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Committee Regulatory Committee
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Report to the Regulatory Committee on the RMLA Conference 2008 at Dunedin

1. Purpose

To provide a summary of proceedings at the RMLA Conference held on 25 – 27 September 2008.

2. Summary

Another good conference with plenty of thought provoking speakers and covering issues we will be grappling with as we go through the RPS and Plan review process.

Professor Joseph Sax from California has taught environmental law, public land law, water law and property rights at Berkley since 1962.

His paper focussed on the question of water management and the need for property-like entitlements to create a predictable supply flexible enough to meet both public and private demand. He acknowledged the potential conflict of each group's needs and the conflict that exists between public rights such as fishing and biota needs, customary rights and recreation rights but says these rights do not abolish private rights.

He concluded that water can be neither fully public nor fully private, that uncertainty of supply is always a factor which needs to be built into granting of users rights, and those rights should not be long term, they should be renewable on a regular basis. He stressed the need for efficiency gains and effective re-allocation particularly for those areas where demand already or will in the future outstrip supply. He advocated for a water market to be developed, after initially auctioning water to set its value, then it can be transferred to higher value economic uses. Enough water should be kept available for public uses and its quality safeguarded, then ordinary economic activities can be allowed. People could put unused water into a water bank, or there could be an environmental water bank for emergencies, or a % of all consents could be required to be available if necessary. Only the used water take is traded, not what was consented.

He urged planners not to rely solely on large scale planning but to use smaller incentives in tandem and to set percentage reduction targets under certain conditions such as in a low supply year along with efficiency incentives – the less you use the less you pay. A use it or lose it system should be in place so that there is an automatic reduction in allocation when water is not used.

But the gem for me was his comment that statistics show there is a 25 per cent reduction in usage when water metering is in place!!

Dr Suzi Kerr, Director and Senior Fellow of Motu Economic and Public Policy Research talked about the Rotorua catchment and the issues around nutrient impacts on its quality.

She explained how a nutrient trading system can achieve cost effective nutrient loss reductions by defining environmental targets, ensuring participation by those in the catchment, and the use of monitoring and verification processes to get the desired outcomes.

Some words of advice to those setting up such a system were:

- Don't allocate all allowances immediately
- Educate, educate, educate!
- Limit the proportions based on vintage usage
- Limit the allowance ownership to those who own property in the catchment

Justice John Fogarty, High Court was an excellent speaker – entertaining AND informative! He highlighted difficulties that all planners and commissioners encounter from time to time where a value judgement is required when assessing standards set down in the regulatory statutes. Value judgements are inevitable but he pointed out that in applying value judgements to any standards it is essential that the ethics and morals contained in the standards should be applied, not the adjudicator's own values. As he said, it's not what the government or authority meant that is the issue but rather what the words say. He is of the opinion that certainty of decision cannot be the goal but rather that consistency should be. He stressed that carefully establishing the "findings of fact" during the decision-making process promotes the appropriate selection of values which will guide decision making and provide consistency.

Judge Laurie Newhook, an Environment Court Judge since 2001 discussed the place of climate change and its effects in decision making under the RMA (which he described as a stature with Multiple Personality Disorder and no coherent ethic, so values have to be applied). He noted that since the 2004 amendments (which included efficiency of the end use of energy, the effects of climate change and the benefits to be derived from use and development of

renewable energy) the court has placed strong emphasis on the benefits when approving infrastructural proposals based on renewable sources. He also noted that the issue of the new S104E (relating to the discharge of greenhouse gases) and the legal arguments around the *Genesis Power v Greenpeace NZ Inc* (2007) has not yet been released by the Supreme Court. There is no doubt it will influence the interpretation of S 104E.

Professor Alexander Gillespie, Professor of Law at Waikato, spoke about recognising and saving the most important places in the world. There are 102,000 protected areas in the world, covering 12.6% of the earth's surface. They are protected for their aesthetic, cultural, ethical, scientific, habitat and economic value but are the Cinderella of environmental policy. Many, e.g. parks, are just 'paper parks'. They are facing more risks than ever before – governments can't afford to maintain them, perverse economic incentives, damage from tourism, alien species, mega-projects like dams and global warming.

Professor Hans Schreier, Canadian Professor at the Institute of Resources and Environment in British Columbia, gave a fascinating presentation about emerging water challenges as a result of increased climatic variability, land use intensification and energy supply concerns. These factors are resulting in more extreme events, greater hydrologic variability and water shortages. Every industry should have a water footprint. 70% of water is used for agriculture, which is the largest contributor to non-point sources of pollution – and demand will increase as food production needs to increase by 50% over the next 30 years. Water is also needed for mining, recreation, forestry and urban expansion. We need to look at the combination of impacts – each use shifts hydrological cycle. Land use change is having a greater impact on water than climate, but the two together are synergistic.

A paradigm shift is needed in the way water is managed – source-water protection, water demand management, conservation and rehabilitation can only be achieved through major changes in human behaviour, incentive programmes and new legal frameworks. For example, to manage urbanisation the following initiatives are needed: keep rain on site through green roofs, collecting water in tanks, etc; grass verged driveways, retain topsoil; plant trees; in new subdivisions have no kerbs, all filtered pervious pavements and roads, drain parking areas into soil areas, have big buffer zones and natural channels. Other solutions for agriculture and other industries were outlined.

John Haydon and Janet Crawford discussed environmental conflict resolution through negotiated rulemaking and other third party facilitation methods. John is an Australian environmental lawyer and Janet has a Masters in Public Administration – both specialise in mediation. Both are involved in the Environmental Law Roundtable of Australia and New Zealand which promotes the use on consensus building techniques for establishing common ground to develop policy or resolve a conflict. This allows public interest disputes to be resolved without fully contested court hearings which will:

- Encourage greater use of mediation and other ECR techniques

- Provide early meaningful chance to be heard because public participation is important (use a 3rd party facilitator)
- Avoid disputes through information sharing and consensus building at the planning process
- Develop pre-litigation ECR further through the recognition of the importance of the neutral third party (at public meetings officers should listen, not talk)
- Improve participation in plan making processes by consensus building and dialogue
- Increase opportunities for dialogue during processing of RM applications – need to know what people are prepared to live with.

Councillor Baber attended a workshop session with Dr Mike Fitzpatrick, an environmental and analytical chemist with considerable experience in investigation and evaluation of water quality. While this was a specialist workshop there was one clear message – when it comes to water quality trigger values for assessing heavy metals the USEPA guidelines should be used – not the ANZECC, but the ANZECC are okay for nutrients.

She also attended a workshop on case law and best practice updates with Helen Atkins of Phillips Fox. Unfortunately it was very long and she raced through which made it difficult to follow. For those who have recently completed MGD qualification, much of her material was covered in that.

Councillor Donaldson attended a workshop on environmental compensation and biodiversity offsets with Mark Christenson, environmental lawyer with Anderson Lloyd, and Dr Susan Walker, ecologist with CRI Landcare Research. Mark claims that Sec 6 (c) of the RMA is overrated and not working – there has been no improvement in biodiversity in the last 10 years.

The benefits of biodiversity offsets are:

- For business, getting projects done
- For Government, getting the conservation outcome at less cost, development of wind and energy projects
- For conservation – will increase funding available, integrate business and biodiversity planning.

The challenges include inappropriate projects, lack of additionality, cost of shifting, leakage, implementation capacity and quantification and design.

Examples given were:

- NSW Threatened Species Conservation Amendment (Biodiversity Banking) Act 2006 – 2 year trial, offsets purchased from a central register, detailed methodology of how to assess offsets in regulation
- Victoria – based on assessment of habitat/hectares against a benchmark

- Business and Biodiversity Programme (BBOP) – best practice principles being developed such as no net loss and preferably net gain, adherence to mitigation hierarchy (avoided, mitigated, remedied, offsets as last resort only for residual non-managed effects), landscape context, stakeholder participation, equity, long term success, and transparency.

Some things can't be offset, e.g. landscape. If the project is unlike the original, it becomes compensation.

Suggested that a National Environmental Standard is needed to get it out of the adversarial process – should cover which activities are subject to offset requirements, methodology, certification, and security/bonding.

Susan Walker was negative about such a system. Biodiversity trading has been in USA since 1960s – outcome has been that development proceeds while compensatory offsets fall short or don't occur. Any trading scheme needs currency, exchange and review adequacy. This is easy to do with a simple pollutant, e.g. SO₂, CO₂, but biodiversity has no simple currency. Simple, mobile ecosystems can be done – salt marshes, coastal dunes, young kanuka/matapouri shrubland, but not primary and post-settlement ecosystems, e.g. forest, limestone pavement, tussock grassland, most wetland types. Effects can be modified, rehabilitated or enhanced, but not replaced, e.g. giant snails. She suggested the destroy now/ restore later model is not credible, and other administrative and price mechanism tools may be more useful.

Councillor Donaldson also attended a workshop on sustainable building led by Lois Easton, Research Team Leader for Beacon Pathway Limited, a sustainable housing research consortium. Beacon has built two new NOW Homes and done nine NOW home renovations. They have demonstrated that using current technology and for average prices, significantly higher quality, healthier and more resource efficient housing is able to be developed.

Prior to the conference, two special interest group meetings were held. Councillor Baber attended the one on national RMA instruments and call-ins. Councillor Donaldson attended the one on climate change, which covered detailed discussion on key findings on the effects of climate change, possible mitigations, Labour and National climate policies, and the ETS trading scheme.

At the end of the conference, both councillors were on the Trains and Plains excursion on the Taieri Gorge Railway.

Former regional councillor Euan Mc Queen was also aboard doing a safety evaluation check – which was reassuring!!! The trip took 4 hours through an amazing range of geological backdrops on a very cold day.

3. Recommendations

That the Committee:

- 1. **Receives the report; and***
- 2. **Notes the contents.***

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