

2013

Consent Support

Certificates of Compliance





Certificates of Compliance

This note provides guidance on preparing, processing and issuing Certificates of Compliance (CoC) under the Resource Management Act 1991 (RMA).

Specific guidance is also provided on dealing with proposals that involve both permitted and non-permitted components, known as hybrid activities.

This guidance note does not address existing use certificates under s139A.

Introduction

Section 139 provides that a council, on request, must issue a CoC if the activity can be done lawfully on the site without resource consent and the council fee is paid. Regional councils, territorial authorities and the Environmental Protection Authority (EPA) can issue CoCs. Each agency can only issue CoCs for matters for which they are responsible. Once issued, a CoC is deemed a resource consent under s139(10) of the RMA.

Where a proposal involves both permitted and non-permitted components (a 'hybrid activity'), a CoC can be issued for the permitted component, if it can be separated from the non-permitted components. An example of a hybrid activity could be a new transmission line, which is permitted within the road reserve, but is a discretionary activity within a certain zone.

Information requirements for CoCs are rigorous and the onus rests on an applicant to provide the council with full information to demonstrate a CoC can be issued. If any element of non-compliance is identified, then a CoC cannot be issued. While there is no set form under the RMA regulations, a request for a CoC should be in the form of an application to ensure adequate details are provided.

This note provides guidance and direction for practitioners on dealing with applications for CoCs.

Overview of certificates of compliance

Information requirements for certificate of compliance applications

Pre-acceptance checks for applications for CoCs should follow the same process for resource consent applications.

The information requirements for a CoC are as rigorous as they are for a resource consent. However, in the case of a CoC, the onus is on the applicant to satisfy the decision-maker that a proposal complies with all of the relevant permitted activity rules, and to provide sufficient information to allow that conclusion to be reached.

A point-by-point analysis is required, covering all the relevant provisions of the applicable operative plan, any proposed plan(s) and any relevant national environmental standards.

A CoC cannot be issued where:

- A proposed plan has been notified, and



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- The activity could not be lawfully carried out without resource consent under that plan.

An application for a CoC should include the following:

- a full description of the proposal - the level of detail required will depend upon the nature of the proposal and upon the particular rules that must be complied with
- a description of the site where the proposal will be undertaken
- a clear explanation of how the activity/proposal meets all the relevant provisions of the district or regional plan, and any relevant national environmental standard - an applicant may choose to present this information as a table listing each provision and showing the activity/proposal complies
- copies of all necessary plans, details and calculations to enable the proposal to be checked for compliance with the district/regional plan
- the required number of copies of the current computer register (title) for the application site(s)
- the required deposit fee.

Requesting a certificate of compliance from the Environmental Protection Authority

A CoC can only be requested from the Environmental Protection Authority (EPA) if the proposal/activity relates to a proposal of national significance which has been referred to a board of inquiry or the Environment Court by the Minister for the Environment.

For example, there may be minor works that are part of a large nationally significant infrastructure project that can be separated out from the main proposal for which a CoC can be issued by the EPA (i.e. minor earthworks that are a permitted activity in association with a transmission line).

The applicant is not required to pay an administration charge to the EPA before the EPA considers a CoC. However, the EPA may recover "its actual and reasonable costs of dealing with the request from the person making the request" (s 139(13)). For more information on the EPA application process refer to the [Resource Management Section of the EPA website](#).

Requesting further information

Section 139(4) allows an authority to request further information from an applicant, if it is necessary to determine whether the proposal complies with the plan.

Section 139 does not specify a time frame within which requests for further information need to be made by the authority in relation to an application for a CoC. Section 21 requires the authority to do it as promptly as is reasonable in the circumstances (i.e. to avoid unreasonable delay).

A CoC needs to be issued within 20 working days of receipt of the request by the council. If further information is requested, then the decision on the application does not need to be made until 20 working days after the information requested has been received (s139(6)(b)).



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Unlike resource consents, there are no formal procedures about how to deal with an application when the applicant refuses to give the information. In practice it is likely the application for CoC will be refused if the information requested is not provided. However, an authority should not issue a CoC unless it is satisfied the activity can be established lawfully in the particular location without resource consent. If any element of non-compliance is found then a CoC cannot be issued.

Issuing a certificate of compliance

A CoC should contain the following information:

- that it is issued pursuant to s139
- the date the council received the application and the date any further information was requested and received
- a detailed description of the proposal/activity - where required, clearly referencing the plans and any other information submitted by the applicant and used to make the determination
- a description of the location of the proposal - refer to the address and legal description and any other relevant details
- the relevant plan, proposed plan and national environmental standard provisions at the time the application for a CoC was lodged
- a statement that the particular proposal or activity is permitted or could be carried out without a resource consent, as at the date on which the council received the request.

Advice notes can be included if necessary to provide further guidance or information to the CoC holder. Examples of advice notes that could be attached to CoCs include:

- "This Certificate is deemed a resource consent under the RMA (section 139(10) of the RMA) and is issued subject to any conditions specified in the plan. It is issued without alteration."
- "Section 125 of the RMA applies to this deemed resource consent (see section 139(12) of the RMA). Accordingly, this consent will lapse five years after the date of the commencement of this deemed consent unless, before the deemed consent lapses:
 - a. it is given effect to; or
 - b. an application is made to the council to extend the period of the deemed consent, and the council decides to grant an extension after taking into account the statutory considerations, set out in section 125(b) of the Resource Management Act 1991."

A covering letter to the CoC can be useful to explain any particular aspects of a CoC. Where used, a covering letter should state the date of issue and any relevant reference number.

Because a CoC is a decision by the council that the proposal/activity complies with the plan fully, some councils adopt a process where all CoCs are legally reviewed before they are issued. While this is not essential, and some councils have abandoned this practice, it is the council's decision whether or not this is done. Legal advice may be sought depending on the complexity of the proposal or the rules, whether other CoCs have been issued in respect of the same rules, or there are any other circumstances particular to a proposal/activity.



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A CoC must not be issued if the request for a CoC is made after a proposed plan is notified and the proposed activity could not be carried out lawfully without resource consent under the proposed plan.

Certificates of compliance and conditions

A CoC cannot contain conditions, limitations or provisos of any kind. A CoC is to be treated as if it were a resource consent that contains the conditions specified in the plan or an applicable national environmental standard (s139(10)).

Lapsing of a certificate of compliance

Section 139(7)(b) requires that a CoC states that the particular proposal or activity was permitted, or could be lawfully carried out without a resource consent, on the date the request was received by the council. Effectively, the CoC acts as a 'snapshot' in time, confirming that an activity was permitted at the date the application was received by the council.

A CoC is deemed a resource consent and s125 applies (see s139(12)), meaning that a CoC lapses in the same manner as a resource consent.

Appeal rights

The appeal provisions contained in ss120 and 121 apply to CoCs. As CoCs are non-notified, this means only the applicant has a right of appeal. Any challenge by any other party can only be carried out by way of a High Court judicial review.

Transfer of certificates of compliance

Sections 134, 135, 136 and 137 of the RMA relating to the transfer of resource consents also apply to CoCs (see s139(12)).

Certificates of compliance and designated sites

Section 176(1)(b) of the RMA does not allow a third party to undertake any work on a designated site for works not associated with the designation unless the written consent of the requiring authority is obtained.

In such cases, a proposal is assessed against the provisions of a district plan, proposed plan or national environmental standard that apply to the site (sometimes called 'underlying zoning') and not the designation and any relevant conditions. The third party must obtain resource consent where their proposal does not meet the underlying plan provisions.

A council can issue a CoC in relation to a designated site, where the applicant (third party) can demonstrate that the proposed works are:

- not for the purpose of the designation
- a permitted activity under the relevant plan
- not requiring any resource consents.



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Before implementing the CoC, however, the applicant will need to obtain the written approval of the requiring authority. This does not allow a council to issue a CoC confirming a proposal is consistent with the designation, as this is a different matter.

Certificates of compliance for hybrid activities

Many activities for which resource consents are sought involve both permitted and non-permitted components. An application for resource consent is typically sought for any non-permitted components of a proposal, on the understanding that any permitted components may be carried out as-of-right. However, difficulties may arise where:

- the permitted components of an activity can only be carried out once a non-permitted component has occurred
- an applicant wants to safeguard their ability to carry out the permitted components of the overall activity, through a CoC.

Key principles for hybrid activities

There are three key principles derived from Environment Court cases that may provide guidance to practitioners on hybrid activities:

1. Resource consent cannot be granted for the permitted components of a hybrid activity.
2. The permitted components of a hybrid activity form part of the overall activity and must be considered as part of the resource consent application for the non-permitted components.
3. To obtain a CoC, a specific application for a CoC is required, independent of the resource consent application.

What is unclear as a result of *Housing New Zealand v Auckland City Council* (W74/2007) and the subsequent Minute issued by the Court, is whether a CoC can be issued for the permitted components of a hybrid activity, if those components are interwoven with those that require resource consent, or, whether the permitted components must be divisible from the non-permitted components.

This could be a particularly pertinent issue if applying to the EPA for a CoC in relation to permitted aspects of a larger proposal. In such instances it is advisable to seek legal advice on this issue and to discuss with the EPA prior to lodging.

Benefits of taking a hybrid activity approach

An applicant may consider making separate applications for resource consent and a CoC where a proposal includes both permitted and non-permitted components. However, before lodging the applications, the applicant should consider whether it is a situation where it is possible to apply for a CoC for the permitted aspects and whether there are any benefits derived from separating the components. Benefits to the applicant may arise when:



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1. There is an upcoming plan change or other matter that would affect activity status that in turn may mean permitted components are no longer permitted and the applicant seeks to safeguard the permitted components of the activity.
2. There is some advantage in having a deemed resource consent in place for the permitted components (e.g. it may be regarded as a 'value add' to any prospective purchasers of the land).
3. Separating out minor permitted matters which are able to be considered alone can allow the focus to be centred on the key issues of the proposal. For example, for a proposal of national significance lodged with the EPA, people resources (including the board of inquiry and the Court) can use their time and consideration to focus on the key matters critical to the decision.

Lodging hybrid activity applications

If an applicant chooses to apply for resource consent and a CoC, then two separate applications need to be made:

- an application for a CoC for the permitted components
- an application for a resource consent (which will include a description of those components which are permitted and the components which require resource consent).

There is no form for a CoC application in the RMA regulations. Several councils, however, have developed their own version of an application form which details what to include with a CoC application. The CoC application should refer to the application for resource consent.

The application for resource consent should incorporate all aspects of the proposal, including the permitted components covered by the CoC application. A standard resource consent application form is provided in the RMA Regulations and most council's have developed their own form.

Processing the applications

While any CoC application solely addresses any permitted components of the hybrid activity, the permitted components must still form part of the overall activity for which resource consent is being sought. Therefore, the permitted components must be addressed in the assessment of environmental effects submitted with the resource consent application. The permitted components must also form part of the overall consideration of the resource consent application.

Under ss95D(b), 95E(2)(a) and 104(2), any adverse effects arising from the permitted components of the hybrid activity may be disregarded when considering an application (known as the permitted baseline test). Whether effects arising from those permitted components are disregarded or not is not pre-determined by the issue or decline of the CoC.

The processing of each application is independent and the time frames are likely to diverge. For example, further information may be required to progress the resource consent application but not the CoC. The processing of the resource consent cannot hold up the CoC application.



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Implementation of certificates of compliance

It is important when issuing a CoC for a hybrid activity that any implications are made clear. What is unclear as a result of the *Housing New Zealand v Auckland City Council* (W74/2007) and the subsequent Minute issued by the Court, is whether permitted activities of a CoC can be exercised before non-permitted components (that require a resource consent) are given effect to, or, if they can occur if the permitted components are divisible from the non-permitted components. Legal advice may be required on this issue. The council could include advice on implications in a covering letter to the applicant (but it cannot impose any conditions on the CoC relating to this).

Council compliance staff should also be made aware of what the CoC relates to, to avoid any confusion during inspections.

The permitted component may not be able to be implemented until resource consent is granted. This should be made clear to the applicant.

