Practice Note: The Existing Environment and the Permitted Baseline

The following advice note outlines what the existing environment is; its application and what the permitted baseline is. Both concepts apply to the processing of resource consents.

The Existing Environment

When processing a resource consent regard must be had to what constitutes the "environment" to inform the assessment of the effects of a proposal. This includes existing use rights, existing activities carried out under existing consents and resource consents which have been granted where it appears those consents will be implemented. It includes:

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

The existing environment does not include 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, council will consider the environment as it is at the time of the application. It will also consider the likelihood of change to that environment in the future, based upon the activities that could be carried out as of right or with respect to resource consents that have been granted (where it is likely that they will be given effect to). Deemed permitted activities that have been given under section 87BB(d) or 87BA(2) will therefore likely need to be taken into account by decision makers in this manner under section 95D.

Case law and the existing environment

Case law has confirmed that for activities that are seeking to be reconsented, the activities subject to those consents should not form part of the receiving environment as it cannot be assumed that existing consents with finite terms will in fact be replaced or replaced on the same conditions.

The High Court decision of *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council*[1] has clarified the law regarding what constitutes the 'environment' for the purposes of section

[1] *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948.

104(1)(a) of the RMA in the context of regional consents. The High Court overruled the Environment Court decision and found that the correct approach was that taken in *Port Gore Marine Farms Ltd v Marlborough District Council,*[2] where the Environment Court observed that it must imagine the existing environment as if the activity (for which renewal was sought) were not actually there. Whilst the Court indicated there may be exceptions to the approach in *Port Gore*, including where "it would be fanciful or unrealistic to assess the existing environment as though those structures authorised by the consent being renewed did not exist":[3]

The Permitted Baseline

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

The permitted baseline is a concept that began through caselaw and notably in *Bayley v Manukau City Council*[4] where the Court suggested it is not sufficient for a consent authority to assess a proposal against the environment as it exists, but that it must go further and assess the proposal against the environment "as it would exist if the land were used in a manner permitted as of right by the plan". The permitted baseline has been developed further to not only be applied to permitted rules. In the cases of *Arrigato Investments Ltd v Auckland Regional Council*[5] and *Queenstown Lakes District Council v Hawthorn Estate Ltd*[6] it was held that the permitted base line test may extend to include unimplemented resource consents. This is on the basis that the 'environment' includes the environment that would be modified by unimplemented resource consents. The permitted baseline was recognised in the RMA in Sections 95D(b), 95E(2)(a) and 104(2).

The permitted activity baseline applies to consideration of both who is affected and whether effects are, or are likely to be, more than minor. If Council applies the permitted activity baseline, it is only the adverse effects over and above those forming a part of the baseline that are relevant when considering those two issues. It is the decision-maker's discretion whether to use the permitted baseline as the basis for assessing effects and identifying affected parties. The exception to this is if the application is for a controlled activity or restricted discretionary activity where s95E(2)(b) directs that the council MUST disregard an adverse effect of the activity on a person if the effect does not relate to a matter for which a rule or NES reserves control or restricts its discretion.

The purpose of the permitted baseline test is to isolate and make effects of activities on the environment that are permitted by the plan or NES, irrelevant. When applying the permitted

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[2] *Port Gore Marine Farms Ltd v Marlborough District Council* [2012] NZEnvC 72.

[3] *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948.at [65]. This same excerpt was cited at [135] of *Otago Fish & Game Council v Otago Regional Council* [2021] NZHC 3258 (a plan change appeal).

[4] *Bayley v Manukau City Council* [1999] 1 NZLR 558

[5] *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA)

[6] *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424

baseline, such effects cannot then be taken into account when assessing the effects of a particular resource consent application. The baseline has been defined by case law as comprising non-fanciful (credible) activities that would be permitted as of right by the plan in question.

When will the Permitted Baseline be applied?

When applying the permitted baseline, a question that will be asked is what permitted activities would be credible (as opposed to fanciful). Typically, this will be the permitted activity that the applicant cannot meet, and the baseline will be disregarding the aspects of the rule that can be met.

Points that will be considered:

- 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) states that adverse effects can (or must) 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.
- The permitted baseline is optional.

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
- 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

The difference between the permitted baseline, the existing environment and the receiving environment

The permitted baseline applies to permitted activities on the subject site and removes the effects of those activities from consideration under ss95D, 95E and 104(1)(a) of the RMA.

The receiving environment is the environment upon which a proposed activity might have effects.

The permitted baseline is an overlay that would be applied on top of the receiving environment, whereas the receiving environment is the environment that may be affected by an activity.