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9 December 2022

Water bottling decision has broader implications for water permits

The *Aotearoa Water Action* cases challenged ECan's decision to approve a change in the consented use of water to enable water bottling, but the decision has had wide ranging implications the way Environment Canterbury processes water permits, and has resulted in a number of activities becoming prohibited. The Supreme Court has now granted leave to appeal the decision

Background

The Court of Appeal concluded the Canterbury Regional Council (ECan) could not grant a resource consent limited to the use of water without considering the authorisation to take water first.

Rapaki Natural Resources Ltd. (**Rapaki**) and Cloud Ocean Water Ltd. (**Cloud Ocean**) had purchased sites in Belfast, Christchurch, with existing resource consents for the take and use of water. These consents were originally granted for industrial purposes (one for a freezing works, the other a wool scour). They applied for new use consents to be used for waterbottling purposes. Both consents were approved by the ECan, leading to public opposition.

The High Court decision

Aotearoa Water Action Inc. (**AWA**), sought judicial review of ECan's decision. In the High Court (*Aotearoa Water Action Inc. v Canterbury Regional Council* [2020] NZHC 1625), AWA sought review of the decision to grant the new use consents without needing to consider or grant consents to take water. ECan's position was that water 'take' and 'use' were separately referenced in legislation and could not be considered together. No breach of judicial review principles was found regarding ECan's approval.

The Court of Appeal decision

AWA appealed the High Court decision to the Court of Appeal, which reversed the decision (*Aotearoa Water Action Inc. v Canterbury Regional Council* [2022] NZCA 325). While the Court did agree that 'take' and 'use' should be interpreted separately in the Resource Management Act 1991 (**RMA**), the question ultimately depended on the wording of the relevant rule in the Cantebury Land and Water Regional Plan (**CLWRP**). There, the CLWRP made specific distinguishment between 'take *or* use' and 'take *and* use' of water. CLWRP rule 5.128, the relevant provision, uses the latter wording, resulting in 'take' and 'use' being interpreted together. As ECan had not considered the authorisation to take water as well as use, the consents were held not to have been legally granted. Rapaki and Cloud Ocean can now only take and use water according to the original purpose consents were granted.

Implications for consent applications

The decision has implications for the way ECan processes resource consents where the applicable rule is for "take *and* use" of water, particularly in over-allocated catchments. In those circumstances both the take and use must be considered together, and as there is no further allocation to take water available, the activity is prohibited.

This change in application of the rules is having a significant impact on activities that intercept groundwater, including development of stormwater management areas and dewatering activities. However, depending on the drafting of the rule applying to the application site, also has potential implications for:

- Site to site transfers of water, where there is a

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change in use; and

- Applications for a new, additional or expanded 'use' within an existing 'take' allocation, for example, increasing the irrigation area, or adding a new use such as dust suppression or use in on-site processing activities.

What now?

The Supreme Court has granted Rapaki and Cloud Ocean leave to appeal the Court of Appeal decision. A hearing has been set for the week of 20 March 2023, with a decision expected later in the year. Until then, ECan will process new consents in line with the Court of Appeal's decision.

Want to know more?

If you have any questions, please contact our specialist Resource Management team.