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Court of Appeal decision has significant implications for identification of wetlands

A recent decision by the Court of Appeal overturned 29 charges and set aside a $118,742 fine and three month prison sentence in respect of activities relating to wetlands.

The Court of Appeal in *Page v Greater Wellington Regional Council*[1] found the Regional Council had not proven beyond reasonable doubt the existence of the alleged wetlands. At the heart of the issue was whether the presence of "*animals that are adapted to wet conditions*" had been proven. This phrase appears in both the definition of "wetland" in the Resource Management Act (**RMA**), and "natural wetland" in the Greater Wellington Regional Council's proposed Natural Resources Plan (**pNRP**).

The Court of Appeal determined that:

- Evidence was required to demonstrate that the alleged wetlands support "*a natural ecosystem of plants and animals that are adapted to wet conditions*"[2] (our emphasis); and
- In relation to all but one alleged wetland, there was no evidence at all that demonstrated the presence of animals that are adapted to wet conditions.

In making this finding and overturning the large majority of charges against the appellants, the Court also determined that a miscarriage of justice had occurred.

Background

One of the two appellants, Mrs Crosbie, owns a property in the Kāpiti District. Mrs Crosbie's partner, Mr Page, had undertaken extensive works on the property between May 2019 and August 2020, including construction of access tracks and stream crossings, reclamation of four areas alleged by the Regional Council to be wetlands, and installation of water takes. The Council brought 35 charges against the appellants for unlawful activities in and relating to wetlands.

Prior to being heard in the Court of Appeal, the appellants were self-represented in the District Court and High Court, and did not bring any expert evidence. They were unsuccessful on both occasions. Mrs Crosbie was fined $118,742 as the owner of the property, and Mr Page was sentenced to three months imprisonment (which he had already served prior to the Court of Appeal hearing).

On appeal to the Court of Appeal, the appellants engaged legal representation and expert support for their position. Prior to the hearing by the Court of Appeal, the parties agreed that the charges in respect of the fourth alleged wetland could not be proven beyond reasonable doubt. The charges relating to this area were dropped and the convictions set aside.

Definition of 'wetland'

The definition of "wetland" in the RMA is as follows:

> **Wetland** includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions

The pNRP definition of "natural wetland" adopts and elaborates on this definition and adds some exclusions.

Proving the existence of wetlands

The Regional Council needed to establish to the criminal standard - beyond reasonable doubt - that the wetlands were "*permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are*

[1] *Page v Greater Wellington Regional Council*, [2024] NZCA 51

[2] Section 2 RMA, definition of "wetland".

Court of Appeal decision has significant implications for identification of wetlands (Continued)

adapted to wet conditions", and that the exemptions in the pNRP definition of "natural wetland" did not apply.

The Court allowed further evidence to be filed on appeal. Both parties filed ecology and hydrology evidence. The Court noted that this was more comprehensive than the evidence at the trial. The only relevant expert evidence at the trial was that of a senior environmental monitoring officer at the Regional Council without ecology, hydrology, or pedology qualifications, and the Court was critical of this approach.

Despite the further expert evidence filed, there was no evidence at any stage that recorded observations of animals that were adapted to wet conditions. In the absence of this evidence, the Court relied on evidence given in cross examination on the likelihood of there being animals adapted to wet conditions. The Court accepted the evidence for the appellants that it is virtually certain there will be wetland adapted animals (in this case, invertebrates) in one of the alleged wetlands, which was an open water pond, but that they are "*probably less likely*" in the other two alleged wetlands.[3]

The Court found based on this evidence that the Council had not established beyond reasonable doubt the existence of animals adapted to wet conditions in any of the wetlands, except for the open water pond (which the appellants successfully argued fell under an exclusion for 'stock watering').[4]

This finding meant a number of the charges failed to meet the criminal standard of proof. The Court was critical of both the method used by the Regional Council to identify the wetlands, and the manner in which it was implemented. The Regional Council used the 'Clarkson Method' for delineating wetlands, derived from the US Army Corps of Engineers Wetlands Delineation Manual (**Corps Manual**).

The Court noted that the Clarkson Method is of limited use, because it relies on a vegetation assessment and does not account for the presence of animals required to be proven in the RMA.[5]

In addition to this inherent limitation, the Court also considered the Clarkson Method had not been properly followed in the circumstances, noting that:

- In circumstance of likely or pending litigation, the Corps Manual emphasises the need for a comprehensive assessment that also covers soils and hydrology;[6]
- The Clarkson Method also recommends expanding the approach to include analysis of soils and hydrology in any situations where the wetland is atypical, for example if it is heavily modified;[7] and
- This expanded assessment of vegetation, soils, and hydrology was not used in this case despite the litigation context and atypical nature of some of the alleged wetlands.[8]

Even when used in accordance with this more robust method, the Clarkson Method still does not account for the presence of animals required to be proven in the RMA context.

Take home points

The case provides important learnings for proving the existence of wetlands in the criminal jurisdiction. The Court of Appeal decision provides the following advice:

- a prudent prosecution would reference hydrology and soils in addition to vegetation; and
- there would also need to be proof of a natural ecosystem of animals adapted to wet conditions.

[3] At [78]-[80].
[4] At [81].
[5] At [46].
[6] At [47].
[7] [84]
[8] At [84], [95](d), [105], [108]-[109], and [112].

Court of Appeal decision has significant implications for identification of wetlands (Continued)

These points will need to be considered in other RMA contexts when assessing if a wetland is involved.

The Ministry for the Environment issued Wetland Delineation Protocols (**Protocols**) in 2022, to provide a national method for delineating wetlands under the RMA and the National Policy Statement for Freshwater Management (**NPS-FM**). The Protocols include assessment of vegetation, hydric soils and hydrology to identify wetlands. Regional Councils are required to have regard to the Protocol in cases of uncertainty or dispute about identification of a wetland (as required by cl. 3.23 NPS-FM). This Protocol was introduced after the charges in *Page v Greater Wellington Regional Council* were filed by the Regional Council, and is not referred to in the decision.

Want to know more**?**

If you have any questions about this decision, please contact our specialist environment, planning and natural resources team.