your activities, please contact Helen, Vicki or Phoebe:

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