

Responsible and Inclusive Environmental Management and Due Process

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PRESENTER

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Due process – fundamental principle of fairness

Inclusiveness:

- above and beyond the bottom line of “due process”
- consultation
- public participation

Snapshots - RMA

- Legislation
- National Policy Statements (NPS) and National Environmental Standards (NES)
- Plans, plan changes and resource consents

Snapshots - other

- Conservation Act
- Managing our Oceans

Special Legislation

- Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 “Ecan Act”
- Canterbury Earthquake Response and Recovery Act 2011

The Ecan Act

- 31 March 2010 in less than 48 hours under urgency
- Changed legal tests mid process, with no right to be reheard
- Intervened directly in Environment Court proceedings
- New legal tests for WCOs and Plans, and no rights of Appeal to the Environment Court. Presentation of evidence restricted
- Statutory weight to the non statutory Canterbury Water Management Strategy
- Ability to impose moratoria

Ecan Act – the outcome 2 years later

- Hurunui – no WCO, no regional plan, numerous consents on hold under the moratoria
- Regional Plan hearing – on-going delays
- RPS as it relates to urban development – overtaken by earthquake related issues
- Reviewed RPS notified for submissions August 2011. hearing held. Decision pending. Rights of Appeal to High Court only.

CERRA

- Minister through “Order in Council” may change statute to achieve broadly defined ends. Not subject to Judicial Review. Full legislative force. Orders in Council to date:
- Historic Places Act, Local Government Act, Resource Management Act and others

National Policy Statements

- NPS for Freshwater Management 2011
- Proposed NPS on Indigenous Biodiversity

Proposed National Policy Statement for Freshwater Management

- Notified for public submissions August 2008
- Board of Inquiry hearings
- Report and recommendations January 2010
- On hold until July 2011

Proposed National Policy Statement on Indigenous Biodiversity

- Submissions closed 2 May 2011
- No Board of Inquiry

National Environmental Standards

- s 43 – technical standards, methods, requirements
- Status of Regulations
- Section 44 process – notification required. Process at the Minister's discretion.
- Recent examples – Air Quality, Contaminated Soil

Plans, plan changes, resource consents

- Ability to hide behind “due process”
 - Further information requests
 - extending statutory timeframes

Plans and plan changes

- Councils' duty to consult

- *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council*, CIV 2009-419-1712

- CI3 (1) (d) Schedule 1 Council required to consult tangata whenua

- (1) During the preparation of a proposed policy statement or plan, the local authority concerned shall consult—
 - (a) The Minister for the Environment; and
 - (b) Those other Ministers of the Crown who may be affected by the policy statement or plan; and
 - (c) Local authorities who may be so affected; and
 - (d) The tangata whenua of the area who may be so affected, through iwi authorities ...[; and]
 - [(e) any customary marine title group in the area.

Resource consents

- Changed presumption to “notify, unless...”
- Now publicly notify if:
 - Activity will have or is likely to have adverse effects on the environment that are more than minor
 - The application requests notification
 - An NES requires notification

Conservation Act - concession

- Case Studies – Tunneling and monorailing through Te Wahipounamu World Heritage Area, conservation land and the Fiordland National Park.
- 2 issues:
 - The process
 - The weight being given to upholding management plans

Conservation Act – the process

- S 49 (3) – discretion to determine procedure at any hearing – ability to ensure process fair, comprehensive and conducive to providing best information to the decision maker.
- No rights of appeal – judicial review only. Evidence not tested.
- Significant public interest. Complex and hard to access application information. No notice given of response to issues raised in submissions.
- Process complied with “due process” at a minimum

Conservation Act – management plans

- Concern – indication that the Minister's discretion is not fettered by management plans.
- Management Plans undergone extensive public process. If not to be complied with, what was the point?

Managing our Oceans

- Discussion document on the Regulations proposed under the Exclusive Economic Zone and Continental Shelf (Environment Effects) Bill