AHM News

INTRODUCTION

Welcome to the interesting times of global quarantines, we hope you're all coping well during this disruption. The Courts have been declared an essential service and have continued to operate throughout the lockdown under new measures such as remote telephone conference hearings.

Recently there has been progress on the Resource Management Amendment Bill, with a report back from the Select Committee recommending it be passed. We've also seen the Courts retain their ability to act quickly despite COVID-19 restrictions in the *BW Offshore v Environmental Protection Agency* proceedings around oil field abatement notices. *Oceana Gold* has also received a decision on their appeal of biodiversity offsetting provisions under the Proposed Otago Regional Policy Statement. Finally, in a new first a Water Conservation Order has been recommended in respect to aquifers. This includes orders over Te Waikoropupū Springs despite existing protections already in place.

RESOURCE MANAGEMENT AMENDMENT BILL

The Select Committee released its report on the Resource Management Amendment Bill (**Bill**) on 30 March this year, recommending by a majority that the Bill be passed, with some amendments. The Bill will make two notable changes to the existing resource management system: giving new enforcement powers to the Environmental Protection Authority (**EPA**) and introducing a new planning process for freshwater management.

The Bill will enable the EPA to initiate its own Resource Management Act 1991 (**RMA**) investigations, assist councils with their RMA investigations, and to intervene in RMA cases to become the lead agency of an investigation and subsequent enforcement actions. The Bill will also introduce a fast tracked freshwater management process, similar to the process that was undertaken for the Auckland Unitary Plan. The Bill will establish the position of a Chief Freshwater Commissioner who will convene the freshwater hearing panels. It is intended that the new freshwater management system will assist regional and unitary councils to meet the 2025 deadline for implementing the requirements of draft 2019 National Policy Statement for Freshwater Management.

The Select Committee also recommended that the Bill include amendments to the RMA to enable local decision makers to consider climate change mitigation under the RMA.

The Select Committee noted that the National Party does not support the Bill. The National Party raised concerns that the Bill will add further cost, uncertainty and delay to RMA processes. The next step for the Bill is for it be put before Parliament for its second reading.

ENVIRONMENTAL PROTECTION AGENCY v BW OFFSHORE SINGAPORE PTE LTD [2020] NZHC 704

The High Court has made a ruling on six abatement notices served on BW Offshore (**BWO**) and Tamarind Taranaki Limited (**TTL**) by the EPA. The related proceedings were dealt with as matters of urgency, seeing the abatement notices come from the EPA, through the Environment Court and to the High Court in just a matter of weeks.

The High Court began its decision with a summary of events leading to the proceeding. BWO had sought two rulings from the EPA to allow the removal of its ship when oil production in the Tui oil field halted after TTL became insolvent in November 2019.

The EPA allowed the disconnection of mooring lines and retrieval of anchors but this could not be done without the EPA allowing disconnection of the equipment on the seafloor which was still being decided when BWO advised the EPA that removal of the ship was a matter of urgency and steps had already been taken to disconnect. BWO had begun this process on reliance of a 2017 ruling the EPA had granted TTL allowing disconnection as adverse effects would be minor or less than minor.

Abatement notices: issued and stayed

On 17 March 2020 the EPA served six abatement notices in total on BWO, a BWO staff member and TTL. The abatement notices prohibited BWO and TTL from disconnecting equipment from the ship and laying it on the seafloor; or making any alterations to the equipment related to the installation.

BWO applied for a stay of the abatement notices so that the ship could be removed to the Environment Court who granted the application in decision [2020] NZEnvC 033 on the 25 March 2020.

High Court Appeal

The EPA immediately appealed this decision and filed their own application to stay the Environment Court's decision. This was dealt with as a matter of urgency by the High Court and, under Level 4 COVID-19 measures, a remote hearing by telephone conference was held and a decision issued on 7 April.

The EPA's central argument was that BWO's reliance on the 2017 ruling was not appropriate due the circumstances surrounding that ruling that no longer applied. This included TTL no longer being able to continue operations, the fact that the ruling was for temporary removal until a replacement ship was connected, and consideration of an oil spill TTL advised the EPA of in November 2019. Subsequently, the High Court held that the Environment Court erred in failing to identify that it was permissible as a matter of principle for the EPA to issue an abatement notice notwithstanding the 2017 ruling if there had been a material change in circumstances.

Other errors in the Environment Court decision included consideration of what could reasonably be expected of BWO in decommissioning the oil field operations and the risk assessment of disconnection risks versus potential risks from keeping the ship in place.

The High Court found that the scheme and purpose of the Act must prevail. This led to the conclusion that the EPA abatement notices were appropriate, given that they only halted activity in the oil field pending a more comprehensive reassessment. The High Court granted the EPA's appeal, upholding the abatement notices.

OCEANA GOLD (NEW ZEALAND) LTD v OTAGO REGIONAL COUNCIL [2020] NZHC 436

This appeal related to Environment Court findings regarding the Proposed Otago Regional Policy Statement (**PORPS**) where the Court confirmed policies regarding offsetting for indigenous biodiversity, and compensation for biological diversity.

Oceana Gold appealed on seven grounds, succeeding in only the first. That ground was regarding the wording of Policy 5.4.6(c) which required a decision maker to consider offsetting when there is no loss of individuals of "rare or vulnerable species" as defined in reports published prior to 14 January 2019 under the New Zealand Threat Classification System. Oceana Gold argued, and Council agreed, that there was an error here as there is no definition of rare and vulnerable species in the reports. Accordingly, this ground succeeded, and the policy is to be reworded.

The second ground concerned the relationship between offsetting in the PORPS and offsetting under section 104(1)(ab) of the RMA. However, because this provision was not enacted until after the PORPS was notified, it was not possible to establish an error of law here and the ground was withdrawn.

The third ground was breach of natural justice, on the basis that the Environment Court had relied on research papers in its decision which Oceana Gold was not able to respond to in submissions. Ultimately, the Court found that there was no breach as the use of such papers was normal in the ordinary course of things and Oceana Gold could have requested leave to file submissions at the time.

Interestingly, the Court, departed from a previous High Court decision which regarded offsetting as a part of mitigation, and instead found that offsetting is a possible response *following* minimisation or mitigation– rather than as a part of it - at the point of impact.

The fourth appeal ground centred on the Environment Court coming to a conclusion that it could not have come to on the evidence. This was the inclusion of the word "individuals" in Policy 5.4.6(c) which provided for the consideration of offsetting where "*the offset ensures there is no loss of individuals of rare or vulnerable species*". The High Court found that, based on the evidence provided by the parties *as* well *as* the Environment Court's own expertise and experience, there was sufficient evidence to arrive at such a conclusion.

The fifth ground also alleged arriving at a conclusion the court could not have reasonably come to regarding the *Coronation North* mine example. The mine was introduced by Oceana Gold as an example against which policies in the PORPS can be tested against. The Court here declined this ground for various reasons including that the Environment Court was not bound to follow previous consent decisions.

The sixth appeal ground put forward related to an assessment of alternatives and alleged that the Environment Court had not appropriately assessed the range of options presented to it. The High Court found that Environment Court had appropriately eliminated a model proposed and considered the remaining two.

The final general appeal ground was admitted by Oceana Gold to act as a "catch-all" and it was acknowledged that one of the other appeal grounds would have to succeed to successfully appeal the decision.

The appeal was allowed to the extent that Policy 5.4.6(c) be reworded in accordance with the first appeal ground. The appeal was otherwise dismissed.

WATER CONSERVATION ORDER – TE WAIKOROPUPŪ SPRINGS AND ASSOCIATED WATER BODIES

In a unique decision, the Special Tribunal recommended a Water Conservation Order (**WCO**) over:

- the Te Waikoropupū Spring;
- the Confined and Unconfined Arthur Marble Aquifer;
- the Takaka River from its headwaters to the point that it crosses the artesian boundary including its surface water tributaries; and
- the groundwater hydraulically connected to the Takaka River including groundwater hydraulically connected to the Takaka River's surface waters.

This recommendation was unique because it was the first proposed order to be made with respect to aquifers in New Zealand. The hearing was held over 12 days in April, May and June 2018 and was formally closed on 28 August 2018. The Special Tribunal's Recommendation Report (**Recommendation Report**) was published on 17 March 2020.

Te Waikoropupū Springs are the largest freshwater springs in the southern hemisphere and are a registered Tapu, a taonga tuku iho and are listed as a Water of National Importance for biodiversity. The Recommendation Report recognised the importance and protection that the Springs already had over it, but also due to these protections and its exceptional cultural significance and ecological values, the WCO should also be granted.

Due to the effect of COVID19, the period for making submissions to the Environment Court has been extended to 1 May 2020.

Questions, comments and further information

If you have any questions, comments or would like any further information on any of the matters in this newsletter, please contact the authors:

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