

Legal update - Environment Court decision casts doubt on an "overs and unders" approach under the National Policy Statement for Freshwater Management

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In our [July 2014 environmental alert](#) we noted that the National Policy Statement for Freshwater Management (NPSFM) had been updated. The 2014 update introduced a national objectives framework to help regional councils set freshwater objectives in their regional plans (and, by extension, regional policy statements), and set "*national bottom lines*" for ecosystem health and human health for recreation.

A recent decision of the Environment Court, *Ngāti Kahungunu Iwi Inc v Hawke's Bay Regional Council* [2015] NZEnvC 50 analyses regional councils' obligations under the Resource Management Act 1991 (RMA) to maintain and enhance the quality of freshwater bodies, in light of the NPSFM. In particular, the case considers the key issue of whether Objective A2 (and related provisions) of the NPSFM, requiring that the "*overall quality of fresh water within a region*" be "*maintained or improved*", allows planning instruments to contemplate degradation of a particular water course provided that quality overall is maintained or enhanced across the region.

In short, the Court's view in this case was that this type of "*overs and unders*" approach is not permissible.

Ngāti Kahungunu Iwi Inc v Hawke's Bay Regional Council

The case involved a proposed change to the Hawke's Bay Regional Resource Management Plan – Land Use and Freshwater Management (the Plan), intended by the Hawke's Bay Regional Council (the Council) to be a partial step towards implementing the NPSFM. The Plan is a combined regional policy statement and regional plan, with the proposed change in this case being primarily concerned with the regional policy statement component.

As originally notified, the proposed change introduced objectives that there be "*no degradation of existing groundwater quality in the Heretaunga Plains and Ruataniwha Plains aquifer systems*" (Objective 21) and that fresh water be "*managed in an integrated and sustainable manner which includes ... the maintenance or enhancement of groundwater quality ...*".

The decision's version of the change deleted Objective 21 and amended Objective 22 to remove the requirement for "*maintenance or enhancement of groundwater quality*", and instead introduced a requirement to maintain the overall quality of fresh water within the Hawke's Bay region, echoing the wording of Objective A2 of the NPSFM.

Ngāti Kahungunu opposed those amendments and argued that the provisions should largely remain in the form as originally notified.

In the appeal, the Council argued that the as-notified objectives requiring "*no degradation of existing groundwater quality*" and to "*maintain or improve*" the current groundwater quality would be impossible to achieve, in part due to the time lag between cause and effect in aquifers – that is, a contaminant may not have an effect on the groundwater it has entered for years or even decades, depending on the permeability of the land. This concept is referred to in the decision as the "*load to come*".

Ngāti Kahungunu argued in response that those objectives were workable and would properly provide for "*the relationship of Māori and their culture and traditions with ... water*", as required by section 6(e) of the RMA.

The Court noted difficulties in assessing the "*load to come*" and in any event noted that objectives of regional policy statements are just that – goals or aims to be aspired to rather than rules with binding legal effect. The Court considered that the possibility that an objective may be unfulfilled does not excuse a failure to try to achieve the objective.

Of particular note, however, is the Court's rejection of the Council's argument that Objective A2 of the NPSFM allows for (and indeed mandates) an overs and unders approach where "*deterioration of the quality of water in one area or waterbody could be tolerated, so long as there is a matching (at least) improvement in quality somewhere else.*"

The Court considered such an approach to be inconsistent with the "*unqualified function imposed on regional councils*" by section

30(1)(c)(ii) of the RMA, namely the *"maintenance and enhancement of the quality of water in water bodies and coastal water"*, and incompatible with the requirements of section 69(3), which provides that:

"Subject to the need to allow for reasonable mixing of a discharged contaminant or water, a regional council shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters at the time of public notification of the proposed plan unless it is consistent with the purpose of this Act to do so."

The Court also hinted that an overs and unders approach may be inconsistent with section 107 of the RMA, as well as Objective A1 of the NPSFM (*"to safeguard the life-supporting capacity [etc] of fresh water"*).

The Court conceded that, in principle, it may be appropriate for a council to use an overs and unders approach in regard to the overall quality of an **individual** water body: for instance, an increase in one contaminant could be justified if the same water body experienced an equivalent decrease in another contaminant.

The Court noted, however, that practical implementation and monitoring would be very difficult if the Council's view of overall quality, allowing for overs and unders, were adopted. That is, the Court questioned how anyone could plan to compensate for a decline in water quality in one area with improvements in water bodies in other parts of the region. The Court expressed doubt whether such compensation could even be measured, and queried how one could work out which beneficial effects would be capable of counterbalancing adverse effects in water bodies that could be many kilometres apart. That being the case, the Court highlighted what it considered to be a practical impossibility of ascertaining whether the objective of maintaining overall water quality within the region had been achieved.

To conclude on this issue, the Court held that the overs and unders approach to the interpretation of overall quality is *"fundamentally flawed"* and one that could lead to a more *"degraded and unacceptable water outcome"*.

The Court therefore allowed the appeal by Ngāti Kahungunu, in light of this interpretation and its finding that the directive in section 6(e) *"cannot possibly be achieved in failing to even aspire to maintain, let alone improve, the quality of the water in these aquifers. For the same reasons it does not meet Objective D1 and Policy D1 of the [NPSFM]"*.

Discussion

It is yet to be seen if the decision will be appealed, but in any event the Court's discussion of the relevant RMA provisions and NPSFM is worthy of close analysis.

We note that the judgment does not discuss in any detail the qualifying words at the end of section 69(3) of the RMA, which seemingly allow a council to set standards that result in a reduction in the quality of water where *"it is consistent with the purpose of the Act to do so"*. It is arguable that regional councils' functions under section 30(1)(c)(ii) should also be subject to the *"consistent with the purpose of the Act"* qualifier, so that an overs and unders approach is not necessarily ruled out in all circumstances.

Nor does the judgment address other provisions in the NPSFM that seem to contemplate an overs and unders approach, such as Objective CA2(d) which allows councils to assign attribute states for freshwater bodies *"at or above"* the national bottom lines identified for those attribute states, rather than at or above the current states of those attributes.

That said, as the Court observed, regional councils clearly face considerable practical challenges in devising systems to account for freshwater quality and quantity, and in proving that the objective of maintaining or improving the *"overall quality of fresh water within a region"* is met, as required by the NPSFM.

If you would like to discuss implementation of the NPSFM and related issues further, please contact a member of our team.

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