

## Expert caucusing

Changing paradigms in resolving disputes over different interpretations of environmental impact assessment

*I.K.G. Boothroyd*

*Golder Associates (NZ) Limited, Auckland, New Zealand*


*D. Serjeant*

*Merestone, Auckland, New Zealand*




### Decision-making

- ESIA is prepared to inform a decision
- The final decision in ESIA process is an important stage of the process
- Good ESIA practice helps the decision-maker
- Looking for an effective good decision
- But do we always get a 'good decision?'




## Effective decision-making

- Decision-makers are not necessarily experts
- Evidence-based decision making:
  - Facts
  - Assumptions
  - Opinions
- Different interpretations of environmental impact assessment by stakeholders and experts can confuse decision-makers and significantly hold up decision-making and may lead to poor decisions
- *Is 'business as usual an option?'*



November 24, 2013 3

MERESTONE Planning and Resource Management Golder Associates



## RMA Resource consents

### Resource Management Act

- **Council hearing:** Elected councilors, independent commissioners
- **Environment Court:** Environment Judge & appointed environment commissioners
- **Board of Inquiry:** Government minister appointed Judge and commissioners

November 24, 2013 4

MERESTONE Planning and Resource Management Golder Associates

Adversarial vs Collaborative decision-making		
Adversarial		Collaborative
Identify key issues and professional judgment		Identify key issues and professional judgment
Prepare full expert evidence		Expert conferencing
		Write evidence on matters of disagreement
		Possible settlement
Expert conferencing		Environment Court hearing on matters of disagreement
Full Environment Court hearing		Decision
Decision		

November 24, 2013 5

MERESTONE Planning and Resource Management Golder Associates

### What is expert conferencing?

Group of experts (typically acting as expert witness for stakeholders) present expert evidence

“Expert conferencing is a process by which expert witnesses confer ....

....a structured discussion between peers within a field of expertise....”

*May involve a mediator*

November 24, 2013 6

MERESTONE Planning and Resource Management Golder Associates



## Who caucuses; who is an 'expert'

....'expert' means a person who would be recognised by the Court as an expert in his or her field by reason of relevant qualifications and/or experience....

Anyone can call themselves an expert

'Expert' tested through evidence and questioning

'Expert' is there to serve the decision-maker



November 24, 2013

7

**MERESTONE**  
Planning and Resource Management

**Golder Associates**



## Environment Court Practice Note

"I confirm that I have read, and am familiar with, the Code of Conduct for expert witnesses and agree to abide by that Code. This evidence is within my area of expertise, except where I state that I am relying upon the specified evidence of another person. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express."

Sections 5.4 to 5.7 of the **Environment Court of New Zealand Practice Note 2011** which relate to Expert Conferencing

November 24, 2013

8

**MERESTONE**  
Planning and Resource Management

**Golder Associates**



## Why caucus?

.....attempt to reach agreement on issues, or at least to clearly identify the issues on which they cannot agree, and the reasons for that disagreement....

....narrow points of difference and  
save hearing time (and costs)....

Expert conferencing is not mediation and expert is there as an expert to assist the Court

November 24, 2013

9

**MERESTONE**  
Planning and Resource Management

**Golder Associates**



## Timing: Before or after preparation of evidence


Before evidence		After evidence
• Opportunities for time and cost saving greater		• Witnesses have thought through issues better
• Witnesses do not have such entrenched positions		• Counsel and client know your position
		• Parties prepare on the basis of known positions
		• Easier to prepare agenda for conferencing

November 24, 2013

10

**MERESTONE**  
Planning and Resource Management

**Golder Associates**




### Agreed statement of facts

- Not a statement of evidence by one or more parties
- Tabular format useful for keeping focused:
  - Issues
  - Key facts and assumptions
  - Methodology
  - Primary data
  - Agreed position
  - Disagreement, with reasons
  - Additional information

November 24, 2013 11

MERESTONE Planning and Resource Management Golder Associates



### Agreed statement of facts

- A series of statements relevant to the discipline and project
- May be a series of simple statements to flesh out the issue
- Agree vs Disagree
- Reasons for disagreement
- Narrative or Table Format
- **Not the solution**

November 24, 2013 12

MERESTONE Planning and Resource Management Golder Associates



## Caucus agreements: Guidance to decision-makers

### District Plan Change: Environmental Lots - Protection and enhancement of biodiversity

#### *Mapping of Significant Natural Features*

**We agree** that the maps 109Z and 109X showing Identified Significant Natural Features (ISNFs) should contain all of the ARC 2004 survey report high value sites, SSWIs, and the Hunua PNA priority vegetation sites (see Attachment 1 and 2). The existing Franklin District Council (FDC) and QEII covenants should also be mapped.

**We recommend** that all sites within the coastal zone be excluded.

**We agree** that the ecological enhancement corridors should follow the drainage catchments and relate to the second order streams and above (Attachment 1). **We agree** that first order streams should be excluded with the exception of first order streams that connect to ISNFs (Attachment 1). **We note** that Qualifying Natural Features (QNFs) have not been mapped, and so adjoining connecting first order streams are not identified, but that future potential exists for these connections once QNF's have been identified. **We agree** that that many of the first order streams may be ephemeral.

November 24, 2013

13

**MERESTONE**  
Planning and Resource Management

**Golder Associates**



## Caucus agreements: Agreed statements

### District Plan Change: Environmental Lots - Protection and enhancement of biodiversity

#### *Width of Ecological Corridor to Achieve Desired Outcomes of the Plan*

**We agree** (if the goal is to be a biodiversity corridor and not stream enhancement goal) with the provisions for ecological corridor planting in Table 22B.11.1C but accept that flexibility in meeting the 30 metre average may be required acknowledging terrain and topography.

**We acknowledge** that continuous linear ecological corridors will not be created in the first place but that the objective is to initially achieve stepping stones and parts of corridors across the landscape. The full vegetated extent of the ecological corridors remains the long term goal.


In recognising drainage channels as corridors of biodiversity enhancement, **we recommend** a minimum length of planting of 250 to 350m. **We agree** that planting a minimum length will better ensure the goal of a functioning ecological corridor is achieved. **We note that scientific evidence** suggests that planting a minimum length in that range will contribute to achieving the desired outcomes.

November 24, 2013

14

**MERESTONE**  
Planning and Resource Management

**Golder Associates**



## Caucus agreements: Agree and disagree



### District Plan Change: Environmental Lots - Protection and enhancement of biodiversity


**Protection and enhancement of biodiversity**

**XX and YY are of the opinion** that to achieve significant biodiversity and environmental enhancement, and to improve the long-term ecological viability of remnants, a small natural feature (including the core area of a QNF) should be planted up to a larger size of at least 2-3 hectares.

**ZZ has reservations** as to increasing the minimum size of the feature due to the potential loss of the remaining unprotected smaller features in the landscape because landowners will view the revegetation effort required as too costly and too long until success and so they will not undertake to protect (and enhance) those remaining small features.

November 24, 2013
15





## Caucus agreements


### Proposed Expressway

Number	Issues and sub issues	Key facts and assumptions	Position Agreed	Disagreement with reasons
2	There are sites with significant ecological value that have been avoided through the design process.		ALL	
3	The ecological significance of sites and features affected by the Expressway has been adequately assessed.		Appropriate sites have been identified under Policy 23 - JT	Assessment of ecological state and significance not correct and not consistent with Policy 23 & 47 - PW, JM, SM, PC, IB. Would add Otaki River dotterels - JT <span style="color: red;">Outside of expertise (terrestrial ecology) - SL</span>
17	The new Mary Crest mitigation proposal - mitigation adequacy	The new Mary Crest mitigation proposal will be in addition to other mitigation provided as part of the AEE, and with adequate consent conditions and management would <b>meet the mitigation requirements for loss or modification of wetland and waterway habitat of the Expressway.</b>	As indicated in attached plan - JT, JM, PC, SL, SM, IB  JT and SL agree in principle, however, they consider that <span style="color: red;">the existing mitigation proposal as lodged is adequate.</span>	<span style="color: red;">Inadequate information</span> and unsurveyed habitats would not be adequately avoided and mitigated - PW
29	Mitigation for loss of banded dotterel breeding habitat below Otaki gorge.	Dotterel survey is required prior to commencement of construction of the Otaki River Bridge. Provide habitat replacement upstream (location to be specified by GWRC). Woody weed removal is required prior to breeding season.	JT, PC, IB, SM, JM	<span style="color: red;">Outside of expertise - PW, SL</span>

November 24, 2013
16







## Caucus agreements

Proposed new cleanfill:

Statement	Agreed	Disagreement	Explanation
<b>Mitigation for loss of Permanent Streams</b>			
The benefit of stream restoration (e.g., riparian planting and stream fencing) prior to impacts can be reflected in a 'discount' rate within mitigation calculations. If a single multiplier is used over the total length lost over all stages of construction and operations then a multiplier of 1.2 for the ECR calculations is acceptable so long as the planned staging of the DCR construction and operations is in accordance with the planned loss of the permanent streams.	GU, DM, IB	<b>KH prefers</b> a multiplier of 1.5 where planting is not ahead of impact (e.g., Stages 1 and 2) and a multiplier of 1.2 beyond that.	<b>We note</b> that overall the ECR methodology and the DCR methodology converge to the same or very similar multiplier (of approximately 1.2).

November 24, 2013
17



## New paradigms: Benefits of expert conferencing

- Reduces hearing/Court/BOI appearance time
- Several caucuses occurring at same time
- Speeds decision-making
- Is collaborative
- Clear guidance from experts
- Can get a good decision

November 24, 2013
18






### New paradigms: Now the solution?

- Increasing use of expert caucus to settle differences between expert opinions
- Settlement and agreement becomes the driver and significance/value assessments and mitigation proposals can be isolated
- Some stakeholders can be isolated
- Expert experience and pragmatism (or lack of) can dominate
- Increasing reliance on the expert agreement as the 'decision'
- Timeframes increase pressure to complete caucus and reach agreement

November 24, 2013

19

**MERESTONE**  
Planning and Resource Management

**Golder Associates**



### New paradigms: now the solution?

- Can be adversarial
- Moves beyond collaboration?
- Experts not skilled negotiators/mediators
- May not lead to the best solution
- **Removes decision-making from the decision-makers?**
- **Removes accountability from decision-makers?**

November 24, 2013

20

**MERESTONE**  
Planning and Resource Management

**Golder Associates**



## Final Thoughts

- Increasing use of expert caucus to settle differences between expert opinions
- Expert conferencing can lead to a narrowing of issues to decide on at hearing
- Well considered expert conferencing can lead to a good decision
- Increasing reliance on the expert agreement as the 'decision'
- Caution on extent that expert conferencing is driven to reach agreement

November 24, 2013

21

 **MERESTONE**  
Planning and Resource Management **Golder Associates**

## Acknowledgements

- RMLA sponsored workshops in 2012
- Judge Newhook chaired and prepared summary of workshop sessions

November 24, 2013

22

 **Golder Associates**



## Thank you – Any questions?



November 24, 2013

23



## Beyond caucus: 'Hot-tubbing'

- A method where all experts (of same discipline) are questioned and/or cross-examined together.
- Questions generally directed at each individual with some follow-up.
- Generally on points of disagreement as already provided in statement.
- Useful way to assess strength of opinion.

November 24, 2013

24





## Making Good Decisions (MGD) Programme

The Making Good Decisions (MGD) Programme helps councillors, community board members, and independent commissioners make better decisions under the Resource Management Act 1991 (RMA). It provides RMA decision-makers with the skills they need to run fair and effective hearings, and to make informed decisions.

Are decisions well-informed?

November 24, 2013

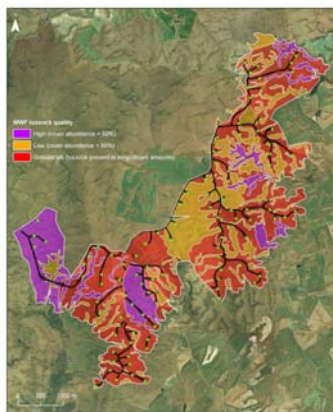
25

**MERESTONE**  
Planning and Resource Management

**Golder Associates**



## Caucus agreements



Windfarm: Bird collision risk and mitigation

Windfarm: Significance assessment and vegetation removal



November 24, 2013

26

**MERESTONE**  
Planning and Resource Management

**Golder Associates**