



THE DECISION-MAKER

OCTOBER 2010

A NEWSLETTER FOR MAKING GOOD DECISIONS PROGRAMME CERTIFICATE HOLDERS

Welcome to the ninth edition of The Decision-maker, the Ministry for the Environment's newsletter for certified RMA decision-makers. This newsletter provides guidance on issues you face as a decision-maker, tells you about future training opportunities and shares the perspectives of others actively involved in making decisions.

In this edition:

- MGD wins another award
- Māori values and world views integration in to the MGD programme
- Urgent legislation to help Canterbury recovery
- Permitted base line and existing use rights
- Best practice example of conflict of interest
- Opportunities for further specialised training.

FOR THE LATEST MGD COURSES

Check out the Centre for Continuing Education's website below for information on the next round of MGD foundation and re-certification courses: <http://www.cce.auckland.ac.nz/uoa/rmakinggooddecisions>

MGD WINS ANOTHER AWARD!

Susan Geertshuis's paper entitled "Improving decision making for sustainability: a case study from New Zealand" published in the International Journal of Sustainability in Higher Education was chosen as a Highly Commended Paper at the Literati Network Awards for Excellence 2010. Susan is the University of Auckland's Director of our MGD programme and this award helps raise the profile of the MGD programme at an international level.

MĀORI VALUES AND WORLD VIEWS INTEGRATION INTO THE MGD PROGRAMME

The MGD programme is committed to integrating Māori values and world views in resource management decision-making. Decision-making roles are being actively sought through Treaty Settlements, new entities such as the Auckland Council and the Environmental Protection Authority, water governance, and under the RMA generally. Joint management agreements and other statutory provisions for Māori to be part of decision-making under the RMA are now seen as likely to become increasingly common in the near future.

As Māori become more involved in decision-making, it is essential to develop other decision-makers' knowledge of Māori values and how to integrate these values into decision-making. It is also critical there is wider capacity building for those advising decision-makers to ensure they have increased knowledge of Māori values. Consequently, there is a need to upskill other decision-makers (non-Māori) on Māori values and worldviews.

The Ministry has recently completed a Māori Values and World Views supplement to the MGD foundation course and is working on integrating it into the re-certification courses. This supplement will help decision-makers to better incorporate Māori values and world views into decision-making and improve the quality of resource management decisions.

The Ministry has partnered with Te Puni Kōkiri (Ministry for Māori Development) and the NZPI to deliver a series of training courses entitled 'Māori Values and World Views in Resource Management'. The courses are organised by the NZPI and aim to attract a mix of decision-makers and RMA practitioners with an interest in learning about Māori values and world views in resource management. The courses will be held throughout November in a variety of locations. See www.planning.org.nz for details.

URGENT LEGISLATION TO HELP CANTERBURY RECOVERY

The Government has passed legislation to facilitate earthquake recovery work in Canterbury. Gerry Brownlee, the Minister responsible for coordinating the Government's recovery response to the earthquake, believes the Building Act, Local Government Act and Resource Management Act were not designed for the special circumstances that Canterbury now faces.

"We don't want recovery work being slowed or stopped by filling out paper work. That is why the Government is introducing the Canterbury Earthquake Response and Recovery Bill to allow a seamless transition from the state of emergency," Mr Brownlee said.

The temporary legislation will expire no later than 1 April 2012 and will exempt or relax legislation as it applies to the emergency and recovery response.

The legislation enables the Government to use orders-in-council to ensure recovery operations can occur efficiently and without delay. It creates the Canterbury Earthquake Recovery Commission that includes the mayors of the three worst-hit districts – Christchurch, Waimakariri and Selwyn. This Commission will link decision-makers on the ground in Canterbury directly with government Ministers.

This legislation has been used to create several Orders in Council including the Canterbury Earthquake (Resource Management Act) Order 2010. The Order extends the timelines required for the application, renewal, and processing of resource consents and plan changes and removes the requirement for councils to pay a discount for the late processing of resource consents until 1 July 2011.

PERMITTED BASE LINE AND EXISTING USE RIGHTS

There appears to have been some confusion regarding the definitions and relationships between the concepts of 'permitted baseline', 'existing environment' and 'existing use rights'. This article aims to clarify this.

When consent authorities decide whether or not to grant a resource consent, they must consider the actual and potential effects of the proposed activity on the environment.

Sections 95D(1)(b) and 95E(2)(a) of the Resource Management Act (RMA) provide that when determining the extent of the adverse effects of an activity or the effects on a person, a council 'may disregard an adverse effect if a rule or national environmental standard permits an activity with that effect'. This is the permitted activity baseline:

- the permitted activity baseline applies to consideration of both who is affected and whether effects are, or are likely to be, minor
- if a council applies the baseline, only the adverse effects that are **over and above** those that form the baseline are relevant when considering who is affected and whether effects are, or are likely to be, minor.

It is the council's discretion whether to use the permitted baseline as the basis for assessing effects and identifying affected parties.

The purpose of the permitted baseline test is to isolate the adverse effects on the environment and make them irrelevant if an activity with those effects is permitted by the plan, or already has a resource consent. When applying the permitted baseline test these adverse effects cannot then be taken into account when assessing the effects of a resource consent application (*Queenstown Lakes District Council v Hawthorn Estate Limited* (Court of Appeal, CA45/05, 12 June 2006, William Young P, Robertson and Cooper JJ). The baseline has been defined by case law as comprising the 'existing environment' and non-fanciful (credible) activities that would be permitted as of right by the plan in question.

The Permitted Baseline and the Receiving Environment

The Court of Appeal in the *Hawthorn* case (above) confirmed the distinction between the permitted baseline analysis and the analysis of the receiving environment:

- the **permitted baseline** applies to permitted activities on the subject site and removes the effects of those activities from consideration when assessing resource consents
- the **receiving environment** (beyond the subject site) is the environment upon which a proposed activity might have effects. The Environment Court in *Eyres Eco-Park v Rodney District Council* (A147/04) suggested that existing use rights are part of the environment.

‘Existing use rights’

Section 10 of the RMA states that land may be used in a manner that contravenes a rule in a district plan and proposed district plan if the use was lawfully established before the proposed plan was notified. This is known as an ‘existing use’ activity.

An existing use certificate is a legal document that may be issued by the council to formally certify that an activity or a structure has ‘existing use rights’.

Assessing the ‘Future State’ of the Environment

It is permissible (and often desirable or necessary) to consider the **future** state of the environment upon which effects will occur, including:

- the future state of the environment as it might be modified by permitted activities
- the environment as it might be modified by implementing resource consents that have already been granted at the time a particular application is being considered, where it appears likely that those resource consents will be implemented

but not

- the environment as it might be modified by implementing future resource consent applications (because these are too speculative).

The ‘environment’ upon which effects should be assessed is therefore the existing and reasonably foreseeable future environment. In identifying the environment, a council should consider the environment as it is at the time of the application. It should also consider the likelihood of change to that environment in the future, based upon the activities that could be carried out as permitted activities and under resource consents that have been granted (where it is likely that they will be given effect to).

When applying the permitted baseline test, a council should first ask what permitted activities would be credible (as opposed to fanciful).

Points to consider:

- Section 87A(1) states that an activity permitted by regulations (including any national environmental standard), a plan, or a proposed plan does not require a resource consent. Section 95D(b) and s95E(2)(a) state that adverse effects can be disregarded if permitted by a national environmental standard or a rule. This refers to rules that have either taken legal effect in accordance with section 86B, or have become operative under section 86F
- ‘permitted by the plan’ does not include controlled or restricted discretionary activities. It is unclear whether the permitted baseline includes activities already occurring on the site as a result of existing consents.

Situations where applying the baseline may not be appropriate include:

- where the application of the baseline would be inconsistent with Part 2 of the RMA (see *Kapiti Environmental Action Inc v Kapiti Coast District Council* [2002] NZRMA 289)
- where the baseline claimed by the applicant is fanciful or not credible
- where the application of the baseline would be inconsistent with objectives and policies in the plan
- applying the permitted baseline in relation to controlled activities.

BEST PRACTICE EXAMPLE OF A CONFLICT OF INTEREST

Earlier this year, Environment Judge J E Borthwick set an example of best practice when faced with the potential for a conflict of interest when sitting on a case or appeal.

Judge Borthwick removed herself from hearing an appeal because she believed there was a risk that her directions might be perceived as biased due to a potential conflict of interest between herself and Christchurch International Airport Limited (CIAL).

When CIAL made an application Judge Borthwick excused herself from hearing the appeal on the grounds that, in 2005, she acted as counsel against CIAL in a matter that raised the same, or fundamentally similar, core issues. To support the application, CIAL pursued an order that confidential and/or without prejudice correspondence during the 2005 proceedings be placed before the Court. However, this correspondence was considered privileged communication and Judge Borthwick did not have the jurisdiction to make the order, and could not place it before the Court.

Judge Borthwick considered CIAL's claim of the alignment of subject matter between the appeal and the former client's proceedings as border line. However, Judge Borthwick believed that 'more importantly, the potential for the appearance of bias may not be able to be dispelled' if the information that CIAL claimed as relevant could not be brought forward.

For these reasons, Judge Borthwick excused herself from the proceedings and transferred it to Judge Jackson to administer.

OPPORTUNITIES FOR FUTHER SPECIALISED TRAINING

Māori Values and World Views in Resource Management – Auckland, 4 November; Wellington, 10 November; Rotorua, 17 November; and Whangarei, 24 November.

This workshop draws on the material in the Māori Values and World Views Supplement to the MGD Programme and is designed for all types of practitioners under the RMA, including planners at all levels (both public and private sector), decision-makers and those involved in advising councils. It will also be relevant for applicants and submitters. The day will involve presentations, discussions and exercises aimed at improving knowledge of Māori values and world views and how to incorporate these into resource management decision-making and practice. This will be supported by the knowledge of tikanga Māori from a local iwi representative/Māori commissioner experienced in resource management.

Further information:

www.planning.org.nz

SOLGM Opus Business School – *Who's Afraid of the RMA?* 19 November, Wellington.

This one-day training programme is designed to meet the needs of anyone who wants a basic understanding of the RMA. This is good preparation for those who have little prior knowledge or experience of the RMA but who wish to undertake Making Good Decisions training.

Further information:

http://www.solgm.org.nz/tools/events/details.aspx?SECT=Business_School_Events&ID=213

Centre for Continuing Education, University of Auckland – *Writing Good Resource Management Decisions* – a workshop for councillors, independent commissioners and RMA practitioners. Wellington, 8 October; Christchurch, 15 October; Auckland, 5 November.

A one-day course to examine the features of well-reasoned and well-written decisions and learn how to:

- write a clear decision that conforms to the requirements of the RMA and the needs of both the professional and lay audience
- organise large amounts of complex material into an appropriate format
- clearly communicate the reasoning behind the decision.

Further information can be found at the following website:

<http://www.cce.auckland.ac.nz/uoa/rmaputtingthermaintopractice>

Local Government Online – Te Mātāpuna Conference – *Nā Kohuki, ko wheriko whakamua – Reflect on the past to glimpse the future.* 11–13 November 2010, Hawke's Bay Opera House, Hastings.

What does the RMA Amendment Act mean now for Māori? How can councils better help iwi through their Treaty negotiations? If hapu in your area are now involved in their Treaty settlement process, or have recently settled, then your key elected members and staff may benefit from attending Te Mātāpuna 2010. The conference will also add value through sharing and listening to presentations from officers who are engaged with Māori in current work programmes.

Further information:

http://www.localgovt.co.nz/site/LGOL/Events/Te_Matapuna_Conference_13_Nov.aspx

MORE INFORMATION

To enrol for training and certification under the Programme: contact Petteenae McOnie, Centre for Continuing Education, Auckland University, phone (09) 373 7599 x 89695 or email p.mconie@auckland.ac.nz

For general enquiries about the Programme: contact Julian Jackson, phone (04) 439 7486 or email julian.jackson@mfe.govt.nz

For enquiries about the Programme review: contact Sarah Myhill, phone (04) 439 7449 or email sarah.myhill@mfe.govt.nz

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