Public Decision-Making Newsletter

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DLA PIPER

Summary

This newsletter summarises recent developments in law relating to resource management and local government in Aotearoa New Zealand that may be of interest to local authorities and decision makers.

In this edition, we:

- Provide an update on the recent Supreme Court decision to grant leave to appeal both the previous Court of Appeal decision and aspects of the High Court decision in relation to appeals against the expansion of a water bottling plant.
- Review a recent noteworthy High Court decision concerning a private plan change request seeking to rezone properties in central Auckland, which clarified the applicability of the National Policy Statement on Urban Development 2020 to private plan changes, and the directiveness of the frequently used policy verbs 'require', 'maintain and enhance' and 'enable'.
- Review a recent High Court decision on a judicial review brought by Forest & Bird relating to coal exploration which may lead to coal mining. This case provides guidance on the standards of decision-making pursuant to sections 14 and 78 of the Local Government Act, and what constitutes unreasonableness in the context of processes which will progress to further consultation.
- Review a recent Environment Court case which confirmed that Intensification Planning Instruments must be limited to the matters set out in the applicable sections of the RMA – which potentially raises more questions than answers.
- Review the recent decision by the Environment Court *Balmoral Developments (Outram) Ltd v Dunedin City Council*, which provides guidance on the application of the National Policy Statement on Highly Productive Land. Specifically, on whether land subject to appeals on the proposed district plan were exempt from being considered highly productive land.
- Provide an update on the recent refusal by the Minister for the Environment to refer the Mātai Moana Te Taumata o Te Motu Kairangi Project (also known as the Shelly Bay development) to an expert consenting panel for fast-track consenting.
- Provide a legislative update in relation to:
  - The passing of the new National Hazards Insurance Act 2023, which will come into force on 1 July 2024.
  - Proposed changes to the national direction on renewable energy, including changes to the NPS-REG, the NPS-ET and NES-ET, and a proposed new National Environmental Standard for Renewable Energy Generation.
- Provide a review of some recent decisions concerning enforcement for environmental offending, including helpful guidance on resource consent condition breaches (particularly in relation to the standard general condition 1), the standard to which environmental harm must be established and the required service of enforcement orders and how this can impact their coming into effect. We also review recent High Court decision *Faulker v Bay of Plenty Regional Council*, which considered the Council's jurisdiction for enforcement and prosecution in the context of Te Tiriti o Waitangi, and the application of the rule of law.

Sustainable Otakiri Inc v Whakatāne District Council and anor; Te Rūnanga O Ngāti Awa v Bay Of Plenty Regional Council and anor [2023] NZSC 35

In the wake of last year's Court of Appeal decision on the end use of water, *Te Rūnanga O Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598, leave has been granted to Sustainable Otakiri and Te Rūnanga O Ngāti Awa (Te Rūnanga) to appeal to the Supreme Court.

Background

The case stems from a proposal to expand an existing but small-scale spring water extraction and bottling operation near Ōtākiri in the Bay of Plenty into a larger industrial-type operation.

A bundle of regional and district consents and consent variations were proposed to be varied to allow for the construction and operation of new facilities, including plastic bottle manufacturing onsite and a consent for the taking of water for the bottling itself (more than triple the existing allowance amount).

The approval of this proposal, itself subject to media attention over the years, has been appealed by iwi authorities Te Rūnanga O Ngāti Awa, Ngāti Pikiao Environmental Society Incorporated, Te Rūnanga o Ngāi te Rangi Iwi Trust, alongside Sustainable Otakiri Incorporated – a local advocacy group.

The consents were granted and subsequently upheld in the Environment Court (subject to conditions). In the High Court, amongst other issues, the Court considered whether:

- the "end use" of the bottles was a relevant consideration;
- whether the Environment Court erred in declining to have recourse to Part 2 of the RMA;
- whether the Environment Court erred in the determination of the relevant activity status;

- whether negative effects on te mauri o te wai and Te Rūnanga's ability to exercise kaitiakitanga could be considered; and
- whether it erred in determining that the activity was the expansion of an existing activity rather than a new activity.

Ultimately the High Court dismissed the appeals.

The Court of Appeal largely considered the same questions above, with the exception that leave was not granted on the issue of the exclusion of the consideration of the negative tikanga effects. The Court of Appeal affirmed the High Court decision on all issues, other than finding that the Whakatāne District Council should have dealt with the proposal as a new activity, rather than seeking consent variations, but found this was irrelevant to the outcome regardless.

Points of law on appeal

The leave to appeal to the Supreme Court was granted for appeals against both the correctness of the Court of Appeal decision, *and* the outstanding questions on tikanga effects in the High Court decision to which leave had not previously been granted in the Court of Appeal.

The application in relation to costs was declined, with the Court stating that:

> We accept that the issue of costs for those acting in the public, as against a private, interest may raise questions of public or general importance, but we do not consider that the jurisprudence, including in this Court, has reached a stage where it may be useful for this Court to hear an appeal of this nature.[1]

This decision, once released, is likely to offer further guidance on the scope of end use of water considerations in consenting decisions, and presents a rare chance for the Supreme Court to set precedent on the extent to which tikanga considerations, particularly relating to kaitiakitanga and te mauri o te wai, can and/or should be considered.

[1] *Sustainable Otakiri Inc v Whakatāne District Council* [2023] NZSC 35, at [11].

Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Society Inc [2023] NZHC 948

The High Court has recently issued its decision on an appeal from an interim and final decision of the Environment Court concerning a private plan change request seeking to rezone properties in central Auckland.

The High Court's decision is significant because it clarifies several legal issues, including the applicability of the National Policy Statement on Urban Development 2020 (NPS-UD) to private plan changes, and the directiveness of the frequently used policy verbs 'require', 'maintain and enhance' and 'enable'.

Background

The private plan change request (**PC21**) to the Auckland Unitary Plan (**AUP**) sought to rezone four adjacent properties in Epsom from residential zonings to a special purpose zone, and to remove three of the properties from the AUP special character overlay. The objective of PC21 being to enable the efficient operation and expansion of the existing hospital on the combined sites, while managing the effects on the adjacent residential amenity.

Hearing commissioners for Auckland Council (**Council)** approved PC21 with modifications. However, on appeal by the Eden-Epsom Residential Protection Society Inc, the Environment Court refused PC21.[2]

The Environment Court concluded that PC21 was 'discordant' with objectives and policies in the AUP Regional Policy Statement (**RPS**) seeking to 'maintain and enhance' the character and amenity values of identified special character areas. The Environment Court considered these objectives and policies were framed in 'strong directive language' and should therefore be accorded more weight than RPS policies that 'enable' social facilities (which were less directive).

Before its final decision on PC21, the Environment Court had issued an interim decision concerning the application of the NPS-UD to PC21.[3] In that decision, the Environment Court had concluded that it was required to give effect to only some of the objectives and policies of the NPS-UD which explicitly referred to 'planning decisions' i.e., objectives 2, 5 and 7, and policies 1 and 6 of the NPS-UD.

The appeal to the High Court concerned nine alleged errors of law, however the analysis below focuses on the

[2] Eden-Epsom Residential Protection Society Inc v Auckland Council [2022] NZEnvC 60.

[3] Eden-Epsom Residential Protection Society Inc v Auckland Council [2021] NZEnvC 82.

issues relating to the applicability of the NPS-UD and the interpretation relevant RPS objectives and policies.

NPS-UD

The first alleged error of law concerned the reasoning in the Environment Court's interim decision. The Environment Court had relevantly concluded:

- A decision on the merits of a private plan change request, including an appeal to the Environment Court, was a 'planning decision' for the purposes of the NPS-UD – meaning that some of the provisions of the NPS-UD could be considered on the appeal; and
- The references to 'planning decisions' among the eight objectives and eleven policies in the NPS-UD were limited to objectives 2, 5 and 7, and policies 1 and 6 and only these needed to be given effect to in the context of PC21.

The High Court concluded that the Environment Court erred in holding that it was not required to give effect to objectives and policies in the NPS-UD that did not refer to 'planning decisions.'

Like the Environment Court, the High Court considered that there were two provisions of the NPS-UD of particular importance: clause 1.3, which identifies the types of local authorities or decisions to which the NPS-UD applies, and clause 4, which sets the temporal scope of the NPS-UD. The High Court however interpreted those provisions in a different way to the Environment Court.

In terms of those provisions, the High Court's decision clarifies:

- Under clause 1.3(1)(a), the NPS-UD applies to all tier 1, 2 and 3 authorities (such as the Council), regardless of the type of decision being made by the authority. Therefore, the Environment Court's analysis of whether a decision on private plan change was a 'planning decision' was an unnecessary question, given that clause 1.3(1)(a) applied the NPS-UD to the Council (and thereby the Court) regardless of the type of decision being made.
- Under clause 4.1(1) of the NPS-UD, all tier 1, 2 and 3 authorities have an obligation to amend their plans to give effect to the NPS-UD 'as soon as practicable'. Clause 4.1(2) of the NPS-UD is expressed to be 'in addition' to clause 4.1(1), setting a two-year outer limit to complying with certain policies (including the intensification policies 3 and 4). The effect of clause 4.1(2) is to add to the two-year outer limit, and it does not defer or diminish the obligation under clause 4.1(1).

RPS objectives and policies

The third alleged error of law concerned the Environment Court's interpretation of objectives and policies in the AUP RPS in its final decision.

The Environment Court had relevantly concluded that certain objectives and policies using the verb 'require' and 'maintain and enhance' and relating to character and amenity were expressed in strong directive language and should be accorded quite significant weight over policies using the verb 'enable' and relating to social facilities.

The High Court's approach to the interpretation of the relevant objectives and policies was informed by the context of the AUP as a whole. It concluded:

- An objective worded 'Require non-residential activities to be of a scale and form that are in keeping with the existing and planned built character of the area' interpreted in context is strongly directive. The High Court agreed with the Environment Court's interpretation of this objective.
- Policies relating to social facilities using the verb 'enable' interpreted in context are strongly directive. The High Court disagreed with the Environment Court's interpretation of these policies.
- A policy worded 'Maintain and enhance the character and amenity values of identified special character areas…' interpreted in context is strongly directive. The High Court agreed with the Environment Court's interpretation of this policy. Other objectives and policies about identifying special character areas have a directive aspect but are less directive because they provide some leeway in how special character areas are identified. Given the Environment Court had also considered the relevant objective and policies are strongly directive, the High Court disagreed with the Environment Court's interpretation.

The High Court therefore disagreed with the Environment Court's conclusion that policies relating to social facilities were not directive, and considered that the errors in interpretation of the RPS provisions had a material effect on the final decision.

Outcome

The appeal has been allowed, including on the errors of law discussed above, and the matter has been referred back to the Environment Court for reconsideration.

Royal Forest & Bird Protection Society of New Zealand Incorporated v Southland District Council and New Brighton Collieries Limited [2023] NZHC 399

This case was an application by Royal Forest & Bird Protection Society of New Zealand Incorporated (**Forest & Bird**) for a judicial review of a decision of the Southland District Council (**the Council**) to:

(a) Enter into an access arrangement with New Brighton Colliers Limited (**New Brighton**) in relation to Council owned commercial forestry (**freehold**) land at Oahi (**the Property**) for coal exploration; and

(b) Authorise its officers to negotiate an access arrangement regarding the Property for mining purposes.

The Property is located adjacent to State Highway 96 between Ohai and Nightcaps, with flat rolling hill country topography. Bathurst Resources Ltd (**Bathurst**) owns and operates the Takitimu coal mine near Nightcaps, and seeks to establish a new coal mine in Southland to be operated by its wholly-owned subsidiary New Brighton.

The Council undertook a decision-making process that involved the preparation of a Recommendation Report, for the consideration by the Services and Assets Committee of the Council, which recommended the Council to enter into an access agreement for mining. It contained the condition that New Brighton would apply for a publicly notified resource consent related to any mining activity.

During the decision-making process, the Council had determined that the matter did not meet the threshold of "significance" on the basis that while there could be community interest in the proposal, not all interested parties would necessarily "be directly impacted or face consequences".

Forest & Bird's application for review

Forest & Bird sought judicial review of the Council's decision on the basis that it was unlawful and sought an order quashing the decision. It raised several alleged errors of law in the Council's decision-making process, as well as a separate claim that the Council had acted unreasonably in making its decision to facilitate the expansion of coalmining operations in the district in the view of identified climate change considerations.

The Court addressed and rejected all of the following errors of law in turn:

(a) Failure to act in accordance with the principles set out in section 14 Local Government Act 2002 (LGA);

(b) Failure to properly apply the Significance and Engagement Policy;

(c) Failure to consider community views as preferences under section 78 LGA;

(d) Failure to consider the scientific consensus on the anthropogenic climate change;

(e) Failure to take account of Council plans and policies and the Local Government Leaders' Climate Change (LGLCC) Declaration;

(f) Legally erroneous reasoning as to a loss of control; and

(g) Legally erroneous reasoning through the Council's failure to inform itself.

First ground of review – failure to act in accordance with section 14 LGA principles

Forest & Bird alleged that the Council had not followed the principles of (among others): having regard to community views; taking into account the interests of future and current communities; and taking a sustainable development approach that took into account the social, economic, and cultural well-being of people and communities.

The Court, in considering the legislative framework of section 14 and some commentary, agreed with a previous decision of the Court that the principles were not mandatory requirements but "a guide" to the council's exercise of its powers and functions. The Court therefore found that any failure to consider these principles did not invalidate the Council's decision. The Court further explained that even if they could invalidate the decision, Forest & Bird had not established the Council had in fact failed to consider the principles. The decision involved the "relatively narrow" issue of granting access to the land, and the Council had reasoned that there would be a consideration of community views through any resource consent process.

Second ground of review – failure to properly apply the Significance and Engagement Policy

The Court rejected this ground alleged by Forest & Bird and found that the Council's decision that it was not a "significant matter" was justified. The Court emphasised that the grant of access to the property at most would represent "a preliminary step towards mine development, with no direct impact during the period of access". The Council's reasoning that "not all interested parties will necessarily be directly impacted or face consequences" was therefore unremarkable. For the same reason, the Court also rejected the third alleged error – that the council had failed to consider community views as required by section 78 of the LGA. The Court noted that pursuant to section 79, the Council was to make a judgment about how to achieve compliance with section 78 that was "largely in proportion to the significance" of the matter. Accordingly, the Council's decision not to seek community views was a proper exercise of discretion under section 79.

Other grounds of review

Given that this land access matter was not "significant", the Council could not be required to consider such issues (and doing so could even be viewed as disproportionate). Regarding another claim that the Council had not complied with section 80 of the LGA – which required councils to identify any significant inconsistencies of a decision with any of its adopted policies or plans – the Court commented that a breach of section 80 would not invalidate the affected decision, as it was an accountability provision. Any invalidation of a decision would have to flow from an error that went to the vires of the decision itself. Further, the particular climate change policy suggested by Forest & Bird was not a policy of the Council, as it was a declaration of local government "leaders" signed by the mayor only.

Second cause of action – unreasonableness

The Court dismissed Forest & Bird's unreasonableness claim on the basis that there was nothing in the Council's approach that reached the stringent test of unreasonableness. It found that it was reasonable for the Council, in reaching the access decision, to have regard to the fact there would be later opportunities for consultation and input at the point when the actual extraction of coal was for consideration.

The Court found that there was a distinct logic to the Council's approach in reaching its decision and the decision fell well short of being "perverse" or "absurd".

Outcome and Orders

The Court concluded that the Council was correct in its decision to grant New Brighton access to Council-owned forestry land near Ohai for coal exploration.

The Court, having rejected each of Forest and Bird's grounds of review, dismissed the application for review. Costs were reserved, but if no memoranda were filed, Forest & Bird was ordered to pay costs to the Council and New Brighton on a 2B basis including reasonable disbursements.

Environment Court confirms that Intensification Planning Instruments must be limited in scope

A recent decision of the Environment Court sent shock waves through the district planning community when it confirmed that Intensification Planning Instruments (**IPIs**) must be limited to those matters set out in the applicable sections of the Resource Management Act 1991. The actual implications of the decision are unknown as it has now been challenged by an appeal to the High Court, and the Independent Hearing Panels which have been appointed by tier 1 local authorities nationwide are progressing though the required hearing processes in order to comply with statutory requirements ahead of that appeal being determined.

It its decision of *Waikanae Land Company Ltd v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056, the Environment Court found that the inclusion of a new site of significance within the applicable schedule as part of a plan change using the Intensification Streamlined Planning Process (**ISPP**) was *ultra vires*. The issue arose in the context of a direct referral for a resource consent as a preliminary issue for the Court to determine. The provisions of the plan change that gave effect to the scheduling were considered to be *ultra vires* as the inclusion of a new scheduled site (as a site of significance to Māori) within the Kāpiti Coast District Plan went beyond what could be achieved through an IPI or ISPP.

The Court was focused on the fact that due to the scheduling of that residentially zoned site, activities other than the activities subject to the Medium Density Residential Standards (**MDRS**) or policy 3 (i.e., not just residential units) were constrained when they previously had not been. The activities in that case included earthworks, fencing, and cultivation and planting.

In the Court's view this went beyond modifying the nine density standards set out in the MDRS in Schedule 3A of the RMA, to be less enabling of development. These standards (for the construction and use of residential units or buildings) are the number of units per site; height; height in relation to boundary; setbacks; building coverage; outdoor living space (per unit); outlook space (per unit); and windows to street and landscape areas.

The question arising is how broadly this decision is to be applied, ie. are any IPI provisions that go beyond amending the MDRS *ultra vires*? Is the decision limited to only those provisions that regulate activities other than the construction and use of residential units and dwellings and subdivision? Does the decision confirm that any 'down-zoning' through an IPI is unlawful? The answers to these questions may be clarified in time by the High Court appeal.

Environment Court consideration of the National Policy Statement on Highly Productive Land

The planning industry, regulatory decision makers and the Courts continue to grapple with the impacts and implications of the National Policy Statement on Highly Productive Land 2022 (**NPS-HPL**) which came into force on 17 October 2022.

The recent Environment Court decision in *Balmoral Developments (Outram) Ltd v Dunedin City Council* [2023] NZEnvC 59 (delivered on 4 April) (***Balmoral***) provides guidance on one element of the definition of highly productive land.

Balmoral involved outstanding appeals on the proposed Dunedin district plan, and whether in considering the appeals, the Environment Court should have regard to the provisions of the NPS-HPL. In particular, the question raised for the court was whether the land under appeals met the exemption from being highly productive land under clause 3.5(7)(b) of the NPS-HPL. Clause 3.5(7) sets out the transitional position to be taken by all relevant territorial authorities until the mapping in the RPS has been undertaken, stating:

Until a regional policy statement containing maps of highly productive land in the region is operative, each relevant territorial authority and consent authority must apply this National Policy Statement as if references to highly productive land were references to land that, at the commencement date:

(a) is:

(i) zoned general rural or rural production; and

(ii) LUC 1, 2, or 3 land; but

(b) is not:

(i) identified for future urban development; or

(ii) subject to a Council initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.

The appellant's land was all zoned rural (of some variety) in the proposed district plan and was LUC 1, 2 or 3. Through their submissions and appeals against the proposed district plan, the appellants sought to change the zoning of their land to one that would allow for future urban development. The appellants argued that because their original submissions and appeals sought a form of urban zoning as relief, this means the appellants' land is '*subject to a council-initiated plan change*' bringing its land within the scope of the exemption in clause 3.5(7)(b)(ii) of the NPS-HPL.

The Environment Court rejected the appellant's argument and held: 'that is not the same as being subject to a council-initiated plan change that proposes to rezone the land to urban or rural lifestyle'.[4] It considered that it was illogical to suggest that because an urban zoning may result from the court's ultimate consideration of the appeals, that the NPS-HPL cannot be one of the relevant matters for the court to consider before coming to a decision on the appeals.[5]

The Court also observed that clause 3.5(7)(b)(ii) applies where a plan change has been adopted by the council and not where a privately requested plan change has been sought, which is consistent with the result that an appeal or submission is not the same as a Council notified plan change.[6]

The *Balmoral* case provides clear guidance on the interpretation of the NPS-HPL in a situation where land will not be exempt from being highly productive land in a transitional period, which may be relevant as applicants/landowners contend with the application of its provisions.

[4] At [62].
[5] At [65].
[6] At [66].

Mātai Moana Te Taumata o Te Motu Kairangi Project (Shelly Bay) – Minister for Environment declines to refer for fast track consenting process

At the end of April, the Mātai Moana Te Taumata o Te Motu Kairangi Project, also known as the Shelly Bay project (in Maupuia, Wellington) was declined referral to an expert consenting panel for fast-track consenting under the Covid-19 Recovery (Fast-track Consenting Act 2020) by the Minister for the Environment.

The applicant for these consents, Taranaki Whānui Limited, proposed the subdivision of about 15 hectares of land for the construction of between 650–700 residential units and other (unspecified) commercial and community activities buildings, alongside the construction and operation of a public cable car between Shelly Bay and the commercial area of the development.

The project included a bundle of wider infrastructure proposals to facilitate the development, including works within road reserves, landscaping and planting, the creation of public and private open spaces, roads and reserves, accessways, car parks and three-waters services.

The development proposal has been subject to some controversy and occupations, relating to the iwi involvement, the status of reuse of heritage buildings on the land, and concerns relating to sea level rise and climate induced flooding,

The Minister's decision to decline the referral of the project for fast-track consenting means the project will be required to proceed through standard consenting processes under the RMA. No further reasons were given by the Minister, other than noting the Minister considers this to be "more appropriate."

Legislative Update

Natural Hazards Insurance Bill passes third reading

The Natural Hazards Insurance Act (**NHIA**) has now passed into law, following a successful third and final reading of the Bill, and Royal Assent on 27 February 2023.

The NHIA replaces and simplifies the Earthquake Commission Act 1993, and primarily aims to enable better community recovery from natural hazards, to clarify the role of the Commission and the cover provided by the Act, and to enhance the durability and flexibility of the legislation.

The Act seeks to improve natural hazard insurance by, among other things:

- modernising the Commission's purpose and introducing new objectives and core functions (such as re-framing its relationship with the Natural Hazard Fund),
- amending insurance coverage rules for buildings and land (including rules around mixed and multi-use buildings, retaining walls, bridges, and culverts, and extending the damage period for volcanic activity events),
- introducing a Code of Insured Persons' Rights to improve claims handling and settlement,
- changing the Commission's financial governance and sustainability settings (including a requirement to review insurance levies and other key financial settings every five years), and
- strengthening the Commission's information gathering and sharing powers.

The Earthquake Commission will be renamed Toka Tū Ake - Natural Hazards Commission, which is appropriate as the Act extends further than earthquakes, now covering: storms, floods, landslips, volcanoes, tsunami, and hydrothermal activity.

The Act also increases levels of cover for the relevant natural hazards. The existing legislation provides for (in most cases) up to $100,000 of cover per event for each dwelling in a residential building. This amount was increased to $300,000 by a regulation in 2022, and the increased cover is carried forward by the Act.

The Act requires claims to be settled in a fair and timely way and provides the ability for claimants to utilise a dispute resolution scheme. Given the increase in coverage of events and increased insurance coverage, the Act may result in fewer civil claims, thus achieving the Act's purpose of promoting insurance availability and affordability.

The Natural Hazards Insurance Act will come into force on 1 July 2024 and will not affect entitlements of current claims, or any claims made prior to this date.

Strengthening national direction on renewable electricity generation and electricity transmission

For those in the sector, changes have been required in renewable energy for some time. The status quo doesn't support the renewable energy development needed in light of decarbonisation – the current national direction was developed prior to the incorporation of emissions reduction targets into law.

In April, the Government unveiled proposed new policies and rules to make consenting pathways for renewable energy generation easier, for which MBIE and MfE have just closed consultation.

CHANGES TO THE NPS-REG, NPS-ET AND NES-ET

The proposed changes are to the existing National Policy Statement for Renewable Electricity Generation (**NPS-REG**), the National Policy Statement for Electricity Transmission (**NPS-ET**) and National Environmental Standard for Electricity Transmission (**NES-ET**) under the Resource Management Act 1991, and a new National Environmental Standard for Renewable Energy Generation (**NES-REG**).

The key aims of these changes are to provide more enabling policy direction for renewable electricity generation and electricity transmission projects, and better manage the balancing act required with competing interests (such as indigenous biodiversity and valued landscapes) against the growing need for renewable energy development.

In detail, the stand-out changes proposed to the NPS-REG include:

- Enabling renewable electricity generation activities in areas with significant environment values, and in areas with local amenity values (where adverse effects can be avoided, remedied or mitigated);
- Requiring consideration to be given to Māori interests as part of the consenting process for renewable electricity and transmission infrastructure, which could look like early engagement, protection of sites of significance, enabling small and community-scale renewable electricity generation.
- Strengthening direction on existing wind and solar renewable electricity generation (renewals of consents, maintenance and upgrade); and
- Requiring that planning decisions give greater weight to the national significance and benefits of renewable energy generation activities, and clarifying the meanings of 'operational need' and 'functional need.'

A NEW NATIONAL ENVIRONMENTAL STANDARD FOR RENEWABLE ENERGY GENERATION (NES-REG)

A new NES-REG has been proposed, which, if progressed, will be the subject of a further consultation round once a draft has been prepared. The new NES-REG, as put forward currently, would:

- Provide new national standards for small/community scale onshore wind and solar PV generation projects, with the goal of improving national consistency in the management of these activities.
- Enabling the upgrade and repowering of existing wind and solar generation. Specifically, this would provide for minor, intermediate and major upgrades and repowering activities by adjusting activity statuses. Subject to general standards, minor upgrades would be permitted activities, intermediate upgrades would be controlled activities and major upgrades and repowering would be restricted discretionary activities.
- Provide nationally consistent rules for new large-scale wind and solar PV generation, including potentially setting a nationally consistent activity status to address current regional inconsistencies.

TIMELINES

With initial consultation just closing on 1 June 2023, this will be followed by:

- In relation to the NPS-REF and NPS-ET, further drafting and exposure draft consultation, with final approval and Gazette notices being published by the end of 2023; and
- In relation to the NES-ET and NES-REG, the Government will continue consideration of issues and options under the RMA and the National Planning Framework (**NPF**), followed by a section 46A report, cabinet approval, and a further exposure draft consultation in 2024.

Enforcement Update

In ***R v Growco Limited***[7] the Court confirmed that it is well established that compliance with a resource consent requires compliance with all of its conditions, and that contravention of a condition is a contravention of a consent.[8] The Court also commented that a condition of a resource consent should be clear on its terms, practicable in its operation and capable of direct enforcement. The relevant condition in this case is usually condition 1 of a resource consent, referring to the application documents and purporting to impose the contents of these documents as a condition of resource consent. The Court commented that:

> That may appear to a busy consent authority to be a handy way of capturing all of the various things that may be put forward in an application and turning them into requirements of the consent, but it does not meet the basic standards of clarity, practicability and direct enforcement. The better approach is to identify and extract the specific performance standards or other limits that are identified in the application and set those out under conditions of consent as things that must be done or not done.[9]

This suggests that prosecutions laid for breach of what is usually known as condition 1, which generally requires compliance with the application document, may have challenges in that the Court may consider that that consent condition is not valid due to uncertainty.

The other relevant aspect of the case is the focus given by the defendant on the lack of environmental harm established. The Court noted that quantification of actual impacts on an environment (particularly lasting effects) is often not possible, and it is not necessary for this kind of assessment to always form part of a prosecution. It noted that the High Court has confirmed that when no specific harm can be identified, an allowance for harm may be made on the assumption that any given offence contributes to cumulative effects (in this case, relating to pollution).[10]

Auckland Council v Noe[11] deals with a prosecution for failure to comply with an enforcement order. The key issue in this case was whether the enforcement orders were correctly served. The enforcement orders directed the defendant to be served directly. The enforcement order was served in person on the defendant's brother who confirmed his relationship to his brother and agreed to give the documents to him. A text message was also sent to the defendant confirming that the documents were left with this brother.

The Court found that the process followed did not meet the requirements for the orders to be served directly. Given this, the enforcement order had not actually taken effect and therefore could not have been breached. Judge Dickey observed that an enforcement order applicant may wish to apply to change the service requirements for enforcement orders for future proceedings.

A recent decision of the High Court in ***Faulkner v Bay of Plenty Regional Council***[12] is an appeal against decision of the District Court in relation to reclamation of the coastal marine area and operation of a piggery near that coastal marine area with corresponding discharges. There was a challenge that the Council did not have jurisdiction to carry out its functions under the RMA in relation to the appellant's activities.

The Court generally found that the Council had the statutory power and responsibility of carrying out an investigation and had the power to enforce provisions of the RMA through prosecuting the appellant. The High Court also agreed that there is no principle of Te Tiriti o Waitangi/The Treaty of Waitangi that any Act of Parliament is not binding on any person in New Zealand, whether they be Māori or non-Māori. All persons in New Zealand are subject to the rule of law meaning that everyone is subject to the laws enacted by Parliament in the same way. The High Court found that the District Court had a compelling evidential foundation for its findings and upheld the decision.

[7] R v Growco Limited [2023] NZDC 5037.
[8] R v Growco Limited, at [54].
[9] R v Growco Limited, at [58].
[10] R v Growco Limited, at [56].
[11] Auckland Council v Noe [2023] NZDC 2810.
[12] Faulkner v Bay of Plenty Regional Council [2023] NZHC 145.

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