



THE DECISION-MAKER

NOVEMBER 2007

A NEWSLETTER FOR MAKING GOOD DECISIONS PROGRAMME CERTIFICATE HOLDERS

Welcome to the third edition of **The Decision-maker**, the Ministry for the Environment's newsletter for certified RMA decision-makers. Published three times a year, the newsletter provides guidance on issues you face as a decision-maker. It tells you about future training opportunities and shares the perspectives of others actively involved in making decisions. **The Decision-maker** refers you to relevant case law and invites your feedback on thought-provoking issues.

WHO'S SIGNING UP FOR CERTIFICATION?

The next round of workshops for those seeking certification for the first time begins on 4 December, and runs through to 4 March 2008. Twelve workshops in all are scheduled in main and provincial centres. Around 140 registrations have so far been received for the first four workshops, from elected members, independent commissioners, council staff and iwi representatives. More registrations on behalf of elected members are expected, as councils make appointments to hearing panels following the 2007 local body elections.

For more information about venues and dates, and to register for foundation training, call Libby Passau at the Centre for Continuing Education (University of Auckland) on (09) 373 7599 x 88532, email l.passau@auckland.ac.nz or visit the Centre's website at: www.cce.auckland.ac.nz/rma

UPDATE ON RE-CERTIFICATION OPTIONS

The previous **Decision-maker** (April 2007) set out what happens when your certificate expires. Course materials for re-certification are now well advanced. To reiterate:

1. For those who plan to continue as members of hearings panels, attendance at a one-day workshop and a robust reassessment of understanding and reflection on experience will be required.
2. For those who want to continue as chairs, or who would like to develop skills as chairs, attendance at a specialised one-day workshop and completion of assignments and reflections will be offered. The requirements for re-certification outlined in (1) above will be incorporated in this training.

Those wishing to be re-certified for a further three years must choose one of these two options. The certificates of those decision-makers who attended the first round of workshops in February / March 2005 expire on 30 June 2008. All decision-makers whose certificates are coming up for expiry will be contacted personally. For 'first-round' certificate holders, registrations will open in late January for workshops scheduled in April and May. Successive opportunities for re-certification will be offered to those achieving certification in later rounds.

Some elected certificate holders may be interested in acting as decision-makers whether or not they stood for re-election or were successful in doing so. Every opportunity will be provided for all certificate holders to re-engage in training, although ultimately appointments to hearing panels are of course made by individual councils.

'INTERIM' DECISIONS – THINKING IT THROUGH

Some decision-makers are issuing what are called 'interim' or 'preliminary' decisions, during complex hearings. Their intention is usually to provide a decision on all or some of the critical issues, while seeking further input or feedback from the parties on proposed conditions.

This approach can present some difficulties and should be treated with caution. Under the RMA, rights of objection and appeal automatically apply on the issuing of any 'decision'. In some cases, decision-makers have issued 'interim' decisions with the intention of seeking feedback on conditions, only to find that appeals are lodged against both 'interim' and 'final' decisions.

In addition, conditions either can or cannot provide the means by which effects on the environment are avoided, remedied or mitigated, and often go to the heart of the reasoning for the grant (or refusal) of consent. Decision-makers should think carefully about the extent to which their ultimate decision to grant or decline consent does or does not turn on the viability (and not just the wording) of possible conditions.

Alternatives are available. Adjournments can be used to give the parties time to provide feedback (either jointly or singly) on draft conditions that may be proposed in the officer's report, proffered by the applicant, or suggested by submitters. A brief recess may also be appropriate, but in cases where discussions over mitigation measures or conditions are likely to be complex and take considerable time, an adjournment may be best.

Irrespective of whether you are contemplating adjourning the hearing or issuing an 'interim' decision for the purpose of seeking feedback on draft conditions, you should consider:

- 1. Whether feedback on conditions can be efficiently provided for during the course of the hearing.** You could signal this as the hearing evolves, and seek feedback from parties during the presentation of their evidence.
- 2. Whether, at this stage in the hearing, you still have an open mind as to the ultimate decision to grant or decline consent.** If so, consider prefacing any adjournment with the words 'without prejudice' to the eventual decision. This makes it clear that a decision has not been made and will in fact be influenced by the feedback from parties over conditions.
- 3. How you will manage participation in this process of obtaining feedback.** It may not be necessary to seek feedback on conditions from those submitters who have chosen not to appear at or attend the hearing, but you should record in a minute any such decision and the reasons for it.
- 4. How you will manage the process of obtaining feedback on proposed conditions.** Given the number of parties involved, you may need a timetable to direct how and when comment is sought. That timetable may need to explain how subsequent reviews and comments are provided for. You may need to seek comment on any such timetable or sequencing from those parties.
- 5. How you will ensure that the scope of feedback sought is clear to all parties.** You should provide a specific list of conditions that you are seeking feedback on.

Whatever option you may select, keep in mind the general obligation under the RMA to avoid unreasonable delay (s21), as well as the specific time limits for the notification of decisions (s115).

UPDATE ON CASE LAW

Naturally, case law continues to evolve. What follows is a short summary of some recent cases that are directly relevant to your role as decision-makers. The cases are grouped under the titles of the relevant Module in your Workbook.

Module 2 – Considerations Relating to Māori

- In *Chapple v Bay of Plenty RC* (W77/06) the Court found that while it is not for the Court to determine issues of mana whenua, it will recognise where there are competing iwi or hāpu interests.
- When applying section 6(e) it is necessary to make a finding on the facts as to the relations of Māori with their ancestral lands or other valued resources (*Chief Executive of Ministry of Agriculture and Forestry v Waikato Regional Council* A133/06). This finding must be made on the evidence (*Outstanding Landscape Protection Society Inc v Hastings District Council* W24/2007).
- When faced with disagreements between applicants and tangata whenua about the adequacy of consultation, the appropriate course of action is to put the issue of consultation aside, deal with the evidence and make a decision based on the evidence (*Outstanding Landscape Protection Society Inc v Hastings District Council* W24/2007 and *Genesis Power Limited v Manawatu-Wanganui Regional Council* [2006] NZRMA 536 HC). In the *Genesis Power* case, the High Court came to a conclusion regarding the limits to the consultation obligation. Justice Wild held:

[51] If Māori do not engage in consultation, or provide probative evidence of measures that will mitigate the adverse effects of them ... then the Court must decide the application on the evidence it has. It must not construct a process to afford Māori another or different opportunity to express their concerns.

- The Environment Court came to a similar view in *Outstanding Landscape Protection Society Inc v Hastings District Council* (W24/2007). The Court held:
[71] ... the only practical course is to put the issue of consultation aside and deal with the evidence presented to us by both sides ... we are required to make our own substantive decision based on the evidence put before us and the process leading up to the Council's decision is not relevant to that.
- The *Genesis Power* case has been appealed to the Court of Appeal. The decision on this appeal (not yet released) could significantly change the law in relation to consultation with tangata whenua and the evidential onus regarding the mitigation of adverse effects on Māori interests.

Module 9 – Deliberations and Preparing Decisions

- On the subject of competing consents, the High Court has previously determined that a regional council was not at liberty to grant further resource consents which would compromise existing water right allocations and consents held by Meridian in respect of the upper Waitaki River hydro development (*Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268).
- This decision was recently considered by the High Court in *Southern Alps Air Ltd v Queenstown Lakes District Council* (17/7/07, Pankhurst J, HC Wellington, CIV-2007-485-134) which concerned an application for a commercial jet boat operation in the Makarora River catchment where another jet boat company was already operating. This decision provides some useful commentary on competing resource consents and the principle of non-derogation:
 - To amount to derogation there must be a substantial interference with the rights of another. It is not correct to say that any subtraction from the rights of another is sufficient.
 - The interference must go to the substance of the right which has been granted, not merely the convenience or enjoyment of its exercise.
 - The interference must be assessed by reference to the rights conferred by the resource consent, and not a situation which may have been enjoyed by chance or circumstance.
- On the subject of multiple applications for a limited resource, the council and the Courts have to deal with such applications in turn and on their merits, not compare them as claims for the same resource (*Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 CA). The applicant with the application first ready for notification is in fact the application which is first in time and should be first served (*Geotherm Group Ltd v Waikato RC* [2004] NZRMA 1HC).

Module 10 – Conditions and Reasons

- The Court has previously held that consent conditions must relate to the activity the consent has been applied for and be relevant to the implementation of planning policy and the purposes of the RMA. Conditions that are not fairly and reasonably related to the needs of a proposal are invalid; see *Ferguson v Far North District Council* [1999] NZRMA 238 (Environment Court).
- Although the consent conditions must be related to the proposal, they are not required to be for the exclusive purpose of ameliorating its effects. The Supreme Court decision in *Waitakere City Council v Estate Homes Limited* [2007] NZRMA 137 rejected the suggestion that there must be a causal link between conditions and effects of the proposal, and stated:
[64] ... We see nothing, however, in the requirement under s104 to have regard to effects on the environment that would restrict imposition of conditions of consent to circumstances where they ameliorate the effects of the proposed development. Such a narrow approach would be contrary to the breadth with which the power under s108(2)(c) to impose conditions is expressed.
- The Supreme Court went on to clarify that what is required is simply that the conditions be logically connected to the development and not relating to external or ulterior concerns. However the Environment Court has since held that notwithstanding the Supreme Court's decision, there is still nothing to prevent a direct causal link being required by the terms of the plan itself between the proposal and a condition (*McNally v Manukau CC* W019/07).
- See *Transit New Zealand v Southland District Council* (C42/06), *Davidson v Otago RC* (C003/07), and *Morgan v Whangarei CC* (A021/07) for further Court perspectives on the validity of certain conditions.

A JUDGE'S PERSPECTIVE

Principal Environment Court Judge John Bollard was a keynote speaker at this year's New Zealand Planning Institute Conference in Palmerston North. His paper *Politics and Planning: The Independence of the Environment Court* contains an interesting perspective from a pinnacle of decision-making in New Zealand, so to speak. In referring to the Programme, Judge Bollard said:

The impetus towards higher standards at the ground floor is all to the good. When accomplished commissioners have already heard a matter at the council stage and delivered a well-constructed decision to which the Environment Court must have regard, the Court's task becomes relatively straightforward should it find itself basically in agreement with the earlier decision for reasons already encapsulated. Should the Court dissent on the other hand, it is necessary and proper, in deference to the prior cogent assessment, that the basis for the differing result be clearly explained.

The Judge goes on to offer solace to local decision-makers, where their decisions are overturned by the Court:

In some cases the varied outcome will be attributable to ameliorating changes to a proposal suggested, or agreed to, by an initially unsuccessful applicant. In others the pivotal factor will simply rest on the persuasiveness of the evidence adduced on appeal.

WEIGHING EVIDENCE FROM ENGINEERS

You may be faced in hearings with having to weigh contradictory evidence from expert witnesses, such as engineers. The Chartered Professional Engineers of New Zealand Act 2002 introduced the title "Chartered Professional Engineer" (CPEng) as a protected quality mark along with a register of those engineers who met the CPEng competence standard. The Act also made the Institution of Professional Engineers New Zealand (IPENZ) the registration authority with responsibility for conducting assessments for entry onto (and continuation on) the CPEng register, as well as managing a complaints and disciplinary process. For more information on CPEng, go to www.ipenz.org.nz/ipenz/finding/cpeng/search/search.cfm

ANOTHER AWARD

The Making Good Decisions programme can add another trophy to its display cabinet. The University Continuing Education Association (a US-based organisation representing most educational institutions in North America and the Pacific) has given its 'outstanding' regional award for a non-credit course to the programme. The award reflects the dedication and commitment of those who work to develop, present and facilitate the course. The award is proudly held by Susan Geertshuis, Director, and Libby Passau, Programme Manager, from the University of Auckland's Centre for Continuing Education. They are accompanied by (left, next to Susan) Craig Mallett, Manager and (right) Mark Leggett, Senior Adviser, from the Ministry for the Environment.



RELEVANT RMA PUBLICATIONS

In your role, you'll no doubt often be asked to explain the RMA to someone. In the last **Decision-maker**, we let you know about a couple of publications you can make available to inexperienced people who attend hearings. Those pamphlets are part of a larger series of guidance on the RMA published by the Ministry and aimed at the general public. The Ministry has also produced a light-hearted, interactive CD-ROM on the RMA. These publications are available free of charge and can be ordered from the Ministry's website. Go to www.mfe.govt.nz/publications/rma/everyday/cd.html and www.mfe.govt.nz/publications/rma/everyday/index.html

You can also refer people to a free phone and email service on the RMA. Suggest they call 0800 RMA INFO (0800 762 4636) or email rmainfo@mfe.govt.nz

Other organisations have a range of RMA-related guidance:

- Environmental and Conservation Organisations of Aotearoa www.rmalink.org.nz/index.php
- Environmental Defence Society www.eds.org.nz/rma/index.cfm
- Royal Forest & Bird Protection Society www.forestandbird.org.nz/rm/BreakingDownBarriers_2005.pdf

MORE INFORMATION

To enrol for training and certification under the Programme: Libby Passau, Centre for Continuing Education, Auckland University, phone (09) 373 7599 x 88532 or email l.passau@auckland.ac.nz

For general enquiries about the Programme: Mark Leggett, Ministry for the Environment, phone (09) 985 4811 or email mark.leggett@mfe.govt.nz

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