

08-B-1049

17 October 2008

Minister for the Environment

Recent Environment Canterbury Commissioner Decision on Groundwater Allocation

Purpose

1. To advise you of the Environment Canterbury (ECan) decision of 7 October 2008 to approve the allocation of groundwater in a "red-zone", identified by ECan through Variation 4 to its proposed Natural Resources Regional Plan (PNRRP) as already being fully allocated. This decision was made by a hearings panel comprising independent commissioners. The decision was made contrary to ECan staff recommendation to decline consent.
2. This is the third recent decision where Environment Canterbury's recommendations to decline consent have been over-turned (once by the Environment Court and twice by appointed Commissioners).

Background

3. There have previously been two relevant decisions on resource consents for groundwater allocation, where ECan staff recommendations to decline consent have been overturned. These were:
 - The February 2008 Commissioner decision to approve 69 applications for groundwater takes in the Rakaia Selwyn Goundwater Zone; and
 - The August 2005 Environment Court decision overturning ECan's refusal of consent for a significant water take within the Rakaia Selwyn Goundwater Zone (referred to as the Lynton Dairy case).
4. Environment Canterbury classifies its groundwater resources into three types of zones which form the basis for its recommendations on resource consents:
 - a) "Red Zones" where 100 percent of the estimated available water is already allocated.
 - b) "Yellow Zones" where the total amount of groundwater currently allocated is above 80 percent of the estimated available water.

- c) "White Zones" where the total amount of groundwater currently allocated is below 80 percent of the estimated available water.
5. While these classifications were initially non-statutory, Environment Canterbury has translated this approach through Variation 4 to its PNRRP. This variation proposes to improve the methods for establishing and implementing groundwater allocation limits in each of the allocation zones. It also takes into account seasonal variation in groundwater levels.

The Decision

6. The decision grants consent to applications for 37 new groundwater takes and four permits to increase groundwater take (a total of 41) within the Selwyn-Waimakariri Groundwater Allocation Zone. These applications were lodged between May 2004 and November 2006. Hearings commenced in July 2007 and ran through to late August 2008.
7. The Commissioners ultimately preferred the evidence presented by the applicants, and their proposed "adaptive management" approach. The consent was also granted for a 10 year period and provides for ECan to review the consent at set times during that period.

Key Elements of the Decision

8. There are two key elements to the decision:
 - The difference between the applicants and ECan on how groundwater availability is measured; and
 - The weight and status given to Variation 4 and the PNRRP.
9. The disagreement on groundwater availability is between how a groundwater system comprising layers of gravel and shallow and deep reservoirs can be regarded as a single entity. ECan's position is that it is a single entity, and that it works as an interconnected system. Variation 4 to the PNRRP sets a maximum allocation volume for the Zone based on it being a single entity. The applicant's position, which was the same for the two previous consents, is that the groundwater system involves a series of components which are weakly connected and that taking further water from deeper components of the aquifer system would have lesser effects on the shallower groundwater aquifers contribution to lowland stream flows.
10. The Commissioners preferred the applicant's evidence for determining the level of available groundwater for allocation and their adaptive management approach. This approach involves the consent holder and ECan agreeing on a baseline environmental flow and the amount available for allocation over the following year on an annual basis, based on local and seasonal groundwater level monitoring. This approach acknowledges that in some years, there will be less water available for

applicants to abstract, meaning that these consents are less reliable than other consents within the zone, that have a set entitlement.

11. The Commissioners gave very little weight to both Variation 4 and the PNNRP. A final decision on the variation is likely to take at least four to five years. Until this time, while the variation has some effect, it is consistently being given minimal weight in these decisions because it is early in the process and not operative. As has been demonstrated by these three decisions, the science surrounding classifications will repeatedly be challenged in resource consent applications so that applicants can gain consent.
12. The Commissioners were also critical of ECan in their decision, particularly castigating staff that they had not requested sufficient information from the applicants to be able to fully understand the applications.

Implications

13. There is high potential that this decision will result in perceptions that:
 - Environment Canterbury is failing to manage water either through its plan or through the resource consent process;
 - Environment Canterbury's red-zone approach is fundamentally flawed
 - The Resource Management Act is not working.

Next Steps

14. Senior Ministry officials are meeting with senior ECan staff on Monday afternoon (20 October) to discuss the implications of this decision and possible government interventions.
15. We will advise you of the outcome of these discussions.
16. Note that ECan have advised that there another two groups of decisions to come.

Recommendations

We recommend you:

- (a) **Note** the recent Environment Canterbury decision to approve consent for new applications for new groundwater takes in an area identified as being fully allocated.
- (b) **Note** that this decision is contrary to the recommendation by Environment Canterbury staff to decline consent.
- (c) **Note** that this is the third decision where recommendations or decisions by Environment Canterbury staff to decline consent has been overturned.
- (d) **Note** that Ministry officials are meeting with senior ECan staff on Monday afternoon (20 October).
- (e) **Refer** this briefing note to the Minister of Agriculture and of Forestry.

Sue Powell
General Manager, Local Government Group

Date:

Date:

Hon Trevor Mallard
Minister for the Environment

Minister's Comments

Administration

	Action Sought	Deadline
Minister for the Environment	Note the outcome of the decision	It is important that the Minister is made aware of this decision, as it likely to raise media and potentially political interest

Ministry for the Environment Contacts

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