2017

Consent Steps

To Notify or Not to Notify

THE RMA QUALITY PLANNING RESOURCE

This guidance has been revised to include changes to the RMA as a result of the Resource Legislation Amendment Act 2017 (RLAA17). The consenting provisions of the RLAA17 commenced on 18 October 2017. For more information about the amendments refer to the RLAA17 - Fact Sheets and technical guidance available on the Ministry for the Environment's website.

To Notify or Not to Notify

Making a decision on whether an application should be notified, limited notified or non-notified is a very important step in processing a resource consent. This guidance note provides good practice advice about making recommendations and decisions on notification.

Sections 95 to 95G of the Resource Management Act 1991 (RMA) set out the requirements for notification of a resource consent application. These provisions apply to resource consent applications (s88), boundary activities (s87AAB), fast-track consent applications (s87AAC), Section 127 applications (change or cancellation of consents conditions); s128 reviews and s221 (vary or cancel a consent notice).

The RLAA17 has amended the RMA by replacing the previous public and limited notification assessment process for resource consent applications with a new mandatory step-by-step process for deciding whether an application should be notified or not.

Note: The statutory tests to determine whether to give public or limited notification of a notice of requirement for a designation and notice of requirement for a heritage order are unchanged. However, because of the amendments made to sections 95A to 95E by RLAA17, they have been moved to sections 149ZCB to 149ZCF in Part 6AA of the Act. Sections 168A, 169, 189A and 190 in Part 8 of the Act detail how sections 149ZCB to 149ZCF are to be modified and applied to designations and heritage orders. Further information relating to this process can be found in the guidance note in relation to Notices of Requirement and Designations.

See the Ministry for the Environments technical guide on resource consent notification and step-by-step notification determination flowchart.

Guidance note

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Definitions Relating to Notification

Section 2AA and 2AB of the RMA sets out notification definitions applicable to resource consent applications:

Notification: *means public notification or limited notification of the application or matter.*

Limited notification: *means serving notice of the application or matter on any affected person within the time limit specified by section 95...*

Public notification: *means giving public notice by -*

a) giving notice of the application or matter in the manner required by section 2AB; and;

b) giving that notice within the time limit specified by section 95…; and

c) *serving notice of the application or matter on every prescribed person* (prescribed by Regulation 10 of the Resource Management (Forms, Fees and Procedure) Regulations 2003).

Public notice: *(1) If this Act requires a person to give public notice of something, the person must*

a) publish on an Internet site to which the public has free access a notice that—

i. includes all the information that is required to be publicly notified; and

ii. is in the prescribed form (if any); and

b) publish a short summary of the notice, along with details of the Internet site where the notice can be accessed, in 1 or more newspapers circulating in the entire area likely to be affected by the matter to which the notice relates.

(2) The notice and the short summary of the notice must be worded in a way that is clear and concise.

Affected person: *means a person, who, under section 95E…, is an affected person in relation to the application or matter.*

Other relevant definitions include:

Boundary activity (defined in s87AAB): An activity is a boundary activity if:

- *resource consent is required due to the infringement of one or more [district] 'boundary rules'*
- *no other district rules are infringed*
- *no 'infringed boundary' is a 'public boundary'*

Note: If an application is lodged for a boundary activity, each owner of an allotment with an infringed boundary has given written approval for the activity,

and the information required in s87BA is provided then the council must provide a deemed permitted boundary activity notice advising the person that the activity is a permitted activity and must also return the resource consent application.

Residential activity (defined in s95A(6)): *means an activity that requires resource consent under a regional or district plan and that is associated with the construction, alteration, or use of 1 or more dwelling houses on land that, under a district plan, is intended to be used solely or principally for residential purposes.*

Accommodated activities are defined in sections 64 & 65 of the Marine and Coastal Area (Takutai Moana) Act 2011.

Statutory acknowledgment: Statutory acknowledgements made in accordance with an Act (which are specified in schedule 11 of the RMA) are referred to in section 95E(2)(c) of the RMA, and must be had regard to for the purposes of assessing the adverse effects of an activity on a person(s). A statutory acknowledgement is a formal acknowledgement by the Crown of the mana of tangata whenua over a specified area. Statutory Areas only relate to Crown-owned land and include areas of land, geographic features, lakes, rivers, wetlands, and coastal marine areas. With respect to bodies of water such as lakes, rivers, and wetlands, the Statutory Acknowledgement excludes any part of the bed not owned or controlled by the Crown. The locations of Statutory Areas are shown on Survey Office (SO) plans. Schedule 11 of the RMA lists the Acts that include statutory acknowledgements.

To bundle or not to bundle? (Separate activities or holistic assessment)?

It is common practice for an application to be prepared on the basis of a proposed development which often involves numerous activities for resource consent. This approach is both efficient and enables proposals to be comprehensively considered, ensuring that all of the effects of a proposal are identified and adequately assessed, for the purposes of making both the notification and substantive decisions on the application.

However, an applicant is also entitled to apply for consents in separate applications. However, splitting the proposal into its separate applications for the purposes of notification could mean that the council fails to look at a proposal in whole. In circumstances where there are multiple applications, the council therefore has two inter-related decisions to make.

Firstly, the council must determine whether all necessary consent applications have been lodged prior to making the notification decision. In some circumstances, a council may determine not to proceed with their notification decision until other related applications (that will help with a better understanding of the proposal as a whole) are made (s91). This may include consent applications that need to be processed by other consent authorities.

Secondly, the council also has to decide whether to treat a proposal as a number of separate activities or as one overall activity (a 'bundle'). For example, should an application for earthworks be treated separately from a concurrent application to

construct and/or use a building? Bundling resource consent activities is generally considered appropriate where the activities for which consents are being sought overlap to such an extent that they cannot be realistically or properly separated. If the decision is made that separate applications should be bundled, they are assessed together as a whole, on the basis of the most stringent activity classification.

Exceptions to the general bundling rule noted above are where separate but concurrent consents have been sought; and (a) one of the consents sought is a controlled or restricted discretionary activity; and (b) the scope of the council's control or discretion in respect of one of the consents is relatively confined; and (c) the effects of exercising the two consents would not overlap, impact or have flow-on effects on each other (*Southpark Corporation Ltd v Auckland City Council [2001] NZRMA 350 (EnvC) at para [15].)*

The decision on whether to bundle separate consents together also has implications for the way in which the preclusions on / requirements for, notification apply under the new step by step notification process. This is explained further below, but in brief (and subject to the steps being worked through in a sequential way):

- all of the activities in a bundle of applications must fall within the scope of a given preclusion in order for the preclusion on notification to apply, and
- conversely, only one of the activities within a bundle of applications needs to fall within the scope of a mandatory notification requirement in order for the whole of the bundle to require notification

Notification decision for fast track consents

RLAA17 introduced a new fast track process for resource consent applications that are district land use activities with a controlled activity status (other than subdivision of land), where electronic address for service has been provided. The council has 10 working days to process the resource consent application, instead of the standard 20 working days, which includes making the notification decision.

Determining whether a fast track consent should be Publicly Notified:

It is important to note that RLAA17 amended the notification provisions by introducing a step-by-step process for determining notification. The step-by-step process is described further below. The steps for determining whether to publicly notify are mandatory – so the consent authority must follow the steps set out in s95A, in the order given (s95A(1)).

As described further below in the step-by-step process, unless there is a mandatory requirement for public notification under s95A(3) or there are special circumstances that exist to warrant the public notification of the application (under s95A(9)), an application for a controlled activity is specifically precluded from public notification (s95A(5)(b)(i)).

If it is determined that the application should be publicly notified, the application ceases to be processed as a fast track application (s87AAC(2)(a)), and the standard public notification process and timeframe applies.

Determining whether a fast track consent should be Limited Notified.

If it has been determined that the fast track consent application does not need to be publicly notified, the council then needs to determine whether it needs to be limited notified. Again it is a requirement of the Act that the consent authority must follow the steps described in s95B, and must do so in the order given (s95B(1)).

The step-by-step process for limited notification is set out further below, but limited notification under Step 1 is required if there are affected protected customary rights groups, affected customary marine title groups, or affected persons with a statutory acknowledgement (s95B(2)-(4)).

If those circumstances don't apply, there is a general preclusion on controlled district land use activities (excluding subdivision of land) being limited notified, as set out under Step 2 (s95B(5)(a) and (6)(b)(i)). However, limited notification may still be required under Step 4 if the special circumstances test is met.

If it is determined that there are persons that need to be limited notified (mandatory requirement or because special circumstances exist), the application ceases to be processed as a fast track application, and the standard limited notification process and timeframe applies.

To Publicly Notify or Not (Section 95A)?

STEP 1 - Is public notification mandatory?

The very first step in making a notification decision is to ensure that the application is not mandatorily required to be publicly notified:

- Has the applicant requested public notification? If yes, the application MUST be publicly notified.
- Has the applicant not provided within the applicable deadline, or refused to provide any further information requested under s92(1)? If yes, the application MUST be publicly notified.
- Has the applicant not responded within the applicable deadline or refused to agree to the commissioning of a report under s92(2)? If yes, the application MUST be publicly notified.
- Has the application been made jointly with an application to exchange recreation reserve land (under s 15AA of the Reserves Act)? If yes, the application MUST be publicly notified.

Is public notification mandatory?	
If YES	**PUBLICLY NOTIFY** APPLICATION
If NO	PROCEED TO STEP 2

STEP 2 - Is public notification precluded/waived?

For any applications that are not publicly notified under Step 1, then the next step in making a notification decision is to check whether public notification is precluded (ie not required). The criteria outlining which circumstances preclude public notification are as follows:

Rules in a plan or National Environmental Standard (NES) (s95A(5)(a))

Check the rules in the plan and any relevant national environmental standard to see if there are any relevant provisions that preclude notification for the activity or activities being applied for.

There must be a rule(s) in a plan or a national environmental standard that waives or precludes *public notification* for all of the activities covered by the application. If this is the case, then the application cannot be publicly notified unless special circumstances apply (step 4).

If the plan or national environmental standard does not preclude notification of all of the activities covered by the application, then the next step is to check the status of the activities in the application.

Do rules in a Plan or NES preclude public notification for all activities in application?	
If YES	PROCEED TO STEP 4
If NO	CONTINUE THROUGH STEP 2

Activity Assessment (s95A(5)(b)(i)-(iv))

Determine whether an application is for one or more of the activities set out below (but no other activities). If the answer is 'yes', the application cannot be publicly notified unless special circumstances apply (see step 4).

Controlled Activities

If the application is for a controlled activity under either a district or regional plan, or as a result of a national environmental standard.

Subdivision of land (Restricted Discretionary/Discretionary Activities)

If the application is for a *restricted discretionary* or *discretionary activity* for the subdivision of land. (Note that: subdivision that is a controlled activity is precluded from public notification under the 'controlled activity' category; and that this preclusion applies to the subdivision of any land, not just that which is, for example, zoned for residential or commercial development).

Residential activity (for Restricted Discretionary/Discretionary Activities)

If the application is for a *restricted discretionary*, or *discretionary activity* for a 'residential activity' (as defined in s95A(6). Note that controlled activities that would otherwise fall within the definition of a residential activity are already precluded from public notification under the 'controlled activity' category.

Boundary Activities (Restricted Discretionary/Discretionary/Non-complying Activities)

If the application is for a *restricted discretionary*, *discretionary or non-complying* 'boundary activity' (as defined under s87AAB). (Note that boundary activities with a controlled activity status are precluded from public notification under the 'controlled activity' category.)

Activities prescribed through regulations

If the application is for an activity prescribed through regulations made under s360H(1)(a)(i).

If an application includes multiple activities and they are to be considered as a bundle, public notification is only precluded under this step if each individual activity is precluded from public notification by virtue of falling within the scope of the categories noted above.

Is public notification precluded/waived for all activities in the application by virtue of their activity type or status?	
If YES	PROCEED TO STEP 4
If NO	PROCEED TO STEP 3

STEP 3 - Is public notification required? (s95A(8))

If the application is not precluded from public notification in Step 2 above, then public notification may be required if the following apply:

Does a rule in a plan or NES require public notification (s95A(8)(a))?

If a rule in a plan or national environmental standard requires public notification (and is not precluded for reasons noted above), then the application MUST be publicly notified.

If an application is for multiple activities, public notification is required for the whole application if any part of the application requires notification by a rule in a plan or NES.

Is any activity in the application subject to a rule or NES that requires public notification?

If YES	**PUBLICLY NOTIFY** APPLICATION
If NO	CONTINUE THROUGH STEP 3

Are the adverse effects on the environment more than minor (s95A(8)(b)?

When the rules in the plan or NES are silent as to public notification, the council needs to assess whether the activity will have or is likely to have adverse effects on the environment that are more than minor in accordance with s95D. If the adverse effects of the activity will be or are likely to be more than minor then the application will need to be publicly notified.

The assessment of whether an effect is more than minor is one of fact and degree. It requires exercising discretion as to the degree of seriousness involved. A minor effect is at the lower end of a scale that includes major, moderate and minor effects, but it must be something more than *de minimis*.

A council cannot take into account positive effects from the proposal when considering whether the effects will be minor or more than minor. It can, however, have regard to any mitigating factors that would eliminate any cause for concern about the possibility of adverse effects, such as extra noise being nullified by additional sound proofing. This can include the consideration of prospective conditions of consent to mitigate effects of the activity which are inherent in the application.

The council is not entitled to consider the effects of one activity in isolation where other activities are part of the application. A proposal can only be split into separate activities in the limited circumstances mentioned in the guidance related to bundled consents earlier.

The council should look at the overall combined effects of the proposal on the broader environment. It is possible that the council may consider there are more than minor effects on one neighbour, but in the context of the wider environment those effects are still no more than minor. In such a case, the application might only be limited notified to the affected neighbour (if limited notification is not precluded after following the steps in s95B).

There is a clear distinction in the RMA between localised effects and effects on the wider environment. Section 95D(a) requires that when deciding if the effects will have or are likely to have adverse effects on the environment that are more than minor for the purposes of public notification, the adverse effects of an activity on the following persons must be disregarded:

- the owners and occupiers of the land on which the activity will occur; or
- the owners and occupiers of any land adjacent to that land.

This means that an assessment needs to be made by the council as to which properties are considered to be adjacent to the activity or land use. The term adjacent has a common meaning which is "close to, but not necessarily adjoining another site". The

term adjacent has also been defined by the Courts as lying near or close; adjoining; continuous; bordering; not necessarily touching".

When assessing whether an activity will have or is likely to have adverse effects on the environment that are more than minor, regard needs to be had to the following:

1. the cumulative nature of any effect over time, or in combination with other effects
2. the probability of occurrence
3. temporary effects, including adverse effects associated with construction work
4. the scale and consequences of the effect (high potential impact?)
5. the duration of the effect
6. the frequency or timing of any effect
7. whether the effect relates to a s6 or s7 matter
8. the area affected (eg, is it an effect on neighbours or the wider environment?)
9. the sensitivity of surrounding uses to that effect
10. reverse sensitivity issues
11. whether the effect is to be mitigated or avoided by a condition contained in the application or offered by the applicant in the application, which the applicant has agreed to.

The council **may** disregard an adverse effect permitted by a rule or national environmental standard (refer to permitted baseline test section later in this guidance note.

The following matters should not be considered by the council when assessing whether effects are more than minor:

- the precedent effect of granting consent
- effects that are outside the council's discretion or control (restricted discretionary and controlled activities and NES)
- trade competition and the effects of trade competition
- any effect on a person who has given written approval.

Are the adverse effects on the environment more than minor (in accordance with s95D)?	
IF YES	**PUBLICLY NOTIFY** APPLICATION
IF NO	PROCEED TO STEP 4

STEP 4 - Are there special circumstances to warrant public notification?

If the application has not been publicly notified as a result of any of the previous steps, then consideration must be given to whether or not special circumstances exist, that warrant the public notification of the application. If special circumstances do exist, then the council must publicly notify the application.

Case law is settled on the application of the special circumstances test with the authority being Far North DC v Te Runanga-a-iwi o Ngati Kahu [2013] NZCA 221:

[36]…A "special circumstance" is something, as White J accepted, outside the common run of things which is exceptional, abnormal or unusual but less than extraordinary or unique. A special circumstance would be one which makes notification desirable despite the general provisions excluding the need for notification. As Elias J noted in Murray v Whakatane District Council: … the policy evident in those subsections seems to be based upon an assumption that the consent authority does not require the additional information which notification may provide because the principles to be applied in the decision are clear and non-contentious (as they will generally be if settled by district plan) or the adverse effects are minor. Where a consent does not fit within that general policy, it may be seen to be unusual.

[37] In order to invoke s 94C(2), the special circumstance must relate to the subject application. The local authority has to be satisfied that public notification, as opposed to limited notification to a party or parties, may elicit additional information bearing upon the non-complying aspects of the application.

The purpose of considering special circumstances is to look at matters that are beyond the plan itself. The fact that a large development is proposed is probably not sufficient to constitute special circumstances. Refer to the Ministry of the Environment's technical guidance on the notification provisions of RLAA17 for further discussion regarding special circumstances.

Are there special circumstances that warrant public notification of the application?	
If YES	**PUBLICLY NOTIFY** APPLICATION
If NO	DETERMINE WHETHER APPLICATION NEEDS TO BE LIMITED NOTIFIED IN ACCORDANCE WITH s95B

To notify on a limited basis or to not notify (Section 95B)?

STEP 1 - Are there certain affected persons/groups that are affected? (Section 95B(2))

If the council determines that certain people or groups are affected by the application, these persons must be given limited notification. The first step in making a limited notification decision is to identify certain affected groups and affected persons, as follows:

Are there any affected Customary Rights Groups (s95B(2)(a))?

A council must decide, with reference to s95F whether a protected customary rights group is affected and whether the activity may have adverse effects on the rights the group has under the Marine and Coastal Area (Takutai Moana) Act 2011 (MCAA) unless the group has given written approval (and has not withdrawn it in writing before Council makes its decision).

Schedule 1 of the MCAA outlines what needs to be considered when deciding whether a protected customary rights group is affected by an application. It states that when deciding whether a consent application will, or is likely to, have an adverse effect on the exercise of a protected customary right, the following matters must be considered:

- the effects of the proposed activity on a protected customary right; and
- the area the application would have in common with the protected customary rights area; and
- the degree to which the proposed activity must be carried out to the exclusion of other activities; and
- the degree to which the exercise of a protected customary right must be carried out to the exclusion of other activities; and
- whether an alternative location or method would avoid, remedy, or mitigate any adverse effects of the application on the exercise of the protected customary right; and
- whether conditions could be included in a resource consent for the proposed activity that would avoid, remedy, or mitigate any adverse effects of the proposed activity on the exercise of the protected customary right.

If it is determined that there is a protected customary rights group affected, then the application must be considered on a limited notified basis, and the protected customary rights group must be served notice.

Are there any affected Customary Marine Title Groups (s95B(2)(b))?

The only activities requiring resource consent that may take place within a customary marine title area are those that the customary marine title group has approved, or accommodated activities. Accommodated activities are defined in the MCAA.

When a council is considering an application for an accommodated activity within a customary marine title area, they must decide whether the customary marine title group is affected (with reference to s95G) i.e. if the activity may have adverse effects on the exercise of the rights applying to the group, unless the group has given written approval. Section 60 of the MCAA outlines the rights of customary marine title groups. In summary, these rights are the right to use, benefit from and develop a customary marine title area. Customary marine title groups are still required to apply for any relevant resource consents for activities they undertake within their title area.

If the council determines that there are affected customary marine title groups (for resource consent for an accommodated activity) then the application must proceed on a limited notified basis, and the customary marine title group(s) must be served notice.

Is the subject land subject to a statutory acknowledgement (s95B(3))?

If the council determines that the proposed activity is on or adjacent to, or may affect, land that is subject to a statutory acknowledgement, and then determines that the person to whom the statutory acknowledgement is made is an affected person, then the application must proceed on a limited notified basis and the person who is identified as being affected must be served notice (unless they have provided their written approval).

The council must have regard to every relevant statutory acknowledgement made in accordance with an Act specified in Schedule 11 of the RMA.

Are there certain affected groups and persons that must be notified?	
If YES	**NOTIFY THE APPLICATION TO EACH AFFECTED GROUP/PERSON** AND PROCEED TO STEP 2
If NO	PROCEED TO STEP 2

STEP 2 - Is limited notification precluded?

For any applications that are not limited notified under Step 1, the next step in making a limited notification decision is to check whether limited notification is precluded (ie not required). The criteria outlining which circumstances preclude limited notification are as follows:

Rules in a plan or NES (S95B(6)(a))

Check the rules in the plan and any relevant national environmental standard to see if there are any relevant provisions that preclude limited notification for the activity or activities being applied for.

There must be a rule(s) in a plan or a national environmental standard that waives or precludes limited notification for all of the activities covered by the application. If this is the case, then the application cannot be limited notified unless special circumstances apply (step 4).

If the plan or NES does not preclude limited notification, or some but not all of the activities within the application are precluded from limited notification, then the next step is to check the activity status of the application.

Are all of the activities in the application subject to one or more rules or NES that preclude limited notification?	
IF YES	PROCEED TO STEP 4
IF NO	CONTINUE THROUGH STEP 2

Activity Assessment (s95B(6)(b)

Determine whether an application is for one or more of the activities set out below (but no other activities). If the answer is 'yes', the application cannot be limited notified unless special circumstances apply (see step 4).

Land use controlled activities (District Plan only)

If the application is for a land use activity with a controlled activity status under a district plan (other than subdivision of land), then the application cannot be limited notified unless special circumstances exist that warrant to limited notification of the application to any other persons (Step 4).

Is the application a district land use activity with a controlled activity status?	
IF YES	PROCEED TO STEP 4
IF NO	CONTINUE THROUGH STEP 2

Activities prescribed through regulations made under s360H(1)(a)(ii)

If the activity is prescribed through regulations made under s360H(1)(a)(ii), then the application cannot be limited notified unless there are special circumstances that warrant limited notification of the application to any persons other than those prescribed persons (Step 4).

Is the activity prescribed by regulations to preclude limited notification?	
IF YES	PROCEED TO STEP 4
IF NO	PROCEED TO STEP 3

STEP 3 - Are there other affected persons in accordance with s95E?

If the proposed activity is not precluded from limited notification under Step 2 above, subject to the eligibility clauses mentioned below, a person is an affected person if the council decides that the activity's adverse effects on the person are minor or more than minor (but are not less than minor). Refer to guidance below. An affected person must be notified.

The eligibility clauses are in relation to:

- **Boundary Activities (s95B(7)(a)**

  The definition of 'boundary activity' is noted above. The owners (not the occupiers) of an allotment with an 'infringed boundary' are currently the only persons that are eligible to be considered as an affected person under section 95E (until any further activities are prescribed by the regulations, as described below). Whether they are considered to be affected persons in accordance with s95E (and served notice) or not, the council must then determine (under Step 4 below) whether there are any special circumstances that warrant the notification of the application to persons other than those with an 'infringed boundary'.

For 'Boundary Activities", are the eligible persons affected?	
IF YES	**NOTIFY THE APPLICATION TO ELIGIBLE AFFECTED PERSONS** AND PROCEED TO STEP 4
IF NO	PROCEED TO STEP 4

- **Activities prescribed by regulations (s95B(7)(b))**

  Any regulations made under s360H(1)(b) will prescribe persons who are eligible to be considered an affected person in relation to particular activities.

  For these prescribed activities, the prescribed persons are the only persons eligible to be considered as affected persons under s95E. Whether the prescribed persons are determined to be an affected person (and served notice) or not, the council must then determine (under Step 4 below) whether there are any special circumstances that warrant the notification of the application to persons other than those that are prescribed.

For prescribed activities, are the prescribed persons affected?	
IF YES	**NOTIFY THE APPLICATION TO PRESCRIBED AFFECTED PERSONS** AND PROCEED TO STEP 4
IF NO	PROCEED TO STEP 4

- **Other activities (s95B(8))**

If a proposed activity is not a boundary activity or an activity prescribed by regulations under s360H(1)(b), the council must determine whether there are any affected persons in respect of the activity in accordance with s95E, and serve notice on those persons who are determined to be affected. If no persons are considered to be affected, the application can proceed on a non-notified basis.

Are there any other persons affected?	
IF YES	NOTIFY THE APPLICATION TO AFFECTED PERSONS & PROCEED ON A ***LIMITED NOTIFIED*** BASIS
IF NO	DO NOT NOTIFY APPLICATION TO ANY PERSON AND PROCEED ON A ***NON-NOTIFIED*** BASIS

Determination of whether a person is an affected person (s 95E)

Section 95E notes that the council can disregard only such adverse effects of the activity on a person if a rule or NES permits an activity with that effect (known as the permitted baseline - refer to guidance below). In the case of controlled or restricted discretionary activities, the council MUST disregard an adverse effect of the activity on a person where an effect does not relate to a matter over which a rule in a plan or NES reserves control or restricts discretion.

Potentially adversely affected persons may include:

- owners and occupiers of the land (an 'owner' includes any person who is a party to a current written sale and purchase agreement for the land [either conditional or unconditional], or a similar agreement to take a lease of the land). Note: If the activity is a 'boundary activity', the only persons eligible to be considered are the owners (not the occupiers/tenants) of adjoining properties with an 'infringed boundary'.
- owners and occupiers of adjacent, nearby and/or downstream land
- tangata whenua
- downstream resource users
- any Minister of the Crown with statutory responsibilities for an area or a site that could be adversely affected
- the relevant district or regional council
- those persons or organisations whose use or enjoyment of an area could be adversely affected
- land owners/occupiers with sensitive activities (reverse sensitivity effects)
- any other person who the council considers is affected in a manner different from the public generally.

Just because some people and organisations may have an interest in a proposal, does not mean they may be affected. Some potential adverse effect, of at least a minor nature on a person, must be apparent in order for a person to be considered affected. Case law has shown that an affected person is one who is 'affected in a manner different from the public generally'. Being 'interested' in a manner different from the public generally has not been enough.

Adverse effects on persons are broadly conceived and are not limited to direct effects on those who own or occupy land. Persons can also be adversely affected in an environmental sense (i.e. indirectly by the proposed activity).

A person is not considered to be an affected person if—

- the person has given, and not withdrawn, written approval for the proposed activity in a written notice received by the council before it has decided whether there are any affected persons; or

- the council is satisfied that it is unreasonable in the circumstances for the applicant to seek the person's written approval. Refer to guidance below regarding obtaining the written approval of affected persons.

If some affected persons or groups have not given their written approval, the council must notify the application on a limited basis by serving notice on all affected persons and groups who have not provided their written approval. Those who have given their written approval to the activity are not considered affected persons and need not be notified.

STEP 4 - Are there special circumstances to warrant limited notification of the application?

Special circumstances have been defined by case law (in the context of whether special circumstances exist to require the public notification of an application) as *"outside the common run of things which is exceptional, abnormal or unusual, but less than extraordinary or unique. A special circumstance would be one which makes notification desirable despite the general provisions excluding the need for notification."* (Far North DC v Te Runanga-aiwi o Ngati Kahu [2013] NZCA 221).

If the proposed activity is precluded from limited notification under Step 2:

The preclusions outlined in Step 2 (i.e. if a rule in a plan or NES precludes limited notification or the proposal is a district land use controlled activity or a prescribed activity) are based on the assumption that the plan, NES or regulations (made under s360H(1)(b)) have anticipated that the adverse effects in relation to the activity are less than minor and therefore likely that no persons can be considered to be adversely affected by the proposal in a more than minor way. Step 4 requires that the council, before proceeding on a non-notified basis, consider whether the proposal actually fits within what the plan/NES or regulations anticipated, and if not, whether this is an

unusual, abnormal or exceptional reason that any person should be notified of the application.

If the council has concluded that special circumstances do exist in relation to the application, that warrant notification to any persons (if those persons were precluded from being considered as affected parties), the council MUST serve notice to those persons.

If the council has concluded that there are no special circumstances that warrant the limited notification of the application, then the application can proceed on a non-notified basis.

If there are certain persons that are not eligible to be considered as affected under Step 3:

In the case of a *boundary activity*, even if the owner of an allotment with an infringed boundary is considered to be affected and served notice of the application, or has been deemed to not be an affected person (under Step 3), the council must make an assessment as to whether there are special circumstances that warrant the notification of the application to a person other than the owner of an allotment with an infringed boundary.

For an activity prescribed by regulations, whether the prescribed person in respect of the proposed activity has been deemed as not an affected person (and served notice) or not, under s95E (Step 3), the council must make an assessment as to whether there are special circumstances which warrant the notification of the application to persons other than those that are eligible (ie prescribed).

If the council has concluded that special circumstances do exist in relation to the application that warrant notification to persons who were not eligible to be considered as affected persons under Step 2 or 3, the council MUST serve notice to those persons.

If the council has concluded that there are no special circumstances that warrant the limited notification of the application to any other persons, then the application can proceed on a non-notified basis.

Are there special circumstances that warrant notification to any persons to whom limited notification would otherwise not be eligible?	
If YES	NOTIFY THE APPLICATION TO EACH OF THOSE PERSONS (PROCEED ON A ***LIMITED NOTIFIED*** BASIS)
If NO	DO NOT NOTIFY THE APPLICATION TO ANY PERSON & PROCEED ON A ***NON-NOTIFIED*** BASIS

Written approval of affected persons

Unreasonable in the circumstances

A person must not be treated as being adversely affected if it would be unreasonable in the circumstances to seek the written approval of that person (s95E(3)(b)). The courts

have made no significant comment on when it might be unreasonable to require an applicant to obtain the written approval of all affected persons.

The provision is not intended to authorise the ignoring of people who 'unreasonably' withhold their approval or refuse to participate. It applies where affected persons are not easily contactable or available and do not have an agent who may act on their behalf. Both the applicant and the council need to have made an effort to contact the affected persons and that needs to be documented. Councils should be conservative when using this test as it has implications for public participation in the resource consent process.

Persons who are unavailable will not need to be served with notice of an application. Furthermore, if they are the only persons who would otherwise be affected, or if all other affected persons have given their approvals, the application can be dealt with as if their written approval had been given.

Obtaining the written approval of affected persons

The responsibility for obtaining the written approval of affected persons lies with the applicant, not with the council. Nevertheless, it is the council's responsibility to determine who it considers to be affected and to determine whether all such persons have given their written approvals.

The council is not expected to investigate the written approvals it receives. However, if the approval does not explicitly state what the applicant is applying for and therefore what is being agreed to, then the council has a duty to ascertain what has been approved of and what has not.

As there is no need to serve notice on persons who have given their written approval to a limited notified application, councils need to be vigilant in ensuring that any changes to the application and/or plans throughout the consent process are communicated to those who provided their written approval. This is especially important given there is the ability for written approvals to be withdrawn. Council officers should assure themselves that any written approvals provided relate to the proposal under consideration. Should any significant changes be made to the proposal then generally new written approvals are required.

Form 8A of the Resource Management (Forms, Fees and Procedures) Regulations 2003 specifies the prescribed form for an affected persons written approval to an activity that is the subject of a resource consent application. It should be noted that there is a different written approval form for neighbours with an infringed boundary (Form 8B) with respect to applications for deemed permitted boundary activities (refer to MfE technical guide to deemed permitted activities for further information).

The following list provides the information requirements for written approvals as required by Form 8A:

- the name of the council to which the application is being made
- the full name of the person giving written approval and contact details (address for service)

- a statement that they are the owner or occupier of the affected property and/or whether they have the authority to sign on behalf of other owners/occupiers of the property
- the proposal for which they are giving approval
- a statement that the affected party has read the full application for resource consent, the Assessment of Environmental Effects, and any site plans (and lists these documents)
- a statement that once the form has been signed the council is no longer entitled to consider any effects on them when deciding the application
- that their written approval can be withdrawn before the date of a hearing if there is one, or if there is not, any time before the consent is granted
- that the affected party has signed and dated the applicant's proposed plans and assessment of environmental effects (AEE).

Signing the actual proposed plans and AEE is important, as sometimes an approval may relate to an earlier version of an application (as outlined above) or to plans that may not have been disclosed to the person. It is also important the signed plans relate to all aspects of the development which require consent, not just the non-compliances on that neighbour's boundary.

Consider using an aerial photograph to identify the site and properties of potentially affected parties.

Checking affected person's approvals

It is important to ensure that the written approvals supplied with an application for resource consent (whether they are on a standard form or not) are complete and adequate. Check the following:

- Has the form been signed and dated?
- Have all relevant plans, and in most cases the AEE, been signed and dated?
- Are they the same plans and information that is now before the council, i.e. current versions?
- If the application is amended in any way, check that the affected person(s) know and approve of the amendments.
- Are the approvals from the correct people (i.e. registered landowner(s), all landowners or occupiers if there is more than one registered on the title (computer register)). Are they signed by or on behalf of other owners and/or occupiers with their authority? For example, if a property is jointly owned, have both owners signed or the second owner confirmed that the first is signing on his/her behalf?
- Have all trustees signed or have authority to sign on the others' behalf?
- Are the approvals unconditional? Conditional approvals should not be accepted. There is no onus on a council to ensure the demands or 'conditions' of an affected person are satisfied. This is the responsibility of the applicant. The proposal should have been amended by the applicant to reflect any agreed changes.

- Has the approval been withdrawn? Note that lodging a submission does not have the effect of automatically withdrawing that party's approval, unless it specifically says that.

Where there are a number of affected persons, it may help to create a checklist to tick off (for each affected person) whether they are the owner or occupier, or both, whether they signed the plans/AEE, and whether their written approval has been obtained. This information can also be transferred into the decision report.

What is the permitted activity baseline? (permitted baseline test)

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

The permitted activity baseline applies to consideration of both who is affected and whether effects are or are likely to be more than minor.

- If a council applies the permitted activity baseline, it is only the adverse effects over and above those forming a part of the baseline that are relevant when considering those two issues.
- It is the decision-maker's discretion whether to use the permitted baseline as the basis for assessing effects and identifying affected parties (unless the application is for a controlled activity where s95E(2)(b) directs that the council MUST disregard an adverse effect of the activity on a person if the effect does not relate to a matter for which a rule or NES reserves control or restricts its discretion. Similarly for restricted discretionary activities, the council must, when determining the extent of the adverse effects, disregard any adverse effects that do not relate to matters for which the rule or NES restricts discretion).

The purpose of the permitted baseline test is to isolate and make effects of activities on the environment that are permitted by the plan or NES, irrelevant. When applying the permitted baseline such effects cannot then be taken into account when assessing the effects of a particular resource consent application. The baseline has been defined by case law as comprising non-fanciful (credible) activities that would be permitted as of right by the plan in question.

A permitted baseline analysis and an analysis of the receiving environment are two different assessments. The permitted baseline, which applies to permitted activities on the subject site, removes the effects of those activities from consideration under ss95D, 95E and 104(1)(a) of the RMA. The receiving environment is the environment upon which a proposed activity might have effects. It is permissible (and often desirable or necessary) to consider the future state of the environment upon which effects will occur, including:

- the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activities

- the environment as it might be modified by implementing resource consents that have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented.

but not

- the environment as it might be modified by implementing future resource consent applications (because these are too speculative).

The 'environment' upon which effects should be assessed is therefore the existing and reasonably foreseeable future environment. In identifying the environment, a council should consider the environment as it is at the time of the application. It should also consider the likelihood of change to that environment in the future, based upon the activities that could be carried out as of right or with respect to resource consents that have been granted (where it is likely that they will be given effect to). Deemed permitted activities that have been given under section 87BB(d) or 87BA(2) will therefore likely need to be taken into account by decision makers in this manner under section 95D.

When applying the permitted baseline, a council should first ask what permitted activities would be credible (as opposed to fanciful).

Points to consider:

- Section 87A(1) states that an activity permitted by regulations (including any national environmental standard), a plan, or a proposed plan does not require a resource consent. Section 95D(b) and s95E(2) states that adverse effects can be disregarded if permitted by a national environmental standard or a rule. This refers to rules that have either taken legal effect in accordance with section 86B, or have become operative under section 86F
- 'Permitted by the plan' does not include controlled or restricted discretionary activities.
- In relation to marginal and temporary deemed permitted activities, these are determined on a case by case basis and are not an activity permitted by a rule. They will therefore not form part of the statutory permitted baseline under the RMA.
- Deemed permitted boundary activities (under s87BA) are not activities permitted by a rule (or NES) and therefore do not form part of the permitted baseline.

An activity that has been deemed a permitted activity by a consent authority under section 87BB(d) or permitted under section 87BA(2) will form part of the **existing environment** (which applies to the site and surrounding environment). There should be a clear determination in the report from the relevant council officer stating the reasons for applying or not applying the permitted baseline. As a matter of good practice all notification decisions should consider whether or not to apply the baseline.

Situations where applying the baseline may not be appropriate include:

- where the application of the baseline would be inconsistent with Part 2 of the RMA
- where the baseline claimed by the applicant is fanciful or not credible

- where the application of the baseline would be inconsistent with objectives and policies in the plan

Documenting the notification decision

The decision whether or not to publicly or limited notify an application, and the reasons for doing so, must be well documented. This documentation should show that the step-by-step process set out in ss95A – 95G of the RMA has been undertaken in the correct order, and should include all those matters that were considered as part of the decision.

If the process is not properly documented there is a higher risk of a successful judicial review as judicial reviews focus on process.

On judicial review, the Court will scrutinise the material that was before the council at the time of the notification decision to determine whether there was an adequate basis for the decision.

The consideration and decision on each of the notification steps (where relevant) should be clearly recorded for each application. Notification decisions should be kept separate from the substantive decision, even if they are within the same document. However, common matters may be cross-referenced.

Procedures – How to notify an application

Overall it is good practice for the processing officer to advise the applicant (verbally or in writing) of an intention to notify in advance of the public notice or serving notice.

There is no requirement for there to be a written report on the notification decision provided to the applicant. However, s35(5)(ga) requires the council to keep records of notification decisions and for these to be publicly available.

For a **publicly notified application**:

- the public notice must be in the prescribed form. Refer to Form 12 of the Resource Management (Forms, Fees and Procedures) Regulations 2003.
- the public notice must be published (along with all the relevant information) on a freely accessible internet site. A short summary of the online notice is to be published in at least one newspaper circulated to the whole area affected by the topic of the notice, along with the web address directing readers to the full notice.
- the notice of the application must be served on every person prescribed in Regulation 10 of the Resource Management (Forms, Fees and Procedure) Regulations 2003.
- the notice (and the summary in the newspaper) must be worded in a way that is clear and concise. The notice should include enough information about the application and the location to enable any person to decide whether or not to view the complete application for the purposes of making a submission.
- the council must serve notice on all affected persons and on various other specified organisations and persons (via the means listed in s352). Any person may make a

submission on an application that has been publicly notified, unless they are a trade competitor and are submitting on trade competition grounds (as outlined in s308B).

- the council has the discretion whether to require the summary of the public notice to be affixed in a conspicuous place, on or adjacent to the site to which the application relates. Refer to Regulation 10A of the Resource Management (Forms, Fees and Procedure) Regulations 2003.

For a **limited notified application**:

- the council must serve notice of the application on all affected persons (as determined by the step-by step process) but does not need to serve notice on any persons who have already given their written approval.
- there is no prescribed form for serving notice of an application on affected persons. Council could use a notice similar to that used to publicly notify an application (Form 12), but this form would need to be amended so it does not get confused with the public notification form.
- the notice should include enough information about the application and the location to enable the affected person to decide whether or not to view the complete application for the purposes of making a submission. The notice must be worded in a way that is clear and concise.
- the council does not need to serve the entire application itself. Service can be by way of a letter advising where the application can be viewed rather than attaching a copy of the application.
- anyone who is served with notice of an application may make a submission, unless they are a trade competitor and are submitting on trade competition grounds (as outlined in s308B).
- no one else has a right to submit, and the council cannot accept submissions from persons who were not served (note: this is mandatory, so it is important the correct affected persons are identified and served notice if they have not provided their written approval).

Section 104(3)(d)

Section 104(3)(d) provides that a council must not grant consent to an application that should have been publicly notified and was not.

In Fullers Group Ltd v Auckland Regional Council [1999] NZRMA 439 (Court of Appeal), the Court of Appeal held that when a council is deciding whether to grant consent, it is not under any duty to consider whether the application should have been notified, if that notification decision was considered at any earlier stage.

Nevertheless, a submitter on a limited notified application may be entitled to argue in their submission, and at the council hearing and/or on any subsequent appeal, that the application should have been publicly notified. (Note: a submitter may only appeal in respect of the matter raised in their submission to the consent authority, and only if the proposal is not a *boundary activity (defined in s87AAB)*, a subdivision consent or a

residential activity (defined in s 95A(6)). If the council or Court agrees, it appears they would have no choice but to decline consent in terms of s104(3)(d).

It is also possible to re-notify an application if a notification decision has been made but further information requires this decision to be changed.