

has released a discussion document that addresses inter alia proposed oil discharge regulations. The MfE anticipates that the discharge regulations will come into effect by the end of June. In the meantime, the approval regime for discharges from offshore installations will remain in place under the MTA's marine protection rules (Part 200). This requires the preparation of a discharge management plan and its approval by the Director of MNZ. It was this plan that was at the centre of dispute under the transitional provisions of the EEZ Act in *Greenpeace v Environmental Protection Authority* [2013] NZHC 3482, [2014] NZRMA 112. Judicial review was declined in this case as the EPA's powers were procedurally limited to determining whether the application was complete, and there was no scope to reconsider the merits of information already considered by MNZ under the MTA.

MNZ will retain jurisdiction over oil-spill contingency planning under the MTA once discharge powers transfer to the EPA. Operators will, therefore, continue to be required to obtain MNZ approval for emergency response measures to be taken in the case of a spill from an offshore installation. Operators of offshore oil installations will also continue to be required to hold at least \$NZ25 million of public liability insurance to cover any clean-up or damage costs in the event of an oil spill (s 385H MTA and Part 102 of the marine protection rules).

Non-discharge offences under the EEZ Act, as with the RMA, are subject to strict liability (ie there is no requirement to prove intent). However, the

Act does not adopt a strict liability regime for oil pollution offences. This difference of approach may be because the financial penalties for a conviction can include orders to meet the costs of clean-up or repairing any damage. It might be said there is a civil flavour to these penalties, which is also reflected in the defences (eg the damage occurred without negligence).

In terms of civil liability, the *MV Rena* oil spill proved controversial from a public policy perspective insofar as limitation of liability under maritime law reverses the commonly accepted assumption that the polluter should pay. Importantly, there is no limitation of civil liability for oil pollution damage from offshore installations under international law. Accordingly, civil liability for oil pollution from offshore structures is theoretically unlimited under the MTA. However, in practical terms, the ability to recover damages is likely to be governed by the financial resources available to those liable.

Insurance cover for clean-up costs and claims up to \$US1.25 billion appears to be available in the market ... "Beyond that, the payment of claims will become a question of whether the operator has the financial capacity to self-insure, as was the case with BP in the Deepwater Horizon situation" see Paul David "The Search For Oil in New Zealand Waters: Work to be Done?" (2011) 25(1) Australian and New Zealand Maritime Law Journal 49, at 64. The potential difficulty in recovering damages serves to emphasise the importance of good decision-making under the Act.

The Selwyn Waihora catchment: A triumph for collaborative management?

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The replacement of the elected and politically accountable Canterbury Regional Council (ECan) by central-government-appointed commissioners through the Environment Canterbury Temporary Commissioners and Improved Water Management Act 2010 (ECan Act) provoked an immediate public outcry, and one cannot help wondering if their tenure would have been so easily extended were it not for the subsequent series of seismic events that devastated large parts of Christchurch. However

outside the city, the Commissioners have continued to push through the government's agenda for change in water management without the usual local government political challenges. A key component in that change has been adopting a collaborative management approach. The latest products are the Canterbury Land and Water Regional Plan (CLWRP), and now the Selwyn-Waihora Chapter for that plan, known as Variation 1 (SWV) announced in February 2014.

The Selwyn River (Waikirikiri) flows into Lake Ellesmere (Te Waihora) which, at 20,000 ha surface area, is New Zealand's fifth largest lake and its largest lagoonal lake. Although a third of the lake and parts of the catchment lie within Christchurch City boundaries (since the demise of Banks Peninsula District Council) the lake and catchment largely lie within Selwyn District Council. Selwyn is the fastest growing district in New Zealand, is home to the ambitious Central Plains Water project and is experiencing rapidly expanding dairy farming. Fresh water resources in this area are under considerable pressure and generally over-allocated, and the water is perceived as being highly polluted. The lake, a taonga of Ngai Tahu and a wetland of international importance, has recently been the subject of both a change to its 1990 Water Conservation Order and a subsequent consent hearing on its key direct management measure; the regime for artificially opening the lake to the sea. Here, I describe the main points of the new planning developments and discuss some of the issues that will be interesting for the courts and resource managers over coming months.

The management of Lake Ellesmere/Te Waihora

In the years before Māori settled in the area, the lake was extended over a much greater area as it was surrounded by extensive marshes and wetlands. Māori opened the lake to the sea to limit the lake's encroachment on their marae. Later Europeans, inspired perhaps by the drainage successes of the Fens in England and the lands of the Netherlands, sought to permanently drain the lake to create rich farmland. This included the passage of the Ellesmere Lands Drainage Act 1905, and significant surrounding wetlands, such as the Killinchy Swamp, were drained and become excellent lowland cropping, sheep and dairy lands.

However, there were other values, some of which, as Golda Varona's 2013 Lincoln University doctoral thesis 'Community Environmental Attitudes' has shown, remained relatively constant, but others changed over the century. The Selwyn River became a major trout fishing destination and was popular for swimming, picnicking and boating. The lake itself was a focus of recreation, particularly bird shooting, commercial and recreational fishing (eg, flounder) and boating. The New Zealand Water Ski Championships were held there in the 1960s. At that time there were extensive water-weed (macrophyte) beds in the lake, some distance from shore, which provided extensive fish habitat and protected the soft shores from wave action.

In 1968, the Wahine Storm ripped the macrophytes from the lake bed and they have never re-established. The lake changed from a macrophyte to microphyte (eg. algae) dominated ecosystem almost overnight, with consequent loss of shore protection and fish habitat. Numbers of trout caught in the Selwyn River dropped dramatically, although there remains considerable debate over the cause. Some species, particularly shortfin eel, appear to be sustainable at their current harvest levels and make up approximately a quarter of New Zealand's commercially caught eels. Increased levels of nutrients from the largely agricultural catchment had become an increasing concern, and by the end of the 1990s there had been health warnings about swimming in the Selwyn and about the algae blooms in the lake, although never at the scale of the toxic algae that affected its neighbouring Lake Forsyth/Wairewa. See the proceedings of the series of Living Lake Symposia held every two years since 2007 for scientific reports and assessments of the lake: Waihora Ellesmere Trust "Events" 2009 at www.wet.org.nz.

However in 1990, the international importance of Lake Ellesmere as a bird habitat was recognised through the National Water Conservation (Te Waihora/Lake Ellesmere) Order 1990 (WCO2009). This order effectively established heights above sea level that would need to be exceeded before the lake was to be opened to the sea. Once the lake was opened, by bulldozers operating in quite hazardous settings, its head of water enabled it to scour a larger channel and it could flow into the sea until a southerly storm blocked the channel with shingle. If there were consistent southerlies blowing, the lake could not be realistically opened or kept open. Failed or delayed lake openings meant both direct inundation of surrounding farm lands and higher groundwater that impeded the flow of surface water from drains or lands during storms, resulting in indirect flooding. The benefits of lake openings were to landowners, largely farmers, and so the bulk of the costs of lake openings were born by the local landowners, through a special drainage rate.

The need for a significant change in approach was apparent by 2002 when the first meeting was held by what became the Waihora Ellesmere Trust, a community organisation whose objects relate to the lake, its environs and tributaries. Three years later, it was drawn to the media and Parliament's (see for instance word of mouth media "Call to halt the serious decline in fresh water" (press release, 29 August 2005) attention by Judge Smith's comments in the *Lynton Dairy Ltd v Canterbury*

Regional Council EnvC Christchurch C108/05, 22 August 2005 where he observed (at [101]) that the state of the lake was a “significant shock” to the Court and it appeared to be “manipulated for farming rather than the natural values.” Urgency was needed to address its problems, but the levels of water quality and quantity in lowland streams in the lake’s catchment were also “unacceptably low” (at [135]). However, the Court was not convinced by ECan’s approach to managing the cumulative effects of land use on water and granted the consent, effectively ending the Council’s approach to the cumulative effects of dairying in Canterbury. The consent was for taking groundwater from aquifers below 150m deep at a rate of up to 560 l/sec to provide additional irrigation to 1000ha of land some 40km from the lake.

Thus, the demand for water to irrigate more extensive areas of the plains and thereby intensify dairy and other agricultural production was seemingly at odds with the observations of concerned citizens and the Court. In the following brief analysis I will not revisit the Canterbury Water Management Strategy or the provisions of the plans in depth. The intention is to describe the issues that are now facing water managers and the community.

Changes to the lake opening regime

In 2011 the National Water Conservation (Lake Ellesmere) Order 1990 was amended and renamed the National Water Conservation (Te Waihora/Lake Ellesmere) Order 1990 [WCO2009] by the “National Water Conservation (Te Waihora/Lake Ellesmere) Amendment Order 2011” (25 August 2011) 134 *New Zealand Gazette* 3823. In this paper, WCO2011 is used to reference the amended version.

The 2011 changes are notable primarily for expanding the outstanding features identified for the WCO. In 1990 the lake was identified only as providing “outstanding wildlife habitat” and included provisions to protect that habitat. WCO2011, cl 3 declares that the lake:

has or contributes to the following outstanding amenity or intrinsic values which warrant protection:

habitat for wildlife, indigenous wetland vegetation and fish; and

significance in accordance with tikanga Māori in respect of Ngāi Tahu history, mahinga kai and customary fisheries.

Both the renaming of the Water Conservation Order and the values in the second value recognise the significance of the lake as a taonga for Ngāi Tahu and the closer relationship between Ngāi Tahu and ECan, whereas the first value is of more general application. For a fuller discussion of the shift to listing an increased range of values and other changes occurring over time in WCOs see Kenneth FD Hughey, Hamish G Rennie and Nick Williams “New Zealand’s ‘wild and scenic rivers’: Geographical aspects of 30 years of water conservation orders” (2014) 70 *New Zealand Geographer* 22.

The primary mechanisms of protection are the restrictions to the height above mean sea level at which the lake can be opened to the sea. These have been retained as 1.05 m (1 August to 31 March) and 1.13 m (for the rest of the year). However, WCO2011 now allows the lake to be opened at any time from 1 April to 15 June (WCO2011 cl 4(2)). This is additional to the openings from 15 September to 15 October, allowed in the original Water Conservation Order. These seemingly contradictory provisions are to enable better fish migration. Lake level management with additional consideration of fish passage is expected to result in a higher average lake level, with earlier spring openings allowing more time for the lake to fill before the heavy evaporation period in summer. It is important to note that the thresholds in the WCO2011 are not triggers at which the lake will be opened, but levels below which no resource consent can allow the opening of the lake.

Subsequently the Canterbury Regional Council and Te Rūnanga O Ngāi Tahu jointly applied for resource consents to enable them to artificially open the lake as the previous Canterbury Regional Council’s consents had expired. The nature of the consent application placed considerable weight on the issues important to fisheries and very little on avoiding the inundation of surrounding lake land, potential drowning of the indigenous vegetation and the loss of important bird habitat. Submitters were concerned over these issues and that productive farm land would be flooded either directly or indirectly if there were any delays in the decision to open the lake. They sought some mechanism to resolve any disputes between the two consent holders that might lead to delays. Although the commissioners expressed their concerns at the lack of any transparent conflict-resolution mechanism, they opted to rely on the goodwill and collaboration of the joint consent holders to act appropriately and open the lake. They also noted that there was no information on which they could arbitrarily set a maximum height, and they included

a condition requiring the consent holders to develop a protocol with various interested stakeholding organisations, possibly with a maximum height and other matters that should be considered when deciding to open the lake. A similar protocol had existed previously, but the Canterbury Regional Council had always given priority to the concerns of the special drainage-rating district rate payers whose land was likely to be flooded when deciding to open the lake. The undue and unfair bad press the Council received during the record-high lake levels caused by an unusual sequence of exceptionally heavy rain events and southerlies in June 2013 will no doubt also be an incentive for ensuring that the consent holders act promptly to open the lake before such events could recur. The new protocol is under discussion at the time of writing.

Constraints on farming

The Proposed Canterbury Land and Water Regional Plan (CLWRP) is produced under the ECan Act, and so some of the processes are truncated (see Hamish G Rennie "The ECan Act: Understanding the New Provisions For Planners (2010) 2 *Lincoln Planning Review*" 20). Somewhat ironically, the CLWRP is a product of the Canterbury Water Management Strategy (CWMS) and associated processes were initiated by the elected councillors, removed by the ECan Act, and former ECan CEO Dr Bryan Jenkins, although, politically, credit is usually given to the Canterbury Mayoral Forum. Despite this controversial background, the preparation of the LWRP has proceeded with considerable collaboration using zone committees, loosely based on catchments and substantial industry discussion. It has been established as a framework plan, providing several general provisions applying across the Canterbury region, but with placeholders left for individual sub-chapters, such as that for the Selwyn-Waihora catchment through SWV1.

The key issues that have already led to court challenges relate to two items in particular:

- (1) requirements to fence ephemeral streams, and
- (2) the mechanism for setting nutrient limits.

The fencing of streams appears to be a definitional issue over what constitutes a river. The new constraints on stock access to rivers essentially require high-country farmers to fence off every dry water course that occasionally has water flowing through it (ie, ephemeral streams). This is likely to be resolved fairly readily through out of court negotiations.

The more substantive issue is the reliance on OVERSEER®, a programme developed to aid farmers in determining how much fertiliser to add to their farm for efficient production, being used as a basis for nutrient discharge limits. The error margins on the estimates can be large, and they are yet to be refined for a full range of land uses. However, using it as a base, landowners with more than 20 ha of land will be required to develop Farm Environment Plans (FEP) that show they have analysed their major risks of discharges and the steps they are taking to address these, while also keeping within limits (based on their historic nutrient use for the years 2009-2013 for the Selwyn Waihora Zone). By 2017, the Council expects Matrices of Good Management (MGM) to be in place which will set more specific levels for discharges that farmers practicing good management would be expected to achieve for each farming type, soil and terrain. These would effectively be industry developed, activity-based performance standards. Once those standards are set, farmers would need to operate to those standards or better. Resource consents are needed to change production activity to a more polluting level and in the interim to any level greater than the type of land use and level of nutrient use in the 2009-2013 period. Notably, resource consents for water takes can be transferred, but 50 per cent of the water take must be surrendered, and farms can base their FEPs across more than one property that they own.

Cultural landscape provision

Submissions have closed for SWZV1, and the major and probably the most contentious item is the inclusion of a cultural landscape overlay that covers an extensive area inland from the current edge of the lake and 20m either side of the main rivers and streams flowing into it. This has been included to recognise the interconnectedness of the various waterways in the low-lying area and Ngāi Tahu cultural values. In practice, the provisions are not greatly different from what might be expected to be considered in any resource consent for septic tanks or other activities in such areas, and consequently they are not that significant. However, it does require owners of more than 10 ha of land to complete their FEPs by mid-2015. This will affect approximately 150 landowners, some of them lifestyle farmers who have largely not been represented in the collaborative nutrient-limit-setting processes used by the Council over the last year. The timeframe was not part of the collaborative discussions held with more than 70 stakeholders involved in the process. There are also question marks over the situation of land owners who

lease their land and of how commercial operators who lease land from several different people in different parts of the catchment will address these issues, but ultimately it is the land owner who has responsibility for producing the FEPs.

The timeframe has been challenged in submissions, and given the shortage of people skilled in writing FEPs and the sudden added, unbudgeted and unexpected cost of producing them, it would seem sensible that this timeframe be extended.

Concluding comments

There are three points that need to be emphasised that have emerged from the processes being run in the Selwyn Waihora Zone in Canterbury. The first is that many of those involved in the collaborative process were surprised that the outcome would not automatically be included in the regional plans. This is a simple matter of law. The collaborative processes were largely by invitation and, as noted, lifestyles

were not specifically represented. Some parties had extra opportunities to influence the process. It is only natural justice for the outcome not to be seen as definitive and for it to be open to normal plan hearing processes and changes, and the Independent Hearing Commissioners for the CLWRP made that clear in their decision.

Secondly, the OVERSEER® programme is still being developed, and the plans as currently written require the most up-to-date version to be used when making decisions and the version is left to the chief executive of the Regional Council to decide. This would seem a far too arbitrary process, given the implications that changes would have on farm values and investments, and it will be interesting to see if this will survive the hearing process.

Thirdly, and most important, the predictions are that water quality will continue to decline, including drinking water, even if all the changes are successfully implemented.

Recent cases

Kane v Attorney-General [2014] NZHC 251

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Background

In the recent Wellington High Court case *Kane v Attorney-General* [2014] NZHC 251, the applicants sought judicial review of the Crown's inclusion of land in Blenheim as part of the settlement of a Treaty of Waitangi claim.

The land was compulsorily acquired by the Crown in 1947 from the Estate of George Fairhall (the Estate) for New Zealand Defence Force purposes. The land has been continuously used since this time as the Woodbourne Airbase and for regional airport purposes. In 2012, the Crown entered into Deeds of Settlement with the three Kurahaupō iwi providing for the purchase and lease back to the Defence Force of those parts of the Airbase still required for defence purposes. This includes the 1947 land, and is to be recognised in legislation through the Te Tau Ihu Claims Settlement Bill (the Bill).

The primary concern of the applicants, successors to the beneficiaries of the Estate, is that the settlement will render the land no longer subject to offer-back provisions under the Public Works Act 1981 (the Act). They contend their "inchoate" pre-emptive rights under section 40 will be extinguished if the land is transferred into iwi ownership. The applicants made this and various other claims in a submission to the Maori Affairs Committee on the Bill and requested removal of the land subject to their potential offer-back rights from clause 146. The Committee recommended no amendment.

The applicants sought judicial review on four grounds:

- The Crown knew of the applicants' offer-back rights in respect of the 1947 land and should have first addressed those rights before including the land in the Deeds of Settlement.