



August 2010

Envirolink

The development of interesting environmental policy continues in this mid-election cycle. We understand that in the next few weeks Cabinet will consider whether to approve a proposal for a national environmental standard that would provide standard planning rules benefiting the forestry sector (if that occurs then there will be opportunity for comment). There is also a discussion document which seeks to review the existing national environmental standards regarding air quality. We expect a Bill on the Government's approach to the Foreshore and Seabed this month – a topic that is likely to have a significant effect on property rights and approaches to resource consents (see our July edition of [Envirolink](#)). Further, a Bill to regulate activities on the continental shelf appears to be evolving and is expected by the end of the year. We also understand that work is well underway on the policy justifications to extend the role of the Environment Protection Agency (EPA). With Environment Minister, Nick Smith, targeting the regional council in Taranaki recently the approach has been similar to that taken in relation to the regional council in Canterbury, albeit with less justification. It seems the future role of the EPA in regional matters is still evolving. We predict that the EPA in future will play a significant part in New Zealand's environmental regulatory environment.

However, most of those matters are still works in progress – we will update you on them as more information becomes available. This month's **Envirolink** is a bit of a mixed bag. We look at the latest developments as we head towards a unified Auckland Council and provide a brief update on the alcohol law reform process, which has been an extremely hot topic of late. In terms of case law we address the recent sentencing of URS for its involvement in a petrol leak, and consider the first case on direct referral to the Environment Court. We also consider the Parliamentary Commissioner for the Environment's interesting report on the state of biofuel use in New Zealand.

Structure approved for Auckland's new Council Controlled Organisations

As the date when the 'Super City' will become a reality draws nearer, work continues toward putting appropriate structures in place. Cabinet has recently endorsed the Auckland Transition Agency's recommendations on the division of responsibilities between the new Council Controlled Organisations (CCOs) which will be set up under the Auckland Council (Council).

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Fourteen existing CCOs will be disestablished to make way for six new CCOs. The new CCOs will consolidate the existing functions and assets of the current CCOs and other council bodies:

- **Auckland Council Investments Limited** will become the owner of the Council's major investment assets and will manage the Council's investment portfolio
- **Auckland Tourism, Events, and Economic Development Limited** will manage Council tourism, events, and economic development activities
- **Regional Facilities Auckland** will manage and develop the Council's heritage, leisure, sport, and entertainment venues and will manage affiliations with related entities
- **Auckland Council Property Limited** will replace existing property management CCOs, and will focus on managing commercial property with a view to ensuring an appropriate return
- **Auckland Waterfront Development Agency** will replace existing waterfront entities and manage the ongoing development of the waterfront and completion of existing projects associated with the Rugby World Cup
- **Auckland Transport** will be created as a new statutory entity taking over the responsibilities currently exercised by the Auckland Regional Transport Authority.

In addition, Watercare will be expanded and will directly supply water services to the entire Auckland region from 1 November 2010, although it will not become a full CCO until 2015.

There is still significant detail to be confirmed about the new CCOs, including their formal objectives and board structures. These details will be finalised when the new CCOs are established through Orders in Council.

Announcement on alcohol law reform expected shortly

The Prime Minister has told the media that an announcement on the Government's proposed alcohol law reform can be expected in the next few weeks. The Government has been considering a Law Commission report released in April this year (see our [April 2010](#) edition for an overview of the report) which recommended sweeping changes to New Zealand's alcohol law.

Alcohol and liquor law issues and their relationship to alcohol related harm have received widespread attention over the last few months. It will be interesting to see which of the Law Commission's 153 recommendations, which it hoped would form a blueprint for reducing alcohol related harm in New Zealand, will be adopted by the Government. We will keep you updated as the Government releases its proposals.

Record fine imposed on companies for petrol station leak

The District Court recently ordered four companies to pay a record fine to the Auckland Regional Council (**ARC**) for their role in a leak of 10,000 litres of fuel from a petrol station in 2007. The companies, URS New Zealand, Brown Brothers, Gasoline Alley Services and Fuelquip have been fined \$160,000 and ordered to pay costs of \$80,000. The Court also ordered further investigations to determine the extent of any remaining contamination and further remediation if required. The judge estimated that further remedial work could cost in the region of \$200,000.

The substantive High Court decision in this matter confirmed that a party that contributed to the cause of a discharge can be found liable for that discharge, even if the discharge occurs after the party no longer has control of operations and if the actions of other parties also contributed to the discharge. This decision has ramifications for environmental consultants who may be held liable in relation to premises they have vacated and in circumstances where they no longer control operations.

Operators may need to consider introducing measures to mitigate any potential liability. This could include becoming increasingly selective around engaging contractors, and ensuring that any contractors engaged are held to the highest standards. Other measures may include increasing the level of documentation required to ensure proper processes have been adhered to, and ensuring that appropriate and sufficient checks have been undertaken before an operator exits a site.

Please contact us if you would like to discuss what measures you could take to mitigate your risk.

Council costs recoverable on direct referral to Environment Court

In June 2010 land use consent was granted to the first application directly referred to the Environment Court under the new streamlined processes. The application was for consent to establish a supermarket and retail shops in Warkworth. In July the Court released its decision on costs, *Progressive Enterprises Limited v Rodney District Council* [2010] NZEnvC 232, and in doing so has made it clear that in bypassing a Council hearing and heading directly to the Court an applicant will not necessarily avoid paying the Council's costs for its involvement in the Court process.

In its decision, the Court has clarified that costs payable by an applicant to the Crown for hearing Environment Court appeals is not limited to the costs for hearing time. The Court's costs and expenses can generally be categorised into three components:

- Preliminary stages; including Court processing time, directions, pre-hearing conferences and pre-reading of evidence

- The substantive hearing costs. This may be assessed either on the actual number of sitting days, or if the circumstances warrant it, on the number of days the Court has set aside for the hearing, even if not all the days are used. In light of the Court's comments, care will need to be taken in updating estimates as a matter progresses and the issues are narrowed
- Time for the Court to prepare and issue a decision.

As for the Council's costs, the Court noted that the Council has an obligation under the RMA to process the application up to the point of its decision on direct referral and, if it grants the request, to prepare a report on the application. The report can include consideration of the activity's effects on the environment and any suggested conditions it considers should be imposed if consent is granted. These costs are recoverable from the applicant (in this case they amounted to \$30,000). However, the costs provisions in the RMA do not specifically provide for the Council to recover its costs of continuing to be involved in the process after provision of a report. There is nevertheless a general ability for the Court to award any other party costs it considers reasonable.

In this case the Court relied on its general powers to award costs and considered it appropriate that the applicant should make a contribution to the Council's costs of preparing for and attending the hearing. A figure of \$22,000 was agreed between the parties to be reasonable.

This decision provides valuable guidance on how the Court may approach and calculate costs in future direct referral cases. Although there is no specific provision in the Act that the Council's costs of preparation for and attending a direct referral hearing are recoverable, the Court may still award the Council a reasonable contribution to its costs.

Refocus on biofuels needed says PCE

The Parliamentary Commissioner for the Environment (**PCE**) seeks to reignite the debate on biofuels with the recent release of a report which aims to "take a fresh look at biofuels". The report, entitled "Some biofuels are better than others: thinking strategically about biofuels", assesses the current use of biofuels in New Zealand and considers how this can be improved so that biofuels can lessen our dependence on fossil fuels and reduce our greenhouse gas emissions. It concludes that today's biofuels have limited prospects, and that if biofuels are to play a significant role, it will need to be in the form of biodiesel made from wood.

The report was motivated by the PCE's analysis of two recent parliamentary bills which focused on biofuels: the Biofuel Bill in 2008 and the Sustainable Biofuel Bill in 2009.

The Biofuel Bill sought to establish a biofuels sales obligation, whereby a percentage of all petrol and diesel sold would have to be biofuel, and penalties would be payable if the

obligation was not met (refer to the **June 2008** and **September 2008** editions of Envirolink). The PCE did not support this Bill, arguing that it did not distinguish between 'good' and 'bad' biofuels (that is biofuels that benefit the environment compared with biofuels which, overall, have a detrimental effect on the environment), and that either could be used to meet the obligation. Sustainability principles were incorporated into the Bill to address these concerns and an amended Bill became law in September 2008. However, the Act was short lived, with the new National Government swiftly repealing it three months later.

The Sustainable Biofuel Bill, introduced as a private member's bill in 2009, sought to ensure that all biofuels sold in New Zealand would meet the sustainability criteria incorporated into the earlier Bill (refer to the **September 2009** edition of Envirolink). Again, the PCE has concerns with the practicability of the Bill, such as the difficulty of enforcing compliance of imported biofuels with the sustainability principles, and the inconsistency of requiring biofuels to meet sustainability principles when other land uses in New Zealand are controlled by the Resource Management Act 1991. The Bill has had its first reading in the House and the select committee is due to report back in March 2011.

The PCE says New Zealand should be seeking biofuels that:

- Benefit the environment
- Can be produced in large quantities
- Can be used without being blended with conventional fuels (ie can be 'dropped-in')
- Can substitute for diesel rather than petrol
- Benefit the economy and New Zealand's 'clean green' image.

The PCE's key conclusions on the current use of biofuels and how this can be improved to lessen our dependence on fossil fuels are interesting:

- *'Bad' biofuels should not be used:* there is no environmental benefit from using 'bad' biofuels made from feedstocks such as palm oil
- *Production limitations:* the biomass capacity for large scale production of the two types of biofuels that are currently being used in New Zealand is limited and therefore availability as a mainstream fuel is unlikely
- *Need for 'drop-in' fuels (vehicle fleet limitations):* if biofuels are to have a major impact on our energy supply, they need to be 'drop-in' fuels that are compatible with the distribution network and the vehicle fleet
- *Focus on diesel substitutes over petrol substitutes:* we should focus our efforts on finding diesel substitutes over petrol substitutes as our economy is reliant on diesel.

We would be happy to assist if you require any further information on biofuel related issues.

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