

HAWKE'S BAY REGIONAL COUNCIL
Environmental Management Committee
Wednesday 14 July 2010

SUBJECT: COUNCIL DIRECTION ON LAPSING OF WATER PERMITS

REASON FOR REPORT

1. The purpose of this agenda item is to seek direction from the Environmental Management Committee regarding what they would like to happen to any water which becomes available as a result of water permits lapsing.

Background

2. On 19 August 2010 a hearing panel comprising of Councillors Christine Scott and Eileen von Dadelszen, and Mr Mike Mohi will hear from thirteen resource consent holders whose water permits lapsed on 31 May 2010.
3. In accordance with section 125(1)(b) of the Resource Management Act, a resource consent lapses on the date specified in the consent document if the consent has not been 'given effect to' before that date, i.e. not used or only a small proportion of the water has been used.
4. The hearing panel can choose to grant or decline these applications for lapse date extensions. In light of the fact that the hearing panel may decide to decline one or more of the applications for a lapse date extension, and there is little guidance provided in the Regional Plan outlining expectations in such circumstances, staff request direction as to how any water that becomes available as the result of a consent lapsing should be dealt with.
5. This is a particularly pertinent question given the 'fully allocated' status of a number of surface water and groundwater catchments throughout the region.

Options for fate of lapsed water

6. There are essentially two options available to Council when considering how any water made available as a result of a resource consent lapsing could be dealt with. These options are:
 - 6.1. Retain the 'lapsed water' in the stream management zone or groundwater body and not re-allocate the lapsed water
 - 6.2. Make some or all of the 'lapsed water' available for reallocation.
7. It should be noted that regardless of the Committee's decision, any person can still make an application to take water that has lapsed. This activity would be assessed as a discretionary activity, and a decision on their application must be based on the matters set out in s 104 of the Resource Management Act (RMA).
8. In stream management zones where allocation is still available, and in areas where there are no concerns about aquifer sustainability any water made available by the lapsing of water permits would be made available for reallocation.
9. Therefore staff request direction from the Committee on which of the two options outlined should apply in a fully or over allocated stream management zone, or an aquifer where there are concerns about its sustainability.

Retaining lapsed water in stream management zone/groundwater body

10. Given the number of fully or over allocated stream management zones, and also concerns about the sustainability of some of the region's aquifers, the option of leaving 'lapsed water' in the relevant surface or groundwater body is an option that requires serious consideration. This would allow what is known as a "sinking lid" policy to operate, which would allow the current allocation within a stream management zone to be brought back towards the allocable volume specified in Table 9 of the Regional Resource Management Plan (RRMP), or the allocation limit calculated using the Proposed National Environmental Standard on Ecological Flows and Water Levels for those rivers and streams that do not have an allocation limit set in Table 9, as well as the aquifers in the region, none of which have a specified allocation limit. The same policy position can also be considered for consents that have been surrendered or not renewed.
11. One advantage of adopting this approach is that it may avoid Council having to "claw back" allocations when all consents within a stream management zone expire and replacement consents are applied for. If a decision is made at that time to grant only to the allocable volume, then obviously the closer the current allocation is to the allocation limit the fewer the number of applicants who will need to have their consented volume cut back. This would also serve to increase the security of supply for existing users.
12. Adopting this approach is also consistent with Policy 73(c) of the RRMP which aims to provide a known level of risk to resource users by ensuring that, for rivers with an established minimum flow, the total allocation authorised through the resource consent process does not result in authorised takes being apportioned, restricted or suspended for more than 5% of the time, on average, during November-April. Allowing 'lapsed' water to remain in the stream management zone would increase the security of supply for existing users. Re-allocating water could potentially increase the number of days when takes were restricted because water that was previously not being taken under the water permit that lapsed could potentially now be abstracted.
13. Staff also consider that this approach would be consistent with the Proposed National Environmental Standard on Ecological Flows and Water Levels which states that the allocation limit for a river or stream should be whichever is the greater of a) 30% of the mean annual low flow (MALF) for rivers and streams with a mean flow less than 5 m³/s, or 50% MALF for rivers and streams with a mean flow of greater than 5 m³/s; or b) the total allocation from the catchment on the date that the national standard comes into force, less any resource consents surrendered, lapsed, cancelled or not replaced. This implies that the proposed NES envisages water which becomes available through the lapsing of resource consents essentially "drops out" of the allocation limit, which would be achieved by leaving it in the river or stream.
14. The NES outlines similar requirements for aquifers. For shallow, coastal aquifers an allocation limit should be the greater of: a) 15% of the annual average recharge; or b) the total allocation from the catchment on the date that the national standard comes into force less any resource consents surrendered, lapsed, cancelled or not replaced. The options are the same for all other types of aquifers, except the calculated limit should not exceed 35% of the annual average recharge.
15. A "sinking lid" policy is used for over allocated catchments by both the Otago Regional Council and the Tasman District Council. Otago uses this approach on the basis that it protects the health of the river, and the Tasman District Council approach is supported by a policy which relates to security of supply levels. Both of these benefits would also be experienced in the Hawke's Bay if 'lapsed water' remains in over-allocated surface and groundwater bodies.

Making lapsed water available for reallocation

16. The option of making water that becomes available through the lapsing of (or indeed surrendered or un-renewed) consents available for re-allocation to new users must also be considered. Support for this approach comes from the fact that effects of resource consents that have not been exercised have already been taken into account in an assessment of environmental effects in accordance with section 104 of the RMA and deemed, on balance, to be acceptable.
17. It could also be argued that as the effects of the proposed activity were considered to be acceptable at the time consent was initially granted, that allowing 'lapsed water' to be made available for reallocation will only result in the occurrence of effects that have previously been deemed to be acceptable through the granting of consent in the first instance.
18. Making water available for re-allocation also allows someone else to provide for their economic wellbeing through the use of that water, which many members of the community would consider to be a significant benefit of making lapsed water available for re-allocation.
19. Any water made available through the lapsing of a water permit would be available on a 'first in, first served' basis and in the case of competing applications, priority would be given to the first application that satisfied the requirements of s 88 of the RMA in accordance with the Court's decision in the recent *Synlait* case ([2009] NZCA 609).

Treatment of lapsing water into the future

20. Policy staff have confirmed that guidance pertaining to the fate of water made available through the lapsing of water permits will be included in upcoming plan changes related to water management.
21. Council staff propose recommending the adoption of a "sinking lid" policy in fully/over allocated stream management zones and aquifers for water that comes available through the lapsing of water permits. Further, it is recommended that plan provisions also require any water made available through the surrender, cancellation or non replacement of water permits in fully/over allocated stream management zones and aquifers to remain in the subject water body.
22. In the interim however, staff recommend that Council adopt a "sinking lid" policy ahead of eventual plan changes to guide staff and the hearing panel if the issue should arise.
23. More importantly, this would clearly signal Council's intent to prospective applicants and possibly avoid costly resource consent applications being made in the absence of this decision. Staff stress that, in any event, this cannot prevent applications being made for lapsed water.

Staff recommendation

24. Staff recommend that water made available through the lapsing, surrendering or non renewal of water permits in fully or over allocated catchments / groundwater systems not be re-allocated as a matter of internal Council policy. This is considered to be the most sustainable option which best meets Part 5 of the RMA and objectives 23, 25 and 26 of the RRMP. While the potential economic benefits of making water available for re-allocation are acknowledged, the recommended approach is considered more prudent at this time, and until new minimum flows and allocation limits are confirmed via plan changes.

DECISION MAKING PROCESS

25. Council is required to make a decision in accordance with Part 6 Sub-Part 1, of the Local Government Act 2002 (the Act). Staff have assessed the requirements contained within this section of the Act in relation to this item and have concluded the following:
 - 25.1. Sections 97 and 98 of the Act do not apply as these relate to decisions that significantly alter the service provision or affect a strategic asset.
 - 25.2. Sections 83 and 84 covering special consultative procedure do not apply.
 - 25.3. The decision does not fall within the definition of Council's policy on significance.
 - 25.4. Section 80 of the Act covering decisions that are inconsistent with an existing policy or plan does not apply.
 - 25.5. Council can exercise its discretion under Section 79(1)(a) and 82(3) of the Act and make a decision on this issue without conferring directly with the community or others having given due consideration to the nature and significance of the issue to be considered and decided, and also the persons likely to be affected by or have an interest in the decisions to be made.

RECOMMENDATIONS

1. That the Committee receives the report titled "*Council Direction on Lapsing of Water Permits*".
2. That the Committee recommends Council:
 - 2.1. Agrees that the decisions to be made are not significant under the criteria contained in Council's adopted policy on significance and that Council can exercise its discretion under Sections 79(1)(a) and 82(3) of the Local Government Act 2002 and make decisions on this issue without conferring directly with the community and persons likely to be affected by or to have an interest in the decision due to the nature and significance of the issue to be considered and decided.
 - 2.2. Confirms that, as a matter of Council policy, any water that is made available as a result of a water permit lapsing, being surrendered or not renewed in an over allocated stream management zone or aquifer where there is concern about its sustainability, remains in the said water body and is not re-allocated.

Charlotte Drury
CONSENTS OFFICER

Darryl Lew
GROUP MANAGER
RESOURCE MANAGEMENT