WYNNWILLIAMS
LAWYERS

TECHNICAL PAPER: IMPLICATIONS OF RESOURCE MANAGEMENT ACT AMENDMENTS IN THE TRANSPORTATION AREA

AMANDA DOUGLAS, PARTNER

(October 2010)

ABSTRACT

An outline of the amendments to the Resource Management Act which came into effect on 1 October 2009, with particular focus on amendments which impact on the processes and practices of transport engineers and planners.

Some of the amendments will still rely on definitions established through existing case law, and therefore an analysis of those existing cases will be made to provide insight into the new provisions of the Amendment Act.

Some of the amendments will impact on the way in which applications are put together, are assessed and notification. Useful and practical hints will be provided as to how to address some of the amendments.

INTRODUCTION

This paper sets out some of the amendments brought into effect by the Resource Management (Simplifying and Streamlining) Amendment Act 2009, and which impact on the matters in which transport engineers and planners are involved. The amendments took effect on 1 October 2009 but only apply to those applications made, and processes commenced, after that date. The full effect of these amendments are, therefore, only starting to be seen.

PLANS AND POLICY STATEMENTS

Legal Effect of Rules

New sections 86A to 86G of the Resource Management Act ("RMA" or the "Act") specify when a rule in a proposed plan or change has legal effect. Previously, all rules had legal effect from the date of notification of the proposed plan or change. This has changed with the amendments.

The new "default" will be that rules have legal effect when decisions on submissions are made and notified.

Exceptions are:

- Rules take immediate legal effect on the notification of the proposed plan if they protect:
  - Air, water, soil (conservation);
  - Significant indigenous vegetation;
  - Significant habitats of indigenous fauna;
  - Historical heritage;
  - Aquaculture management areas.
- If the Environment Court orders that the rules take legal effect on another date;
- If the local authority passes a resolution (prior to public notification of the proposed plan) that the rules take legal effect when the proposed plan is operative.

Section 86E provides that the local authority must clearly identify any rule which has legal effect other than the default or the date on which decisions on submissions are made and notified.

For proposed plans which are notified after 1 October 2009 and to which these provisions apply, you should be able to identify from the plan when a rule is operative. If it is not stated, then the default will apply.

Rules as to Notification

New s77D provides that a local authority may make a rule specifying the activities for which the consent authority:

- Must give public notification,
- Is precluded from giving public notification, or
- Is precluded from giving limited notification

of a resource consent application.

These sorts of rules will likely come out during plan reviews. Whilst, the local authority may decide whether or not to include such a rule, once included, the rules will be more definite than was the case under the previous wording of the section which said that rules could state whether resource consent applications may be decided without notification or service.

The best time for addressing whether a certain type of activity will be notified may end up being at the plan preparation stage. In the resource consent application context, guidance on notification may likely be gained from the relevant plan.

Submissions

Attempts to remove the ability to lodge further submissions on proposed plans were not successful, but the result was a limit on those persons who can make further submissions.

Further submissions are restricted under clause 8 to:

- Any person representing a relevant aspect of the public interest;
- Any person who has an interest in the proposed policy statement or plan greater than the interest that the general public has;
- The local authority itself.

A person who finds that a submission has been lodged seeking a change which affects their property will likely qualify as a person who has an interest in the proposed plan greater than the interest that the general public has.

Overall, however, it will be important to ensure that as many issues as possible are addressed in original submissions on proposed plans and policy statements. Not all persons wishing to make a further submission will be able to do so. For example, the ability to lodge a further submission to support or oppose a submission made by someone else, because you simply did not think of that issue or change initially will be greatly reduced by the amendments.

The period for making further submissions has also been reduced from 20 working days to 10 working days.

Consultation Under Other Acts

Prior to the amendment, local authorities were able to use consultation under other Acts over the previous 12 months as First Schedule consultation for the plan preparation. This period has been extended to 36 months, meaning that any consultation under other Acts will carry heightened importance and relevance to plan preparation in the future.

Appeals

A new provision has been introduced preventing appellants against proposed plans or policy statements seeking that the whole proposed plan or policy statement is withdrawn. Therefore, appeals will need to be focused on the issues and cannot seek a blanket withdrawal of the plan as a backstop or for any other reason. This does not apply to a variation or plan change.

Recognition of NPS

New s55(2) and (2A) provide that if a National Policy Statement ("NPS") directs so, a local authority must amend a document (including a plan) to incorporate certain aspects of the NPS. This will occur without going through the First Schedule plan process. This will provide a more seamless way of incorporating NPS provisions into relevant plans.

Review of Policy Statements and Plans

Previously, all aspects of an operative plan were required to be reviewed every 10 years, regardless of the fact that plan changes may have occurred during that period (and that a plan change may have only recently become operative).

New section 79 provides for a 'rolling review' of policy statements and plans, and will now only require a 10 yearly review of "provisions" that have not been the subject of a review of change during the preceding 10 years. Plan changes may carry more importance, as wholesale plan reviews (as we have seen in the past) will not necessarily occur in the future.

The implications and impacts of plan changes, for example, on other provisions within the plan will need to be considered at the plan change stage.

RESOURCE CONSENTS

The First 10 Working Days

During the first 10 working days after an application for consent is lodged, two critical decisions must be made:

a. Whether the application is complete – section 88

b. Whether the application needs to be notified.

Application Complete?

Section 88, enabling an application to be “rejected”, has not changed as a result of the Amendment Act. However, it is likely to be more widely used now that the processing clock can only be stopped twice for the purpose of obtaining further information. Essentially, if an application for consent does not include an adequate Assessment of Environmental Effects, a local authority may determine that the application is incomplete, and return it to the applicant. Written reasons for the determination must be issued when the application is returned. The determination must be made within 5 working days of receipt of the application.

Notification

One of the important amendments to the resource consent process has been that relating to notification.

A decision on whether an application will be notified, either publicly or on a limited basis, must be made within 10 working days of the application being lodged (unless further information is requested under section 92).

The application must also be notified within 10 working days of it having been lodged. Practically, this will mean that notices will need to be placed in newspapers any day of the week, and not just on a Wednesday or a Saturday, as has often been the case under the previous regime.

The previous presumption has been removed. That presumption was that all resource consent applications would be notified unless they were a controlled activity or the consent authority was satisfied that the adverse effects on the environment were minor. Now, the consent authority has discretion whether to publicly notify an application but it must publicly notify if:

- The activity will have or is likely to have an adverse effect on the environment that is more than minor, or
- The applicant requests it, or
- A rule or national environment standard requires public notification.

It still has a discretion to notify an application if special circumstance exist - s95(4).

Are Adverse Effects Likely to be More than Minor?

Section 95D deals with this and sets out the matters to which regard must and may be had. In making this decision, the consent authority must disregard any effects on persons who own or occupy:

- Land in, on or over which the activity will occur;
- Any land adjacent to that land.

Therefore, the first step will be to identify the land relating to the activity and the land adjacent to that land. "Adjacent" has not been defined, so it will become a matter of interpretation as to whether it is simply the land adjoining or immediately beside the application site or whether it goes beyond that. It is likely to be determined by the Courts. All of that land so identified will be excluded from the assessment of whether the activity will have or is likely to have effects which are more than minor.

Following a change to the Act in 2005, the permitted baseline, which was a creation of the common law, became a discretionary consideration as opposed to a mandatory consideration. Guidance on when the permitted baseline concept should be applied was helpfully set out in the case of *Lyttelton Harbour Landscape Protection Assn Inc v Christchurch CC* [2006] NZRMA 559 (EnvC).

a. Does the plan provide for a permitted activity or activities from which a reasonable comparison of adverse effect can conceivably be drawn?

b. Is the case before the Court supported with cogent reasons to indicate whether the permitted baseline should, or should not, be invoked?

c. If parties consider that application of the baseline test will assist, are they agreed on the permitted activity or activities to be compared as to adverse effect, and if not, where do the merits lie over the area of disagreement?

d. Is the evidence regarding the proposal, and regarding any hypothetical (non-fanciful) development under a relevant permitted activity, sufficient to allow for an adequate comparison of adverse effect?

e. Is a permitted activity with which the proposal might be compared as to adverse effect nevertheless so different in kind and purpose within the plan's framework that the permitted baseline ought not be invoked?

f. Might application of the baseline have the effect of overriding Part 2 of the RMA?

These factors can, therefore, be used to determine whether permitted baseline effects should be disregarded. Once all matters which must be disregarded have been disregarded, and the relevant land has been identified, the key decision as to whether the activity will have or is likely to have effects which are more than minor must be made.

The Courts have consistently held that an assessment of what is minor involves conclusions as to the facts and the degree of effect. There is no absolute yardstick by which effects are to be measured, rather, it is a matter of judgment on the part of the decision maker, in each case.

In *Stokes v Christchurch CC* [1999] NZRMA 409 (EnvC), the Court confirmed that the proper test is whether the adverse effects as proposed to be remedied and/or mitigated are more than minor when taken as a whole.

If, taking into account the matters in section 95D, the decision maker considers that the effects associated with the proposed activity are more than minor, then the application must be publicly notified. In this case, the ability of the public to make a submission and to be involved will not change from previous practice.

If the effects are not, or not likely to be, more than minor, the consent authority will need to consider whether limited notification should occur.

Limited Notification

Previously, if public notification was not required, the consent authority was required to notify, on a limited basis, all persons who may be adversely affected by the activity, even if some had given their written approval.

Now, s95B which deals with limited notification, provides that, if an application is not publicly notified, the consent authority must decide if there are any affected persons (or order holders) in relation to the activity.

It must give limited notification to any affected person unless a rule or NES precludes limited notification.

Who is an Affected Person?

The consent authority must decide that a person is an affected person if the adverse effects of an activity on the person are minor or more than minor (but not less than minor).

A person must not be found to be an affected person if:

- They have given written approval; or
- It is unreasonable to seek the person's approval.

So, limited notification will no longer be given to those who have given written approval. This important change will give more weight to written approvals (from the applicant's point of view) and will provide a greater incentive to obtain them.

Consequences of Amendments to Notification

- There is no longer a presumption that notification will occur.
- To be publicly notified, the adverse effects must be, or be likely to be, more than minor.
- Land relating to the application and the land adjacent to it must not be considered in the public notification considerations. They are relevant only to the limited notification consideration.
- If an application is not publicly notified, the consent authority must then consider limited notification.
- Limited notification must be given to all affected persons. to qualify, the activity's adverse effects on that person must be minor or more than minor.
- Limited notification will no longer occur if there may be adverse effects on persons.

- Previously, as a part of limited notification, consent authorities would give limited notification to interest groups and organisations representing a certain relevant aspect. Now, if matters are not publicly notified, it may be hard to notify such groups, as the adverse effects of the activity on those groups are unlikely to be minor or more than minor. Rather the effects would be on the public. There would need to be some demonstration that the adverse effects on those persons on and adjacent to the application land need to be represented by a specific group - and that may be a long bow to draw.
- There may be an argument that the previous legislation used the words "persons who may be adversely affected by the activity" and the new words "the activity's adverse effects on the person" are not much different. So, it will remain to be seen how it is interpreted. But it would be fair to say, the ability to become involved in resource consent applications are intended to lessen.
- That will make the plan preparation stage important (see section on Plans and Policy Statements).

Requests for Further Information – Section 92

Changes have been made to the manner by which an applicant must respond to requests for further information. Sections 92A(3) to (6) have been repealed and replaced with new provisions. If the applicant:

a. Does not respond to a request for further information; or

b. Agrees to provide the information requested but does not do so; or

c. Refuses to provide the information requested

the consent authority is required, by the new provisions, to go on and determine the resource consent application without such information. Previously, an application would remain on hold until the applicant provided the additional information.

A new long-stop provision has been included in the Act (section 159) which relates to consents lodged before 10 August 2005 and where the applicant has not responded to a further information requests. Those applications will lapse after the later of the following:

a. Within 12 months of the commencement date of the Amendment Act (1 October 2009); or

b. Within 12 months from the date on which the request was made.

If the requested information is not supplied by the later of those two dates, then the application lapses.

Excluded Time Periods – Stopping the Clock

A common complaint of applicants under the previous regime was that the processing clock was stopped every time a request for further information was issued by the consent authority. In order to address this complaint, section 88C provides that the processing clock can only be stopped twice for information requests, once before the closing date for submissions, and once after.

Section 88C(2) sets out the time period which must be excluded when a request for further information is lodged. The starting point is the date when the request was made under section 92(1), and ends:

a. If the applicant provides the information, on the date when the information is provided;

b. If the applicant agrees within 15 working days to provide the information, the date on which the information is provided (which may be more than 15 working days after the information is requested);

c. If the Applicant agrees within the 15 working days to provide the information and does not provide the information, the date set by the consent authority in accordance with section 92A(2);

d. If the applicant refuses within 15 working days to provide the information, within 15 working days.

If an applicant agrees to provide the information requested by the consent authority, the consent authority must set a reasonable time within which the applicant must provide the information.

If the applicant does not provide the information within that time period, then the consent authority must consider the application under section 104.

Extensions of Time –Section 37A

Section 37A of the Act, in relation to extensions of time periods in the resource consent process, has been amended. The relevant parts of section 37A are subsections (3) to (6).

A time period may only be extended for a time not exceeding twice the maximum time specified in the Act, and either:

a. Special circumstances apply (eg scale and complexity of the application); or

b. The applicant agrees to the extension.

In addition, the consent authority must take into account the matters listed in section 37A(1):

a. The interests of a person who may be affected by the extension;

b. The interests of the community in achieving an adequate assessment of the effects of a relevant plan; and

c. Its duty to avoid unreasonable delay.

If a consent authority wishes to extend time by more than double the specified amount, it can only do so if the applicant agrees and it has considered the matters specified in section 37A(1).

Officers Reports – Section 42A

The key change which has been made to section 42A is that a s42A report does not need to repeat material from the applicant's Assessment of Environmental Effects. Instead, the report can either:

a. Adopt the entire assessment; or

b. Adopt any part of the assessment by referring to the part adopted.

In addition, a change has been made to the timeframe by which a consent authority must provide parties with a copy of the s42A report in circumstances where a direction as to the exchange of evidence has been made. In these circumstances, the report must be served at least 15 working days before the hearing (section 42A(3)(a)).

The section also expressly recognises that the report can be served electronically.

Appointment of Independent Commissioner(s)

An applicant or a submitter can now request a consent authority to appoint independent commissioner(s) to hear an application for consent (section 100A).

The costs of appointing an independent commissioner, over and above those costs of a hearing without independent commissioners, is borne by the party or parties who request the appointment of an independent commissioner. This will not change for applicants, but it is something that submitters need to be aware of when taking advantage of this new provision.

Adjournment of Hearing

The new section 103A prescribes a time limit for the completion of adjourned hearings. Previously, many decision makers simply adjourned a hearing following the applicant's reply to extend the period of time within which a decision must be issued.

The new section provides that the hearing must be concluded no later than 10 working days after the applicant's right of reply has been exercised. The decision maker must then issue a decision within 15 working days after the end of the hearing (section 115).

Discount Policy

In the event that a consent authority fails to comply with a time period set in the Act, the consent authority's fees must be reduced in accordance with a discount policy (section 36AA).

Regulations to the Act will set a default policy, in consultation with local authorities, within 9 months of the Amendment Act becoming operative.

Councils can have their own policy provided that it is more generous than the default discount policy set down by the regulations. Any such policy must be prepared using the special consultative procedure under section 83 of the Local Government Act 2002.

OTHER PROCESSING OPTIONS

Other Processing Options - Resource Consents

Until now, all resource consent applications had to be made to a local authority. The Act now allows the council process to be bypassed and

- An application lodged directly with the Environment Court, known as direct referral to the Environment Court;
- An application lodged directly with the Environmental Protection Authority (EPA) if it is, or is part of, a project of national significance;
- An application to be called in by the Minister at the request of the applicant or consent authority, or on the Minister's own initiative, if it is, or is part of, a project of national significance.

Transport Planners and Engineers will need to be aware of different arenas in which resource consent applications may be processed - it will not just be applications to councils.

Highlights - Referral to Environment Court - S87D- 87I

This option is only available for applications for resource consents or changes or cancellation of conditions that are limited or publicly notified.

A request must be made to the consent authority, and the consent authority must agree to the referral. Requests are to be made between the lodging of the application and 5 working days after the close of submissions.

If the council agrees, the applicant lodges a Notice of Motion and Affidavit with the Court and the Environment Court considers the applications as it if was the consent authority.

If the council does not agree, the consent authority continues to process the application.

Parties would become involved in the process before the Environment Court under section 274.

Highlights - Projects of National Significance

Projects of national significance may be lodged directly with the EPA. Matters which can be lodged with the EPA include:

- Resource consent applications;
- Application to change/cancel conditions;
- Request to prepare regional plan;
- Request to change plan;
- Plan change or variation;
- Notices of requirement.

If the Minister decides to call in a matter, he or she will refer it to a Board of Inquiry or to the Environment Court.

Getting Involved in These Alternative Processes

Called In

If the matter is called in, the EPA must give public notice of the Minister's decision. The public notice must call for submissions on the matter to the EPA. Therefore, there is an opportunity to make a submission on a matter called in and referred to the Environment Court or Board of Inquiry. "Any person" may make a submission at this stage. Submissions are to be made to the EPA whether or not that person made a submission to the local authority on the same matter (s149E(2)).

If it is a planning matter, the EPA will then notify a summary of submissions and call for further submissions. Those who may make a further submission are restricted by s149F(3) to:

- Any person representing a relevant aspect of the public interest; and
- Any person that has an interest in the planning matter greater than the interest that the general public has; and
- The local authority.

The EPA then provides the submissions (and further submissions if applicable) to the Board of Inquiry or Environment Court as the case may be, together with all other information that it holds and the application or "matter".

There will be a further opportunity to make submissions if, for example, the proposed plan or change was not prepared at the time that the Minister made the direction. In that case, the EPA calls for submissions after the local authority has prepared the proposed plan / change and submitted it to the EPA (s149O(3)).

Board of Inquiry

A Board of Inquiry is likely to move onto hearing and considering the matter thereafter, and so further opportunity to become involved must be taken up while the matter is still with the EPA.

ENVIRONMENT COURT

If a matter is referred to the Environment Court by the Minister, the applicant would file a Notice of Motion and affidavit with the Court to commence the proceedings in the Court.

Section 274 would then apply to those who wish to be involved in the process, and there would be an opportunity to be involved at that stage also.

SECTION 274

Section 274 - Becoming an Interested Party in Environment Court Proceedings

Amendments have been made to s274. Previously, a person could become a party to Environment Court proceedings if they:

- Had an interest in the proceedings that was greater than the public generally;
- Represented a relevant aspect of the public interest;
- Made a submission on the previous proceedings on the same matter.

Now, the wording relating to having an interest greater than the public generally has been changed to "a person who has an interest in the proceedings that is greater than the interest that the general public has" and this is also now limited in the instance of trade competition.

The wording, although, different on its face, does not seem to have a different meaning. However, since the wording has changed, it would be open to the courts to come up with a different meaning. The wording is similar to that of s157 town and Country Planning Act 1977, which required a degree of affection greater than the public generally, that is reasonably made out, not asserted, to establish such an interest.

In addition, only the Attorney General can now represent a relevant aspect of the public interest.

Those who made submissions on the subject, may still become parties, but an exclusion in relation to trade competition has also been introduced to this provision.

It will be more important to ensure that submissions cover all issues relating to the matter which you may wish to raise now or in the future. This will be then the easiest way to become involved as a s274 party. Without a previous submission, it may be more difficult to become involved at that later stage.

Section 274 Timeframes

The timeframe for becoming a party under s274 has been reduced from 30 working days after the notice of appeal is lodged or other proceedings are commenced, to within 15 working days after the period for lodging a notice of appeal ends, the decision to hold an inquiry or the proceedings are commenced in any other case.

So, care will need to be taken because there will now be less time within which to become a party.

Also, it will not matter on which date the appeal is actually lodged, as time will run from the date that the appeal period ends. That means that the time for lodging a s274 notice can, at least, be calculated ahead of time (ie after the decision) without having to wait to see when the appeal is actually lodged.

Section 274 notices on matters that are referred directly to the Environment Court or referred by Minister call in will be lodged 15 working days after the proceedings are commenced.

Those proceedings are commenced by the applicant filing documents with the court, as already outlined, but the applicant is only required to serve those on others “as soon as reasonably practicable” after lodging the documents and so some of the 15 working days for preparing the s274 notice will be taken up with service of the Applicant’s documents. Preparation will be needed in anticipation.

CONCLUSION

There are a number of changes to the Act aimed at streamlining processes, particularly in relation to resource consent applications. Whether that will occur will remain to be seen. Whether you are working for a council, an applicant, submitter, or other person or entity, your knowledge of these amendments will enable you to advance their position to the best advantage in light of the amendments.