

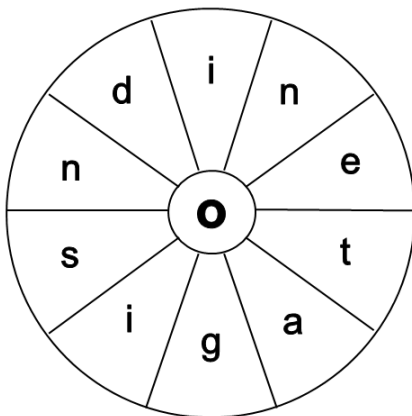
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### Wordfind

The goal of a word wheel puzzle is to create as many words possible with the letters in the word wheel. You can only use each letter once and every word must have the letter in the centre of the wheel.

Can you find the 11 letter word?



### Resource Consent Officers - New Name, Same Great Officers

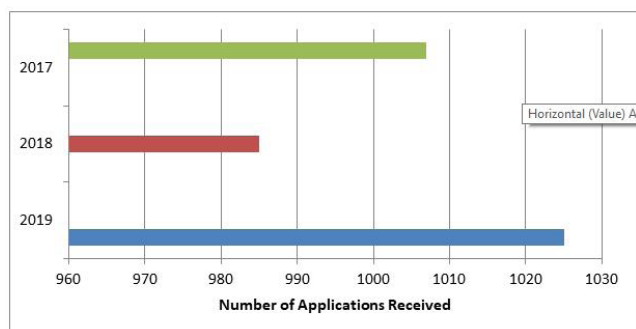
At the end of 2019 the Resource Consents Team undertook an internal review of its team structure to improve the support provided for planners and improve the service provided to applicants. It was felt this was particularly important for when processing large or complex applications. As a result of the review, planners received new titles with Resource Management Officers being referred to as Environmental Planners, Senior Resource Management Officers becoming Senior Environmental Planners and a Lead Senior Environmental Planner being appointed for each main consent type. In addition, a new sub team structure was put in place to ensure the knowledge and experience of these leaders and senior planners was readily and easily shared to those within their sub team. The Resource Consents Team has already seen some great improvements with this new structure and look forward to seeing continued improvement in service delivery as a result.

## Resource Consents Team Statistics 2019

For those of you interested in crunching numbers, the Resource Consents Team has continued to be very busy. In 2019 the Resource Consents Team received 1025 applications. The majority of these were applications for new resource consents (925), with a few (91) applications for variation of resource consent conditions under section 127 and a sprinkling (9) applications for extension to lapse date under section 125.

The overall number of applications received is pretty much on par with the number received in 2018 (985) and those received in 2017 (1005).

The Resource Consents Team anticipates receiving an increase in applications during 2020 with the Proposed Marlborough Environment Plan decision being released and the start of a number of aquaculture consents which will expire during the next few years. There are of course many other changes on the horizon that may also effect the number of applications received with the various proposed national environmental standards and other changes coming out of central government.



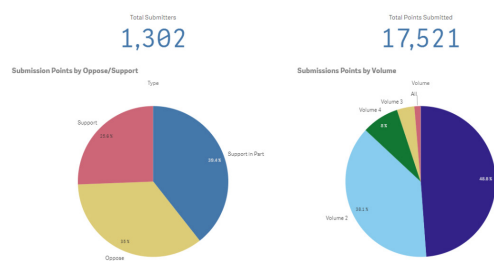
## Public Notification of the Proposed Marlborough Environment Plan Decision

Thursday 20 February 2020 was an exciting day for Marlborough District Council and its community. The Proposed Marlborough Environment Plan decision was made available to the public following more than 12 months of hearings. There was a special ceremony held at Omaka Marae to mark the occasion.

The Proposed Marlborough Environment Plan is one of the first of its kind, providing a combined Regional Policy Statement, Regional Coastal Plan, Regional Plan and District Plan. It was prepared following significant research, consultation and careful drafting, and was publicly notified on 9 June 2016, paving the way for anyone to lodge a submission in respect of the proposed plan. From that date the community and those within Regulatory Services have worked hard to ensure that the provisions of the operative plan and those in the proposed plan with Legal Effect have been properly considered when working under the Resource Management Act 1991.

At the same time a skilled panel of commissioners waded through over 17,000 submission points and sat through months of hearings to ensure that all those interested in having a say about the Proposed

Marlborough Environment Plan were given a fair opportunity to do so. The panel then spent several more months deliberating and reviewing the evidence and submissions received during the hearings to come to its final recommendations and decision. It is this version of the plan (with track changes) that was released on Tuesday 2 March 2020. The timeframe for appeals to the decision will commence from this date. The track changed version of the plan is available for viewing on Council's website.

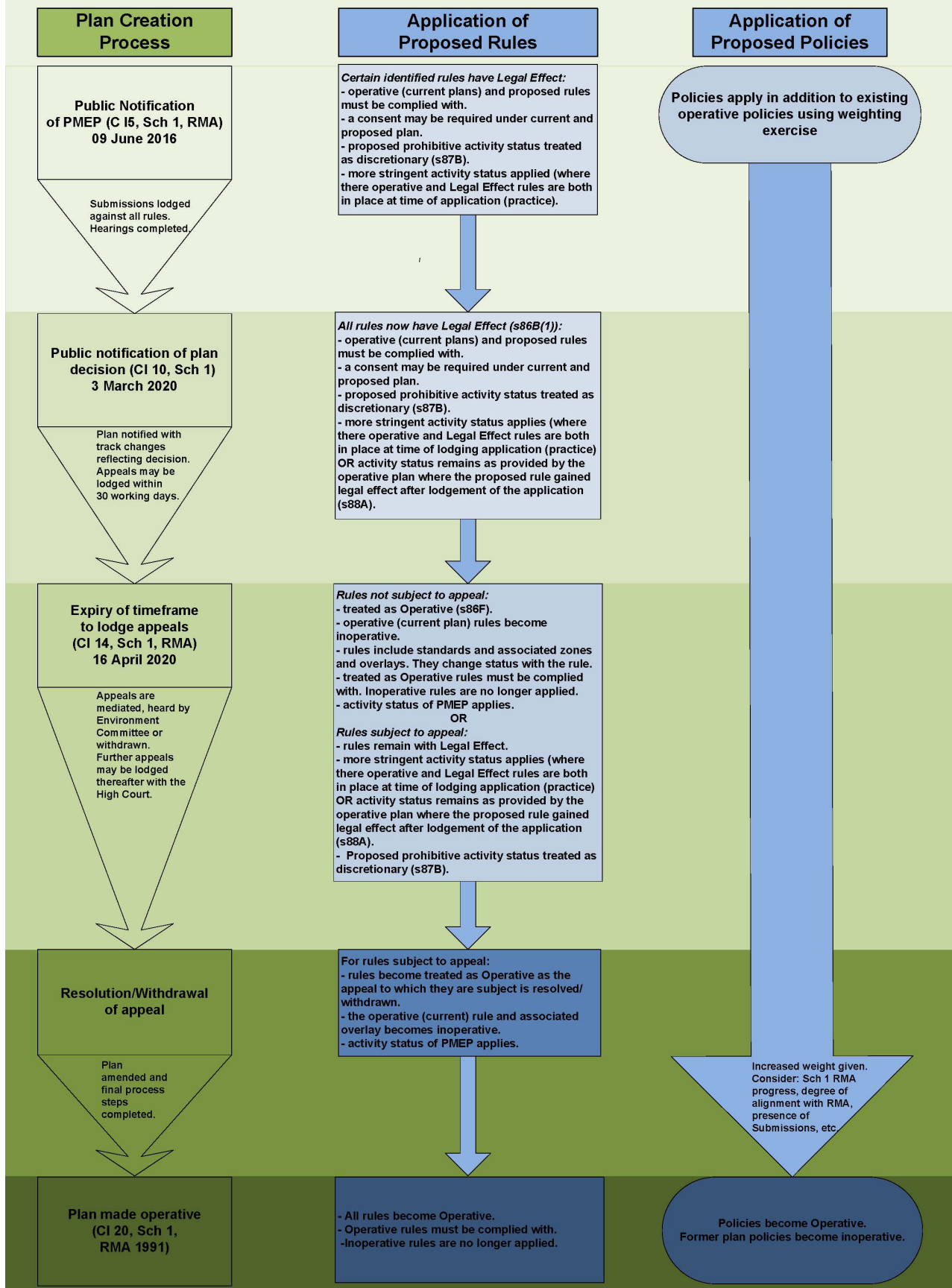


[Link to the above graph](#)

Looking forward, things will remain a little complex for a while longer as there is the opportunity to lodge appeals in respect of the plan decision. Regulatory Services has prepared a table to capture how the plans have and will be applied during this journey. Have a look at the next page to check it out.

# APPLYING THE PROPOSED MARLBOROUGH ENVIRONMENT PLAN

14 February 2020  
MDC Regulatory Services



## Affected Parties - Recent Issues

Council has recently seen a few issues arise regarding identifying 'affected persons' under the Resource Management Act 1991. 'Affected persons' are those people (including organizations and business) that the planner believes will be adversely affected by the activity for which an application is lodged. Sections 2, 2AA and 95E (and section 149ZCF) provide the definition of an 'affected person' for the purposes of limited notification and processing of several applications under the Resource Management Act 1991 including:

- a resource consent application;
- application to change or vary consent/notice of requirement;
- application to alter a designation;
- application for heritage order; or
- application to vary or cancel an instrument creating an esplanade strip or creating an esplanade strip by agreement.

The responsibility for identifying who is an affected person lies with the planner processing the application. They do so by identifying whether the adverse effects of the proposed activity on that person are minor or more than minor. If they are minor or more than minor then that person is an 'affected person'. This means they will be provided with a copy of the application and supporting documents, and given the opportunity to lodge a submission in respect of the application. This is an important step as once a person lodges a submission they have a right to attend the hearing and a right to appeal the decision as it relates to their submission.

The other important effect of being identified as an 'affected person' is the applicant may seek written approval from that person to show their agreement to the activity proposed. If written approval is provided the decision maker determining the application cannot consider the adverse effects upon that person in determining whether to grant or refuse the application.

When seeking written approval it is important that the affected person initial each page of the application and supporting documents, in addition to signing the approval. All of these papers should be lodged with Council to demonstrate that the affected person understood the activity when giving their agreement.

If the activity changes during the course of processing the application, the affected person's approval should be obtained again to reflect continued agreement to the new proposed activity. It is helpful to discuss with the planner processing the application whether this is necessary.

What is 'less than minor' is again a decision of the planner. The Court has held that less than minor includes effects that are insignificant in the overall context which would be objectively acceptable and reasonable in those circumstances. They have considered adverse effects during a construction phase and the loss of views from a home due to construction developments as less than minor. These are case by case assessments.

Council has a practice of advising local iwi groups of all Resource Management Act 1991 related applications it receives. In many instances these groups do not have an interest in these applications, but on occasion they are able to indicate an interest that was otherwise unknown to Council. It is then for the planner to make an assessment as to whether they are an 'affected person'. There may be many groups or individuals that consider themselves affected. A planner will assess each individually when making the determination of who is an affected party. If there is a dispute over who has mana whenua, the planner will not determine that dispute. It may be that both meet the threshold of being an 'affected person'. This approach has been recently confirmed in the case of *Ngati Whatua Orakei Whai Maia Ltd v Auckland Council & Others* [2019] NZEnvC 184).

As an applicant this means there may be multiple representatives of iwi to consider. An applicant might seek to consult those they identify first, or could choose to wait until the planner has completed their assessment before doing so. There is no requirement for an applicant to consult iwi or any 'affected person' under the Resource Management Act 1991, but if they are able to gain written agreement it reduces the issues to be considered when determining the application.

## How are Unimplemented Resource Consents taken into account when processing your resource consent application?

The Resource Consents Team is often asked questions about how unimplemented resource consents are taken into account when processing a resource consent application. There are two key processing points during which the Environmental Planner includes unimplemented resource consents in their decision making; during the notification decision and thereafter during the decision to grant or refuse the consent. A third point, but not covered in this article, is the effect of an existing resource consent (unimplemented or not) on the processing order of applications.

### *The Notification Decision*

When processing a resource consent, the Environmental Planner must make a notification decision. This is an important decision as it determines which pathway the application will take; not notified, limited notification or public notification. Each pathway has a different statutory timeframe and opens up the number of possible parties who may lodge a submission, objection or appeal.

In determining whether public notification is required, the Environmental Planner must determine whether the proposed activity will have, or is likely to have, adverse effects on the environment that are more than minor (section 95A(8)). The test for determining whether an effect is more than minor is laid out in section 95D and includes a discretion for the Environmental Planner to disregard any adverse effect if a rule or national environmental standard permits an activity with that effect. There is no reference in this statutory test which enables reference to the effects of consents, whether implemented or not.

When considering whether the application should be limited notified (provided only to those people with a particular interest rather than publicly notified on Council's website), the Environmental Planner identifies who is an affected person. The test for affected person is set out in section 95E and there is an article in this newsletter which explains the effect of being considered an affected person. What is of importance here is that there is discretion for the Environmental Planner to disregard an

adverse effect of the proposed activity on a person if there is a rule or national environmental standard that permits an activity with that effect. The activity could be different from that proposed so long as the adverse effect is the same. Once again there is no exception for consents whether implemented or not.

The above is referred to as the statutory permitted baseline and **does not include**:

- existing use rights;
- implemented resource consents;
- unimplemented resource consents that are likely to be implemented;
- unimplemented resource consents that are likely to be superseded if the application is granted; and
- those consents that have not yet been granted.

At this point it appears clear, that unimplemented resource consents are not included in the notification decision because they are not included in the permitted baseline. However there is a second opportunity for them to pop up during the notification decision. The Environmental Planner may choose to apply the existing environment principle when applying the section 95D test as it refers to 'environment'. The existing environment is a factual analysis of the environment in which the proposed activity will take place and includes unimplemented resource consents that are likely to be implemented.

Unimplemented resource consents that are unlikely to be implemented are not included. There is some debate over whether a resource consent held by the applicant that would be surrendered if their application is granted could or should not be included. The Court has taken a case by case approach, taking care to ensure that should that consent be included it does not allow adverse effects of a proposed activity to be disregarded where they should be included. Examples of this would be where a consent has a significant, environmental wide impact, such as a hydro dam, or where the applicant is using a series of resource consents as stepping stones to an end goal, that if assessed in the first instance without the prior steps would have resulted in a broader, more complete assessment of adverse effects. This second example is referred to as 'environmental creep'.

## How are Unimplemented Resource Consents taken into account when processing your resource consent application? continued ...

### At Decision Time

Unlike during notification decision making where the application of the 'existing environment' is discretionary, the factual analysis of what makes up the 'environment' is mandatory when determining whether to grant or refuse a consent. This is because there are set matters provided in section 104 that the decision maker must have regard to. These matters reference the 'environment' as the starting point, for example "*any actual or potential effects on the environment of allowing the activity*" (section 104(1)(a)).

The analysis is of the environment as it is at the time of decision making, not at the time of application lodgement or notification decision, and seeks to identify what the current environment looks like and what it may look like in the future. It includes:

- existing use rights;
- permitted activities provided for in a plan or national environmental standard;
- implemented resource consent activities;
- unimplemented resource consent activities where it appears they will likely be implemented. However, there is a discretion to exclude these where they:
  - o are likely to be superseded in full (i.e. the applied for resource consent will significantly modify the prior consented activity or replace it entirely with); or
  - o they are a stepping stone that will enable environmental creep.
- registered consent notices and those unregistered but granted by resource consent.



Resource consents held by the applicant for the same activity are usually excluded. The reason for this is to avoid environmental creep. Should the consent expire the activity will cease in any event. The Court has taken a case by case approach as to whether these existing consents held by the applicant would be included. Those which will be implemented regardless of granting of the new application are usually included. Those that would be surrendered if the application is granted and produce the same adverse effects are often included as there will be no 'double up' or lack of consideration of those effects.

This area of law continues to develop and the above inclusions/exclusions will continue to be refined. The Resource Consents Team is endeavouring to record with care when and why they choose to apply these principles or to include/exclude unimplemented resource consents. Like the Court, it is a case by case approach, applying the statutory tests and exercising discretion where they consider appropriate.



## Variation or New Consent - when to 'throw the baby out with the bathwater'!

There have been several appeals heard in 2019 nationally that examined the 'scope' of a consented activity. The questions revolved around; how to determine the scope of an activity, what reference could be made to permitted activities within a resource consent and when would you need to apply for a new consent rather than vary the conditions of an existing consent?

The means of identifying the scope of a consented activity has been examined in case law previously and the Court has not moved too far from that. The starting point is the resource consent decision, application, supporting documents and evidence filed. Where it becomes trickier is when reference is made to either permitted activities or standards for permitted activities in the plan or a national environmental standard. Council takes the view that a permitted activity cannot become a consented activity even when referenced in resource consent documentation. Further, where the permitted activity will be taking place alongside the consented activity (if granted) creating a complete package as such, it would be proper that it is referenced so as to give some understanding of what the consented activity is required for.

Where there are adverse effects arising from the consented activities which must be managed and which overlap with the permitted activity standards, it would be acceptable to include these standards as conditions. The test of whether the condition should be included remains the same, the standard simply provides a good starting point for drafting that condition.

With respect to applications to vary conditions, Council looks first to identify the scope of the activity described in the resource consent. This may be very different from the what is actually taking place currently, especially where the consent is a number of years old and the activity has grown and expanded. Volume is often the key change that can move the activity beyond the scope of what was consented. At first blush it may seem that tweaking the conditions

that relate to volume would be enough to address this expansion and in some cases it is. In most cases however there are more changes than simply volume or the increased volume presents the possibility of a number of new, different or more serious adverse effects that have not been considered and would not be properly considered without a new application being lodged.

The litmus test could be described as asking whether the adverse effects from the increased volume would have been anticipated and provided for by the decision maker and, further, whether the submitters or affected parties in the original application would have considered these? The Court has applied a test of whether the variation would enable the applicant to carry out an activity which is materially different in nature than what was initially granted under the original consent?

If an application to vary is lodged and Council is concerned the application may be a scope rather than condition variation, the Environmental Planner will likely call you or your agent to discuss this further and plan an approach. This will likely be amending the application to give more clarity or withdrawing the application to re-lodge a fresh application. On most occasions if you are currently carrying out an activity beyond the scope of your consent, the Environmental Planner will agree a plan to move forward and inform the Monitoring and Compliance Team. The same approach works in the reverse; where Monitoring and Compliance identify a scope issue they will work with you and keep the Resource Consents Team aware of progress should the plan include applying for a variation or new consent.

Should the plan include applying for a new consent it is important to remember that any rights to continue the activity while waiting for the application to be considered are limited to the scope originally granted. Any expansion in scope that is not consented is not protected. As mentioned above, in most cases Council's teams work with you to move through this period of time so long as the adverse effects of the increased scope can be managed.

## Staff Profiles

### Cassandra Irvine



After attending boarding school at Christchurch Girls' High, Cassandra attended Canterbury University where she completed a Bachelor of Science Degree, double majoring in Biological Sciences and Geography. In November last year Cassandra completed her Environmental Science Honours where she focused on managing the effects of wildfires on freshwater systems, under a regime of climate change. Cassandra was stoked when a role became available at Marlborough District Council as she was eager to put her studies into use and kick start her career. Growing up on a farm in Mid-Canterbury has greatly shaped Cassandra's love for the outdoors and, ever since her partner introduced her to the amazing countryside in Marlborough, she has been drawn to the sunshine and lifestyle. In December last year Cassandra joined the Resource Consents Team as an Environmental Planner and she is enjoying learning new things and meeting new people every day.

### Oliver Rathmill



Oliver is originally from the UK with strong family connections to New Zealand. He has studied at Sussex and Oxford Universities and received an MSc in Environmental Assessment and Management from Oxford Brookes University; where he focused on infrastructure projects and rewilding. Oliver has worked as an outdoor educator and bushcraft instructor, managing the education team for a charity running a farm and nature reserve. For the last five years he has worked for the Environment Agency where he has advised stakeholders in managing risk and maximising environmental gains through varied construction projects and policy creation. Oliver moved to Marlborough in January to join the Council as an Environmental Planner and is looking forward to discovering the region.

## Next Issue out 1 June 2020

