



## **Determination 2010/002**

Subject to clarification of 21 May 2010<sup>1</sup>

### **The refusal to issue a code compliance certificate for a dam at “Southdowns”, Fraters Road, Martinborough**

#### **1. The matter to be determined**

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>2</sup> (“the current Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of the Department.
- 1.2 The applicant is the owner of the dam, Mr R A Sutherland (“the applicant”), acting through an agent (“the applicant’s agent”). The other parties are:
- Environment Waikato Regional Council carrying out its duties and functions as a building consent authority (“the BCA”)
  - South Wairarapa District Council carrying out its duties and functions as a territorial authority and a building consent authority the (“the TA”)
  - Greater Wellington Regional Council carrying out its duties and functions as a regional authority (“the RA”).
- 1.3 This determination arises from the refusal of the BCA to issue a code compliance certificate for a dam. The refusal arises from a situation where an earth dam, that was initially exempt from the need for a building consent, increased in size during its construction. The increased size triggered the need for a building consent which was applied for retrospectively and issued by the TA. The BCA took over responsibility for issuing the code compliance certificate after the dam was completed, but it declined to issue the certificate as it believed the building consent had been issued in error.
- 1.4 I take the view that the matters for determination in terms of sections 177(b)(i) and 188<sup>3</sup> are:
- a) whether the decision of the TA to issue the building consent is correct

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<sup>1</sup> The clarification is appended to this determination as pages 10 to 12.

<sup>2</sup> The Building Act 2004 is available from the Department’s website at [www.dbh.govt.nz](http://www.dbh.govt.nz).

<sup>3</sup> In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

- b) whether the decision of the BCA to decline to issue a code compliance certificate for the dam is correct.

In order to determine these matters I need to consider whether the dam as-built required a building consent.

- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

## 2. The building work

- 2.1 The building work consists of an earth dam with a storage capacity of approximately 60,000m<sup>3</sup> retaining water to a height of 4.25 metres above the lowest surrounding ground level. The water depth in the dam itself is 5.25 metres. The dam is built on a sloping site and constructed from spoil excavated from up-slope portions of what is now the dam bed. Sections of the dam at the lowest surrounding ground level, as originally designed and as-built are shown schematically in Figures 1 and 2. The as-built shape of the dam also changed from what was proposed, consequently the sections shown in Figures 1 and 2 are at different locations on the site (the as-built section being further down-slope): the RLs of the lowest surrounding ground level are correspondingly different.

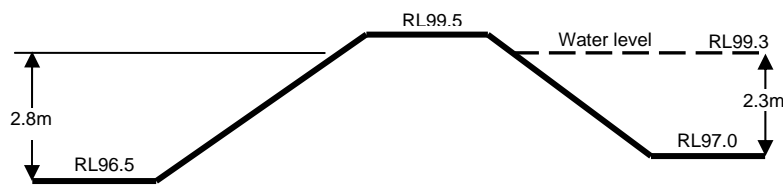


Figure 1: Schematic section through dam as designed

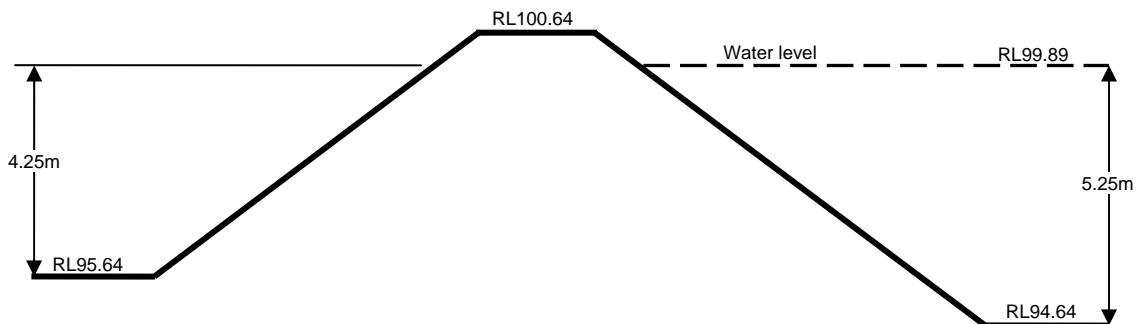


Figure 2: Schematic section through dam as built (as at March 2006)

- 2.2 The dam is constructed principally of compacted clay with all exposed portions of the dam covered with topsoil. The dam has purpose-made intake and outlet structures. The overflow to the dam consists of two 300mm diameter pipes discharging to an adjacent stream.

## 3. Background

- 3.1 An application for a resource consent to divert water and construct the dam in question was lodged with the RA in August 2004. As the proposed dam was to have a maximum depth of 2.3 metres and a capacity of 40,000m<sup>3</sup>, it was correctly designated as not being subject to a building consent in terms of paragraph (c) of the

Third Schedule of the Building Act 1991 (“the former Act”). Accordingly, the RA approved the resource consent in November 2004 and work started onsite immediately after this date.

- 3.2 The applicant constructed the dam but during the course of construction the dam size was increased. As-built plans prepared by the applicant’s agent, arising from a site survey undertaken in March 2006, showed that the dam had an actual storage capacity of approximately 60,000m<sup>3</sup> and a maximum water depth of 5.25 metres. The dam bed at its lowest point is 1.0m below the lowest surrounding ground level, meaning the height of the water retained by the dam reduces to 4.25 metres.
- 3.3 On 25 July 2006 the applicant’s agent wrote to the TA regarding the risk of the dam failing. The report concluded that ‘the dam has been built solidly and the material used in its construction is suitable for the application...[t]he dam as built is unlikely to fail and has been assigned a very low to low potential impact’.
- 3.4 Following a site inspection, the TA in a letter to the applicant dated 17 November 2006 noted that
- ...as the depth is more than 3m and the volume of water is greater than 20,000cum, building consent should have been sought prior to the start of any construction or filling of the dam.
- The letter noted that the water in the dam at the time of the TA’s inspection was 4 metres deep. The letter requested that an application be made for a building consent for the dam structure. A building consent application for the dam and for some proposed amendments to the outlet structures was made on 24 November 2006.
- 3.5 A building consent (No 11134) for the as-built dam was issued by the TA on 11 June 2007, under section 51 of the current Act.
- 3.6 On 11 July 2007, the applicant lodged an application for a code compliance certificate to the TA, which was passed on to the BCA. The application was accompanied by a ‘Producer statement - PS4- Construction review’, dated 11 July 2007, prepared by the applicant’s agent in respect of the dam construction.
- 3.7 On 30 June 2008, the BCA was accredited and registered as a building consent authority in terms of section 191 and assumed responsibility for the building control for dams and their appurtenant structures in the TA’s area. I note that in this respect that the RA had transferred its building consent functions for dams to the BCA.
- 3.8 During August and September 2008 it was decided to increase the height of the dam by 0.5 metres and the appropriate applications for both building consent and resource consent were requested of the TA and RA respectively. According to the applicant’s agent’s work on the dam to increase its height did not commence until some time in 2009.
- 3.9 The BCA wrote to the applicant on 15 May 2009, acknowledging the application for the code compliance certificate lodged with the TA. The BCA noted that the revised dam configuration had been built prior to the issuing of the building consent. The BCA was of the opinion that the building consent had been issued in error and accordingly, a code compliance certificate could not be issued. The BCA was also of the opinion that a certificate of acceptance could not be considered as a building consent had been issued.
- 3.10 The application for a determination was received by the Department on 23 June 2009.

## **4. The submissions, the draft determination, and the meeting with the applicant's agent**

### **4.1 The initial submissions**

4.1.1 In a submission with the application dated 18 June 2009, the applicant's agent set out the background to the dispute and listed the matters that it considered relevant. The agent forwarded copies of:

- the plans and specifications
- the building consent
- the application for a code compliance certificate
- the correspondence between the parties
- a set of photographs showing aspects of the dam.

### **4.2 The draft determination**

4.2.1 The draft determination was issued to the parties for comment on 7 July 2009.

4.2.2 The BCA responded on 9 July 2009, accepting the draft determination. The BCA also noted some non-contentious amendments that clarified the functions of the different authorities.

4.2.3 The RA responded on 13 July 2009, accepting the draft determination. It also listed some amendments that I have incorporated as appropriate.

4.2.4 The TA advised the Department in a letter dated 16 July 2009, that it did not accept the draft determination. The TA was of the opinion that the building consent issued was not a retrospective one, it was a consent to convert an existing small dam, which was already under construction, and did not require a building consent, to a large dam that did. Accordingly, the building consent could not have been issued before the work began.

4.2.5 Correspondence from the parties was also received about which authority had the jurisdiction in respect of the dam and when this had been transferred, which authority had the resources to assess the dam, and which authority should issue the code compliance certificate.

4.2.6 The BCA also responded in a letter to the Department dated 27 July 2009. The BCA stood by its decision to refuse to issue the code compliance certificate given the timeline of the original building consent application documentation, the date of the code compliance certificate application, and the correspondence between the applicant's agent and the BCA.

4.2.7 In a letter to the Department dated 6 August 2009, the TA addressed the responses from the RA and the BCA. The TA did not consider it had issued a retrospective consent. The TA was of the opinion that the applicant's agent had not carried out a full investigation of the dam and was not aware that a building consent was required for the work. However, the TA submitted that until full compaction had taken place, and other work had been carried out, it was not possible to determine the final height and capacity of the dam.

- 4.2.8 In a letter to the Department dated 7 August 2009, the applicant's agent accepted the draft determination. The agent disputed the TA's comments regarding the scale of investigations carried out by the agent's company during the construction of the dam.
- 4.2.9 The TA responded to the agent's comments in a letter to the Department dated 10 August 2009. The letter referred to discrepancies between the agent's advice and what had been observed during the site visit in November 2006.

### **4.3 The additional submissions**

- 4.3.1 The Department sought additional information about the status of the dam prior to the TA's inspection in 17 November 2006 (refer paragraph 3.4).
- 4.3.2 The applicant's agent responded in a letter to the Department dated 24 September 2009, providing clarification of the situation as the agent viewed it. The agent noted that the main overflow level and that the maximum retained depth relative to the lowest surrounding ground levels was 4.25m. The applicant's agent submitted that the measured water depth of 4.0m level referred to by the TA in its letter dated 17 November 2007 (refer paragraph 3.4) was possible as the bed of the dam was not level and the water level gauge is not located at the lowest point.
- 4.3.3 In a further letter to the Department dated 28 September 2009, the applicant's agent, provided a full time-line of the planning and construction process involved in the dam's construction. The letter also said:
- Unfortunately, the dam wasn't surveyed prior to the additional works [referred to in paragraph 3.8] and hasn't been surveyed since these works were completed. It is therefore difficult to determine if any additional height was placed on the dam between our survey in March [2006] and [TA's] visit in November 2006. However, this becomes a moot point, as by March 2005 the dam had already exceeded the 3m high, 20,000m<sup>3</sup> capacity trigger point for a Building Consent.
- 4.3.4 In a letter to the Department dated 2 October 2009, the TA attached the applicant's agents' letter to the TA of 24 November 2006 and the drawings of the original dam. The TA submitted these showed that the original dam retained water was only 1.3 metres above the surrounding ground level and that the increased depth of the dam to '4 to 5 [metres] ... no doubt was created by lowering the bed and not [increasing the height of] the dam.
- 4.3.5 In an email to the Department dated 7 October 2009, the BCA noted the discrepancies between the interpretations made by the applicant's agents and the TA. The BCA also provided a copy of the latest "Guidelines for rural owners of large dams" that the BCA considered meant that other features, such as the overflow spillway or the dam crest, should be used as the basis for establishing the volume and depth of the dam.

### **4.4 The meeting with the applicant's agent**

- 4.4.1 An officer of the Department met with the applicant's agent in order to seek additional clarification to the above. The agent confirmed the levels in the as-built plans arising from the survey completed in March 2006, described the original topography, and outlined the manner in which the dam was constructed.
- 4.4.2 The applicant's agent expressed the view that the dam was clearly a large dam and also pointed out that some of the information contained in their letter dated 24 November 2005, and on which the TA's submission dated 2 October 2009 was

based, was not correct. In particular the height of the water above the existing ground level was 4.25 metres and not 3.5 metres.

- 4.4.3 The agent also considered the dam was code-compliant as evidenced by issue of the producer statement (refer paragraph 3.6). The agent observed that the opinion that the work was code-compliant was based upon the equipment used to build the dam, the time taken to carryout the work (indicating that the work had been done carefully and methodically), and the results of the on-site testing by the agent.

## 5. The legislation and other relevant documents

- 5.1 The relevant provisions of the current Act are:

### 7 Interpretation

In this Act, unless the context otherwise requires,--

**dam—**

- (a) means an artificial barrier ,and its appurtenant structures that—
  - (i) is constructed to hold back water or other fluid under constant pressure so as to form a reservoir; and
  - (ii) is used for storage, control, or diversion of water or other fluid.
- (b) includes—
  - (i) a flood control dam; and
  - (ii) a natural feature that has been significantly modified to function as a dam; and
  - (iii) a canal; but
- (c) Does not include a stopbank designed to control flood- waters

**large dam** means a dam that retains 3 or more metres depth, and holds 20000 or more cubic metres volume, of water or other fluid

### 13 Role of regional authority

Under this Act, a regional authority--

- (a) performs the functions of a building consent authority set out in section 12 to the extent that those functions relate to dams (including the issue of building consents subject to a waiver or modification of the building code).

### 14 Roles of building consent authorities, territorial authorities, and regional authorities in relation to dams

- (1) The regional authority is responsible for performing functions under this Act relating to the building of a dam.
- (2) If a building includes a dam
  - (a) the regional authority is responsible for performing functions under this Act relating to the dam, and
  - (b) the building consent authority and the territorial authority are responsible for performing functions under this Act relating to parts of the building that are not a dam.
- (5) The building consent authority and territorial authority must do everything reasonably practicable to liaise with the regional authority in performing functions or duties, or exercising powers, in relation to a building that includes a dam.

5.2 The relevant provision of the Third Schedule of the Building Act 1991 (“the former Act”) is:

A building consent shall not be required in respect of the following building work:

- (c) Any dam that retains not more than 3 metres depth, and not more than 20,000 cubic metres volume, of water, and any stopbank or culvert:

5.3 I note that the corresponding provisions of Schedule 1 of the current Act are not relevant to this determination, as they did not come into force until 15 March 2008.

## 6. Discussion

### 6.1 Does the dam require a building consent?

6.1.1 I note that the Third Schedule of the former Act implies that the “depth” of the water within a dam is to be considered in terms of a “retained depth” (with a corresponding “retained volume”). I therefore consider that this definition does not include any water contained “below grade” contained in any or depth or volume excavated below the original lowest surrounding ground level. Should the dam fail, water will remain in any “below grade” excavation.

6.1.2 The question of whether the dam requires a building consent turns on whether it is a “large dam” as defined in the former and current Acts. Both Acts define a “large dam” as a dam that retains water to a depth greater than 3.0 metres and has a retained volume greater than 20,000m<sup>3</sup>.

6.1.3 The dam, as originally designed, retained water to a height less than 3.0 metres. It was not considered a “large dam” and was therefore exempt from the need for a building consent at the time the work commenced in November 2004.

6.1.4 I note that there is a disagreement between the parties as to the background to the work leading to the increased height. The TA maintains that, as the dam was still subject to compaction when inspected by it, there was uncertainty as to its ultimate finished height, and hence its capacity. On the other hand, the applicant’s agent is certain that the structure had already exceeded the non-consented height when inspected by the parties in November 2006 prior to the issue of the building consent.

6.1.5 Having considered the submissions of the parties I believe it is clear that the dam, as it was in 2006, was a “large dam”. The dam at that time retained water to a height of over 3.0 metres and contained a fluid volume in excess of 20,000 m<sup>3</sup> – the actual height of the retained water being 4.25 metres and the retained fluid volume being approximately 50,000m<sup>3</sup>.

6.1.6 I note the 4.25 metre distance is from the lowest surrounding ground level to the water level at the dam outlet under normal working conditions. Consideration of the height of the retained water under abnormal operating conditions (the height to the overflow spillway or the dam crest) simply serves to confirm that the “large dam” threshold is exceeded. I acknowledge the additional work completed in 2009 has increased the capacity of the dam beyond the levels stated.

6.1.7 I therefore conclude that the dam, as it was constructed in 2006, fell within the definition of a “large dam” and therefore required a building consent.

## 6.2 The issuing of the Building consent

- 6.2.1 The TA has issued a building consent under the current Act. In my opinion, as section 44(1) requires an application for a building consent to carry out building work to be lodged and approved before (my emphasis) the building work begins. The building consent was therefore issued retrospectively.
- 6.2.2 The TA has raised the issue that while the original dam did not require a building consent, during its construction, once it reached the height that meet the definition of a “large dam”, it could be considered to be an alteration and that alteration would then require a building consent. However, in this instance, as any height variation is in relation to the dam in its entirety, I am of the opinion that the entire structure should be subject to the building consent in question.
- 6.2.3 The issuing of retrospective building consents was considered in two Court decisions. In *Brodie v Wellington City Council*<sup>4</sup>, the Court accepted a territorial authority’s policy that allowed retrospective consents to be issued, since this would:
- enable such breaches to have no long term consequences in respect of structures which have been commenced or completed for those building them or subsequently purchasing them.
- The decision also stated:
- It is not a consent, in any event, to the appellants’ commencing the work without the requisite consents. It is a consent after the event to certify that the work carried out has been carried out in accordance with the Council’s requirements in respect of the particular type of building.
- 6.2.4 In *Morresey v Palmerston North City Council*<sup>5</sup>, an appeal from a Determination that involved a waiver granted retrospectively, the Judge referred to Brodie and dismissed the appellant’s interpretation of Brodie, commenting (at paragraph 73):
- If anything that case confirms that retrospective consent can be given. What Doogue J did say was that the Building Act regime required building consents to be obtained before work is carried out so the builder’s actions can be properly supervised during the course of the building.”
- 6.2.5 I accept that both these cases were decided in terms of the former Act, which had no provision for the issuing of certificates of acceptance. The provision of certificates of acceptance under the current Act has removed the need for a territorial authority to have discretionary building consent policies. However, I am of the opinion that the cases recognise that a territorial authority may still, as a matter of internal policy, issue a retrospective consent.
- 6.2.6 In Determination 2009/15, I took the view that, while the Chief Executive has the power to reverse an authority’s decision to issue a building consent, in that case it was unreasonable to reverse the statutory decision made by the authority due to the 15-year lapse of time since the consent was issued. I also feel that in general, it is disadvantageous for a building owner if the process to cancel a previously issued building consent is followed.
- 6.2.7 In this current situation, there is a relatively short time between the completion of the work and the retrospective issue of the building consent. I note that if the decision to issue the building consent was reversed, the BCA would be required to process an

<sup>4</sup> 7/11/00, Doogue J, HC Wellington AP186/00

<sup>5</sup> 11/8/08, Judge B Callaghan, DC Palmerston North CIV-454-463



application for a certificate of acceptance generally to the same extent as if it were considering an application for a code compliance certificate. This is necessary, even though the certificate of acceptance carries less “weight” than a code compliance certificate.

- 6.2.8 Based on these circumstances and the specific facts relating to the dam in question, I believe that it would not be appropriate in this case to reverse the TA’s decision to issue the retrospective building consent. From this, it follows that a code compliance certificate can be issued by the BCA for the completed dam. As this determination may impact on future decisions involving regional authorities, I emphasise that I have made my decision based on the facts as they apply in this case and that any other parallel circumstances must be considered in terms of the facts relevant to the case under discussion.

### **6.3 The code-compliance of the dam**

- 6.3.1 The applicant’s agent is satisfied that the as-built work complies with the Building Code. The applicant’s agent has issued a producer statement in support of the application for the code compliance certificate, along with the submission of other documented evidence including successful test results of the as-built work.
- 6.3.2 I acknowledge that the opportunity for the BCA (or its authorised agent) to fully inspect the work during its construction has been lost. However, this loss would appear to have been acceptably compensated for by virtue of various inspections and testing undertaken by the applicant's agent as the work was built, and the testing of the as-built work.

## **7. What is to be done now**

- 7.1 On request from the applicant, the BCA may issue a code compliance certificate in terms of sections 13(a) and 94(1)(a) if it is satisfied on reasonable grounds that the dam is code-compliant.

## **8. The decision**

- 8.1 In accordance with section 188 I hereby determine that:
- the decision of the TA to issue the building consent is confirmed
  - and accordingly, the decision of the BCA to decline to issue a code compliance certificate for the dam based on its opinion that the building consent was issued in error is reversed

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 21 January 2010.

John Gardiner  
**Manager Determinations**

# **Clarification of Determination 2010/002 regarding the refusal to issue a code compliance certificate for a dam at “Southdowns”, Fraters Road, Martinborough**

## **1. Background**

- 1.1 This clarification of Determination 2010/002 is made by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department, under section 189 of the Building Act 2004 (“the Act”).
- 1.2 The application for Determination 2010/002 was received on 23 June 2009, under Part 3, Subpart 1 of the Act. The Determination was made on 21 January 2010.
- 1.3 The parties to the determination were the applicant, Mr R Sutherland (“the applicant”) who is the owner of the dam, Environment Waikato (“the BCA”), South Wairarapa District Council (“the TA”), and Greater Wellington Regional Council (“the RA”).
- 1.4 The determination arose from the refusal of the BCA to issue a code compliance certificate for a dam, for which the TA had issued a building consent. The matters for determination were:
  - whether the decision of the TA to issue the building consent was correct
  - whether the decision of the BCA to decline to issue a code compliance certificate for the dam was correct.
- 1.5 The determination found that the TA was correct to issue the building consent and found that the BCA was incorrect to decline to issue a code compliance certificate.

## **2. The application for clarification**

- 2.1 I received a letter dated 19 February 2010 from a firm of legal advisors representing the BCA, seeking a clarification of the determination in terms of section 189 of the Act. The main matters set down in the request for clarification were:
  - Paragraph 3.6 of Determination 2010/002

[The BCA] was not accredited and registered as a BCA until 30 June 2008, 11 months after the applicant’s lodging of [the application for a code compliance certificate] of 11 July 2007. The application was not passed on to the BCA until late of November 2008 and received by [the BCA] on 2 December 2008. Please clarify whether [it] is accepted... that this chronology is accepted.
  - Paragraph 3.8 of Determination 2010/002

The Chief Executive’s determination refers to a decision by the applicant to increase the height of the dam by 0.5 meters. It has been the RA’s contention that the height of the dam was not in fact increased, but that the water level within the existing dam was raised to 0.5 meters.

- Paragraph 6.2.7 of Determination 2010/002  
Please clarify whether the Chief Executive accepts that the Certificate of Acceptance process is in fact a Regional Authority/Territorial Authority function, and therefore would be an application to be processed by Greater Wellington Regional Council (“RA”), not BCA required as purported.

### **3. The legislation**

#### **3.1 Section 189 of the Act says:**

The chief executive may, within 20 working days after making a determination, amend the determination to clarify it if--

- (a) the chief executive... on the application of a party to the determination, considers that the determination requires clarification; and
- (b) the clarification is either--
  - (i) not material to any person affected by the determination; or
  - (ii) agreed to by the parties to the determination; and
- (c) no appeal against the determination is pending.

#### **3.2 I am treating the BCA's legal advisors' letter of 19 February 2010 as an application for clarification under section 189 of the Act.**

### **4. The draft clarification**

4.1 Copies of a draft clarification were forwarded to the parties on 30 March 2010. All the parties accepted the draft clarification but the RA proposed a non-contentious amendment.

4.2 The RA was concerned that the proposed amendment to paragraph 6.2.7 referred to a “responsible authority” rather than to a “regional authority”, and requested that the paragraph be amended to reflect this.

4.3 I have considered the RA’s submission and have amended the clarification accordingly.

### **5. Discussion**

#### **Paragraph 6.2.7**

5.1 Under section 244, a regional authority may transfer one or more of its functions, duties, or powers under the Act to another regional authority. In order to ascertain the functions that the RA transferred to the BCA in terms of section 244, I requested the BCA provide me with this information.

5.2 The BCA explained the functions that had been transferred in an email dated 25 February 2010 and provided a schedule of the functions of the Act that were transferred from the RA to the BCA. The schedule lists the functions as:

- all of the Building Consent Authority functions (as identified in the Building (Accreditation of Building Consent Authorities) Regulations 2006 ...
- the non-Building Consent Authority functions identified [in the schedule] in relation to dams.

The 'non-Building Consent Authority' functions, listed in the schedule, that were transferred do not relate to section 96 – 99(A).

- 5.3 I accept that in this case, if the decision to issue the building consent was reversed, it would be the RA, responsible for the territorial authority function under section 96 – 99(A) of processing an application for a certificate of acceptance.
- 5.4 I note that this point was immaterial to the decision the determination reached, as the building consent was not reversed. The statement was included to provide general guidance and to explain that in processing an application for a certificate of acceptance, the RA would be required to give the same level of consideration to the compliance of the building work, as if it was giving consideration to an application for a code compliance certificate.
- 5.5 Accordingly I have amended paragraph 6.2.7 to refer to a 'regional authority', rather than a 'BCA'.

### **Paragraph 3.6**

- 5.6 Paragraph 3.6 of the determination stated

On 11 July 2007, the applicant lodged an application for a code compliance certificate to the TA, which was passed on to the BCA. The application was accompanied by a 'Producer statement – PS4 – Construction review', dated 11 July 2007, prepared by the applicant's agent in respect of the dam construction.

- 5.7 I accept the facts as set out by the BCA regarding this paragraph and I have extended paragraph 3.6 to accommodate this additional information.

### **Paragraph 3.8**

- 5.8 A letter from the TA to the Department dated 24 September 2009 stated that the building consent amendment application dated 10 September 2008 was to 'raise water level by 0.5 m and increase dam height by 0.5m'.
- 5.9 Based on this information, I have amended paragraph 3.8 to include the raised water level in addition to the raised dam level.

## **6. Clarifying amendments to the determination**

- 6.1 In accordance with section 189 of the Act, I hereby amend Determination 2008/82 as follows:

- Paragraph 3.6 is amended to read:

On 11 July 2007, the applicant lodged an application for a code compliance certificate to the TA, which was passed on to the BCA. The application was accompanied by a 'Producer statement - PS4- Construction review', dated 11 July 2007, prepared by the applicant's agent in respect of the dam construction. I note in that respect of the application, that the BCA was not accredited and registered as a building consent authority until 30 June 2008, and according to the BCA, the application for a code compliance certificate was not received by them until 2 December 2008.

- Paragraph 3.8 is amended to read:

During August and September 2008, it was decided to increase the water level within the dam by 0.5 metres and the height of the dam by 0.5 metres, and the appropriate applications for both building consent and resource consent were requested of the TA and RA respectively. According to the applicant's agent's

work on the dam to increase its height did not commence until some time in 2009.

- Paragraph 6.2.7 is amended to read:

In this current situation, there is a relatively short time between the completion of the work and the retrospective issue of the building consent. I note that if the decision to issue the building consent was reversed, the regional authority would be required to process an application for a certificate of acceptance generally to the same extent as if the BCA was considering an application for a code compliance certificate. This is necessary, even though the certificate of acceptance carries less “weight” than a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 21 May 2010.

John Gardiner  
**Manager Determinations**