

MEMORANDUM

Date: 24 May 2021
To: Alexandra King
From: Michelle Mehlhopt

CONSIDERATION OF WATER QUALITY EFFECTS WHEN DETERMINING AN APPLICATION TO TAKE WATER

1. You have asked us to consider when assessing resource consent applications to take water, and water is proposed to be used for irrigation, whether the Otago Regional Council (**Council**) is required to assess the potential effects of water use on water quality.
2. This question has arisen in the context of the Council considering the resource consent application currently being processed as RM19.151 on behalf of BTSGT Limited and the A.P McQuilkin Family Trust. The application is for new water permits to replace deemed permits which authorise the take and use of water from New Chums Creek and the North Branch of the Royal Burn.

Executive summary

3. When considering a resource consent application, the decision-maker must consider any actual and potential effect on the environment. Due to the broad definition of “effect”, previous case law has confirmed that this includes consequential effects, as long as they are not too uncertain or remote.
4. In this case, effects on water quality are consequential on the use of water for irrigation. The effects on water quality are a relevant consideration when assessing a resource consent application to use water for irrigation, as:
 - a. The effects on water quality have a causal relationship with the use of water for irrigation: they would not occur to the same extent if water was not used for irrigation; and
 - b. Policy support in a plan is not required to assess an effect, as the assessment of effects under section 104 is independent of the assessment of relevant policies.
5. Whether the potential effects on water quality can be considered will depend on the activity status of the proposed activity. If the activity is controlled or a restricted discretionary activity, the discretion of the decision maker to consider effects will be limited to the matters of control or discretion.
6. The activity in this case is a restricted discretionary activity. However, we consider several of the matters of discretion listed in Rule 12.1.4.8 allow consideration of potential effects on water quality, including:¹
 - a. The proposed methods of take, delivery and application of the water taken; and

¹ Rule 12.1.4.8 also contains a matter of discretion regarding “any effect on any Regionally Significant Wetland or on any regionally significant wetland value.” This would also allow consideration of the effects of the end use, however it is not relevant to this particular application as there are no Regionally Significant Wetlands affected by the activity.

- b. Any actual or potential effects on any groundwater body; and
 - c. The duration of the resource consent.
7. Our detailed analysis of your questions follows.

Analysis

8. The activity being applied for in this case is the use of water (under section 14 of the RMA). We understand the use of water for irrigation is likely to lead to adverse effects, such as nutrient losses to groundwater and water bodies.
9. Section 104 provides that when considering a resource consent application, the consent authority must, subject to Part 2, have regard to the actual and potential effects on the environment of allowing the activity (among other matters). “Effect” is broadly defined in the RMA, and includes:²
- a. Any positive or adverse effect; and
 - b. Any temporary or permanent effect; and
 - c. Any past, present, or future effect; and
 - d. Any cumulative effect which arises over time or in combination with other effects—
- regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
- e. Any potential effect of high probability; and
 - f. Any potential effect of low probability which has a high potential impact.
10. Numerous cases have affirmed the principle that the consequential effects of an activity should be had regard to when assessing its effects on the environment, subject to some limits. This stems back to the Environment Court’s leading finding in *Beadle v Minister of Corrections*. In this decision, the Environment Court determined that there was a “general thrust towards having regard to the consequential effects of granting resource consents, particularly if they are environmental effects for which there is no other forum, but with limits of nexus and remoteness.”³
11. Judge Kirkpatrick set out a summary of the previous case law on the consideration of consequential effects in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*, where the Environment Court stated:⁴

Applying the guidance from those decisions, we must have regard to the consequential effects of granting the resource consents sought, or the amendments sought to conditions, within the ambit of the RMA and subject to limits of nexus and remoteness.

The ambit of the RMA in the context of considering an application for resource consent under s 104(1)(a) requires consideration of an effect of allowing the activity. It does not extend as far as considering any effect on the environment which, given

² RMA, s 3.

³ *Beadle v Minister of Corrections* EnvC Auckland A074/2002, 8 April 2002, at [88]. This case has recently been confirmed as being authoritative on this subject in *Wilkins Farming Co Ltd v Southland Regional Council* [2020] EnvC 155, at [18]-[19].

⁴ *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196 at [41] — [66]. The cases include *Aquamarine Ltd v Southland Regional Council* Decision 079/96, Judge Skelton, 6 November 1996, at 9; *Cayford v Waikato Regional Council*, Decision A127/98, Judge Sheppard, 23 October 1998 at 10; *Beadle v Minister of Corrections*, Decision A74/2002, Judge Sheppard, 8 April 2002 at [88] — [91]; *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87 at [119].

the broad inclusive definitions of those words, might be anything at all. There must be a causal relationship between allowing the activity and the effect: if an effect would occur unchanged regardless of whether the activity was allowed or not, then such an effect would not be within the scope of s 104(1)(a) RMA. If the extent or degree of such an effect would be altered by allowing or refusing the activity, then that effect would be relevant at least in terms of that change but its nexus and remoteness would need to be assessed.

Nexus here refers to the degree of connection between the activity and the effect, while remoteness refers to the proximity of such connection, both being considered in terms of causal legal relationships rather than simply in physical terms. Experience indicates that these assessments are likely to be in terms of factors of degree rather than of absolute criteria and so be matters of weight rather than intrinsically dispositive of any decision. Matters that are de minimis are of course excluded.

12. This matter was further considered by the High Court on appeal. The High Court considered there was no dispute as to the legal principles of nexus and remoteness when considering end use of a resource consent, but the dispute related to their application. The High Court noted that the separate control of the effects of an activity under the RMA may indicate that those effects are too remote to be considered.⁵
13. The effect of these cases is that the Council, when assessing the effects of the activity of using water, is required to consider consequential effects of granting the resource consent, subject to limits of nexus and remoteness.

Whether the effects are within the limits of nexus and remoteness in this case

14. In this situation, we consider the adverse consequential effects of the use of water for irrigation (such as nutrient losses to groundwater) are within the limits of nexus and remoteness, and must be considered as a relevant adverse effect by the Council. In line with the *Ngāti Awa* decision, there is a causal relationship between allowing the use of water for irrigation and the subsequent nutrient losses: the nutrient losses would not occur to the same extent if the water was not used for irrigation.
15. The fact that this is the only time at which this effect could be considered further demonstrates the need to consider the effects on water quality of the end use. If the Council was unable to consider the effects of the use of water on water quality, there would be no other forum within which to consider these effects. The consideration of such an effect is consistent with the Environment Court's approach in *Beadle*.
16. Any actual and potential effect is required to be considered under section 104 of the RMA, independent of the consideration of policies. However, the status of the activity will determine whether the effects may be considered. If the activity is controlled or a restricted discretionary activity, the discretion of the decision maker to consider effects will be limited to those matters to which the Council has restricted its control or discretion. That is, if effects on water quality are not captured by the matters of control or discretion, then the effects cannot be considered.

Whether the effects are within the scope of matters of discretion

17. In this particular case, the following matters of discretion of Rule 12.4.1.8 allow for the consideration of the effects of the use of water (in this case, including any effect on water quality):
 - (iv) The proposed methods of take, delivery and application of the water taken; and

⁵ *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388 at [152]-[153].

...

(xv) Any actual or potential effects on any groundwater body

18. These matters of discretion are broadly framed. In particular (vi) refers to the “method of ... application” of the water taken. Therefore, the effects of the “application” of the water are a relevant consideration for the Council under this rule. In addition, any effects on groundwater quality would be directly relevant to (xv).
19. Further, the duration of the resource consent is also a matter for which discretion is reserved. Any potential effects on water quality also inform the duration for which resource consent is granted, which is apparent from Policy 6.4.19(d). This states that the Council should consider the “extent to which the risk of potentially significant, adverse effects arising from the activity may be adequately managed through review conditions.”
20. This anticipates that where there is a potentially significant adverse effect arising from the activity, that may inform the duration of the resource consent (as it may not be able to be adequately managed through review conditions).
21. We note also that Rule 12.1.4.8 also contains a matter of discretion regarding “any effect on any Regionally Significant Wetland or on any regionally significant wetland value.” This would also allow consideration of the effects of the end use, however it is not relevant to this particular application as there are no Regionally Significant Wetlands affected by the activity.
22. For these reasons, we consider that when assessing this application for the use of water for irrigation, the Council is required to consider the effect on water quality as a consequential effect of that use.