The debacle continues – a natural wetland or not?

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A recent decision of the Environment Court, *Greater Wellington Regional Council v Adams* [2022] NZEnvC 25, has further emphasised the challenges faced in navigating New Zealand's wetland protection regulations.

The proceedings brought by Greater Wellington Regional Council (GWRC) related to a 12-lot rural residential subdivision in Upper Hutt, Wellington, which had been approved by Upper Hutt City Council (City Council) in February 2020. The subdivision plan identified two areas as natural wetland where buildings and earthworks were not allowed. The nub of the proceedings was that GWRC contended that the identified natural wetland areas extended considerably beyond the areas identified on the subdivision plan and sought orders protecting the alleged more extensive wetland areas.

The outcome essentially turned on the definition of "natural wetland" in the proposed Natural Resources Plan for the Wellington Region (PNRP) and the National Policy Statement for Freshwater Management 2020 (NPS-FM).

THE SUBDIVISION AND PREDEVELOPMENT WORKS

In early 2019, some of the subdividing parties began undertaking predevelopment works on land at Upper Hutt, Wellington. As part of the works relating to tree harvesting, GWRC officers undertook a site visit and raised concerns about the legality of various aspects of the work, particularly whether some of the work was being carried out in natural wetlands.

To address GWRC's concerns, one of the subdividing parties engaged Wildland Consultants Ltd (Wildlands) to identify the extent of natural wetlands on site. The Wildlands assessment concluded that several areas met the pasture exclusion provision such that they did not constitute natural wetlands for the purposes of the PNRP. The Wildlands assessment was subsequently taken into account by the City Council as part of its decision to grant subdivision consent in February 2020.

GWRC alleged there were inaccuracies with the Wildlands assessment and brought enforcement proceedings seeking orders to protect the contended more extensive natural wetland areas. GWRC alleged that the works carried out by the subdividing parties during the course of the predevelopment works, created atypical conditions which influenced vegetation growth such that the assessment of pasture contained in the Wildlands assessment was inaccurate.

A NATURAL WETLAND OR NOT?

The key issue for determination by the Court was whether the natural wetland extent identified by GWRC actually constituted "natural wetland" as defined in the PNRP or the NPS-FM, and in particular, whether the pasture /

improved pasture exclusion provisions in the PNRP and NPS-FM applied to the contended wetland area.

ATYPICAL CONDITIONS?

The Court first addressed the contention that the predevelopment works had created atypical conditions on the property. The predevelopment works included mechanical vegetation clearance (mowing of the vegetation in paddocks), drainage work and ripping (a process using tines to break up soil pans).

The Court found that the mowing, drain clearance and ripping activities were activities typically undertaken on farms, and that the effects of those activities would be typical of the effects of undertaking them irrespective of who actually undertook the activities (ie, a previous owner, the subdividing parties or the land-owning parties) (*Greater Wellington Regional Council v Adams* [2022] NZEnvC 25 at [84]).

PASTURE / IMPROVED PASTURE EXCLUSION

PNRP

The basis of GWRC's atypical situation theory was that the ripping had allowed pasture grasses to outgrow the wetland rushes in the ripped area, thereby upsetting their relative abundance at the time of the Wildlands assessment. The Court considered that this proposition itself recognises that there had to have been sufficient pasture species actually present at the time to outgrow the rushes (*Greater Wellington Regional Council v Adams* [2022] NZEnvC 25 at [116]).

The Court was critical of this proposition and lack of evidence to support it, holding that even if the Wildlands assessment was disregarded for inaccuracies, the remaining evidence before the Court supported (on the balance of probabilities) the proposition that the site constituted wetted pasture or pasture with rushes and met the pasture exclusion provision of the PNRP (*Greater Wellington Regional Council v Adams* [2022] NZEnvC 25 at [118]).

NPS-FM

Turning to the improved pasture exclusion in the NPS-FM, the NPS-FM contains both a definition of "improved pasture" and the application of what the Court described as a bright line test requiring there to be more than 50 per cent of exotic pasture species to be present to meet the exclusion, as well as the requirement that the area be subject to temporary rain-derived water pooling (*Greater Wellington Regional Council v Adams* [2022] NZEnvC 25 at [120]).

The Court accepted the evidence as to the vegetative status of the site, but the meaning of "temporary rain-water pooling" in the absence of wetland hydrology was the subject of some debate. Interestingly, the Court noted that on its face the temporary rain-derived water pooling requirement in the definition seemed quite simple in its application, but noted difficulties with the Ministry for the Environment's non-binding guidance document and hydrology tool which contains a test (the presence / absence of wetland hydrology) which is not apparent on a plain reading of the definition itself (*Greater Wellington Regional Council v Adams* [2022] NZEnvC 25 at [135]). This is not the first criticism of the guidance document, with another division of the Environment Court also criticising the guidance document in *Federated Farmers of New Zealand v Northland Regional Council* [2022] NZEnvC 16 at [19]-[29].

Ultimately the Court held that the areas in contention met the second leg of the improved pasture exclusion provision, being that the areas were subject to temporary rain-derived pooling. The Court noted that even if it considered that the inundation / saturation test contained in the hydrology tool was the appropriate legal test (which the Court did not), there was no hydrological evidence or data advanced by GWRC that remotely established that the hydrology of the site met either of the two tests contained in that tool (*Greater Wellington Regional Council v Adams* [2022] NZEnvC 25 at [142]).

OUTCOME AND COST AWARD

Overall, the Court held that GWRC failed to satisfy the Court by a "massive margin" that the natural wetland area in fact constituted natural wetland area and the evidence before the Court pointed to a contrary conclusion (*Greater Wellington Regional Council v Adams* [2022] NZEnvC 25 at [178]). At the conclusion of its decision, the Court reserved costs in favour of the various parties who had opposed GWRC's application and to the Crown (*Greater Wellington Regional Council v Adams* [2022] NZEnvC 25 at [180]).

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Consequently, in two subsequent decisions (*Greater Wellington Regional Council v Adams* [2022] NZEnvC 107 and *Greater Wellington Regional Council v Adams* [2022] NZEnvC 83), GWRC accepted close to $500,000 in costs to the various parties who had opposed the application and was ordered to pay $100,000 for the Court's costs.

The proceedings and subsequent decisions of the Environment Court only further emphasise the challenges natural wetlands continue to cause for councils, developers and many others. As we discuss below, the Ministry for the Environment has recently attempted to clarify and amend the definition of "natural wetlands" in the NPS-FM.

PROPOSED CHANGES TO THE IMPROVED PASTURE EXCLUSION IN THE NPS-FM

The Exposure Draft of the NPS-FM released in June 2022 (Ministry for the Environment *Exposure draft of the amendments to the National Policy Statement for Fresh Water Management 2020*, June 2022) proposes amendments to the improved pasture exclusion in the definition of a "natural wetland". This removes the reference to "improved pasture" and also removes the second limb "subject to temporary rain-derived water pooling". Instead, to meet the improved pasture exclusion, an area must be (Exposure Draft at 24-25):

- Within an area of pasture; and
- Have groundcover comprising more than 50 per cent exotic pasture species (as identified in the National List of Exotic Pasture Species); and
- Be not known to contain threatened species.

While the proposed amendments provide more certainty as to when the pasture exception applies, the inclusion of the "National list of Exotic Pasture Species" raises new issues. At present, the list mainly comprises commercially available grasses and legumes, with a limited selection of plants historically sown as forage species. It also fails to recognise that there are variances in common pasture species across different regions, based on growing conditions.

In our view, further work needs to be undertaken, with ecologist input, to ensure that the list is robust and workable in regions. The list needs to include plants commonly found in pasture, including non-forage herbaceous pasture species, fodder crops and wet-tolerant grasses. Furthermore, the requirement that an area be "not known to contain threatened species" will be a difficult threshold to determine and it will be evidentially challenging for applicants to rule out the presence of threatened species in many cases. Feedback closed on the Exposure Draft on 10 July 2022, and the final form of the amended provisions is anticipated later this year.