2015

Enforcement Manual

Enforcing Plans and Consents

THE RMA QUALITY PLANNING RESOURCE

Enforcing plans and consents, Existing use rights, Section 17, Costs, Service of documents and Environment Court practice notes

This is the final of seven guidance notes that form the RMA Enforcement Manual. It, covers a range of short topics that may be encountered while carrying out duties, functions, or powers discussed in preceding guidance notes. Please note that Environment Court practice notes can be found on the Ministry of Justice website.

Guidance note

Enforcing plans when there are both proposed and operative plans in existence

Enforcing resource consents

Existing use rights

Section 17 – General duty to avoid adverse effects

Costs including filing fees and witness costs

Service of documents

The Environment Court practice note can be found on the Ministry of Justice website.

To access the guidance note scroll down or click the link above.

Enforcing plans

Old plan, new plan?

The issue of how to weight differing operative and proposed plan provisions is a complex but important issue under the RMA. To assist, each local authority should establish criteria that staff can follow when evaluating consent applications and considering enforcement action, during the period in which two (or more) plans apply. See the good practice examples for further information.

Plan definitions

The terms commonly used to refer to plans at different stages are 'transitional plan', 'operative plan' and 'proposed plan'.

The proposed plan will only be 'operative' when the plan is made operative under clause 20 of Schedule 1 of the RMA. This means it has gone through the full plan preparation process including:

- public notification of the proposed plan
- submissions and further submissions
- council decision
- resolution of any appeals to the Environment Court
- resolution, if necessary, appeals to the High Court.

A council is required to publicly notify the fact that the plan has been made operative. For further information refer to the Making Plans Operative guidance note.

Weighting between operative and proposed plans

Weighting in terms of case law applies only to the evaluation of applications for resource consent. Weighting might, however, also be used as a guide in prioritising enforcement action. The duty to enforce a plan under s84 only applies to *operative* plans.

The weighting of operative and proposed plans under the RMA was considered early by the Planning Tribunal in *Hanton v Auckland City Council* [1994] A10/94. In this case, the Court held the following:

(a) The RMA does not distinguish between the weight to be accorded to an operative plan and to a proposed plan (though this is only an issue where the provisions of the operative plan are inconsistent with the provisions being proposed).

(b) The requirements of s104 for having regard to various matters are related to the exercise of discretions. Rather than have a general rule about the cases where a proposed plan is to prevail over inconsistent provisions of an operative plan, or vice versa, each case should be decided individually according to its own circumstances. Relevant factors include:

i. the extent to which the proposed measure has been exposed to independent decision-making
ii. possible injustice
iii. the extent to which a new measure may implement a coherent pattern of objectives and policies in a plan.

The Environment Court's discretion as to weight was approved by the High Court in *TV3 Network Services Ltd v Waikato DC* [1998] NZLR 360. The weighting approach expressed in *Hanton* has been followed in a number of cases and confirmed by the Court of Appeal in *Bayley v Manukau CC* [1999] 1 NZLR 56.

However, in recent cases, where there has been a significant shift in council policy and the new provisions are in accordance with Part **2**, the Environment Court has indicated that it may be appropriate to give more weight to the proposed plan. For example, in *Mapara Valley Preservation Society Inc v Taupo District Council* EnvC (A083/07) the Court placed substantial weight on recently notified plan changes relating to growth management and rural land use. See also *Auckland Regional Council v Waitakere Council* (A065/08).

When Rules Have Legal Effect

The RMA was amended in 2009 to change when rules have legal effect and plan weighting by way of the introduction of ss86B-G. These provisions mean that a rule in a proposed plan now only has legal effect after decisions on submissions have been made. However, there are a number of exceptions where rules have immediate effect earlier, as follows:

- if an Environment Court order gives a rule in a plan legal effect on a different date; or
- if the rule protects or relates to water, air, soil (for soil conservation purposes); or
- if the rule protects areas of significant indigenous vegetation, significant habitats of indigenous fauna or historic heritage; or
- if the rule provides for or relates to aquaculture activities.

Also note that a local authority may resolve that a plan rule will have no legal effect until it becomes operative.

When Rules Must be Treated as if they were Operative

As noted above, rules in proposed plans do not normally have legal effect until after decisions have been made on submissions. Section 86F of the RMA provides for a rule to be treated as operative if no submissions or appeals have been lodged, or if all submissions or appeals have been withdrawn or finally determined. Section 86F states:

A rule in a proposed plan must be treated as operative (and any previous rule as inoperative) if the time for making submissions or lodging appeals on the rule has expired and, in relation to the rule, -

1. *no submissions in opposition have been made or appeals have been lodged; or*
2. *all submissions in opposition and appeals have been determined; or*

3. *all submissions in opposition have been withdrawn and all appeals withdrawn or dismissed.*

Where a general submission challenges an entire proposed plan, but does not state the change that is required if relief was granted, it cannot be applied to a specific provision. However, if such a submission were made with reasonable specificity, the submission could mean that s86F would not apply to the rules in the plan. The High Court commented that, if a serious challenge to a plan is made, the council should seek a declaratory judgment from the High Court or apply to the Environment Court for a declaration to clarify this issue.

Enforcing resource consents

Activities outside scope of consent

If an activity is being undertaken that is beyond the scope of the relevant resource consent, care should be taken when assessing whether the difference constitutes a breach of the RMA. If so, this could make enforcement action appropriate.

The following factors are likely to be relevant:

- whether a separate resource consent is required or not. If the element of difference is a permitted activity, then enforcement action is inappropriate
- whether the written approval of any affected parties was obtained when the resource consent was first sought. If so, then a change is more likely to be a breach of the resource consent
- why the original activity required consent
- the status of the activity which required resource consent in terms of whether it is controlled, discretionary or non-complying
- the adverse effects of the difference on any person, taking a conservative approach
- any conditions which assist in the interpretation of the resource consent. For example, a condition the "the resource consent be undertaken generally in accordance with the plans".

This issue needs to be approached on a case by case basis.

Voiding of consent by non-compliance

The Environment Court has stated that non-compliance with a resource consent condition may give rise to enforcement action, but this does not necessarily impair the validity of the consent itself (refer to *Graham v Dunedin City Council* [2001] C81/2001).

The core question in relation to this issue is: "Does the non-compliance change the activity consented to?" This was considered by the Court in *Twisted World v Christchurch CC* [2001] C9/2001 where the answer to that question was 'no'. The Court acknowledged there was no resulting adverse effect and there was no clear purpose for the condition involved at all. The change in that case proved immaterial; if there had not been a specific condition, no issue would have arisen.

Existing use rights – sections 10, 10A and 20A of the RMA

Existing use rights are a consideration in terms of a local authority's duty to enforce a plan. A person who proves an existing use right applies has the protections set out in sections 10, 10A and 20A of the RMA (whichever is relevant).

A question arises as to the relationship or differences between an existing use right and a transitional resource consent. The latter is a consent deemed to have been granted under the RMA, but actually granted under previous (specified) legislation in force immediately before the date the RMA commenced (section 383 and onwards).

After the commencement of the RMA, the activity approved by the original planning permission (and now deemed consent) may become subject to new requirements under a plan change. If so, it will be subject to those requirements unless it qualifies for existing use rights.

The case law on existing use rights is extensive; it should be referred to in some detail when considering whether such rights apply. This section provides only an outline. Note that when taking enforcement action, a local authority is not required to prove that an existing use right does not exist before proceeding. It is for the person responsible for the activity to satisfy the council, and the Court, of this. However, in practice a council may wish to provide an opportunity - with timeframes - for the person responsible for the activity, to produce relevant evidence that their activity qualifies for existing use rights (to save itself the costs of a wasted enforcement effort).

The appropriate test to apply when determining whether a use was lawfully established is, on the balance of probabilities. The onus is on the person seeking to establish that a use qualifies as an existing use, and to satisfy the Court that the character, intensity and scale of the activity have not changed to a greater extent than is allowed for under the Act.

Existing use rights for land use - s10 of the RMA

Section 10(1) of the RMA addresses existing use rights for land use. Under this section, land may be used in a manner that contravenes a rule in a district plan or proposed district plan if both:

- the use was lawfully established before the rule became operative or the proposed plan was notified
- the effects of the use are the same or similar in character, intensity and scale.

Section 10 of the RMA does not apply to activities that have been discontinued for a continuous period of more than 12 months after the new rule became operative or the proposed plan was notified.

Existing use rights under section 10 do not apply to:

- reconstruction, alteration of, or extension to, any building that increases the degree to which the building fails to comply with any rule in a plan or proposed plan

- use of land controlled for the purposes specified in s30(1)(c)
- restrictions of use of the coastal marine area under s12
- restrictions on uses of lake and river beds under s13.

Existing use rights on the surface of lakes and rivers - s10A

Section 10A of the RMA deals with existing use rights for activities on the surface of water in lakes and rivers. Where an activity was lawfully established before the rule in a plan became operative or the rule in the proposed plan was notified, and the activity now requires a resource consent, the activity may continue if both of the following criteria are met:

1. the effects of the activity are the same or similar in character, intensity and scale
2. the person carrying on the activity applies for a resource consent within six months of the rule in the plan becoming operative.

Where an application for resource consent has been lodged, the activity can continue until such time as a final decision on it is made.

Existing use rights in relation to proposed regional plan rules - s20A of the RMA

Section 20A of the RMA provides that any existing activity that was formerly a permitted activity, or that otherwise could have been lawfully carried out without a resource consent as a result of a rule in a proposed plan, may continue until the plan becomes operative if the factors in sections 20A(1)(a) to (c) are present.

Activities that were permitted, or were lawfully carried on without a resource consent, but which become controlled, discretionary or non-complying activities as a result of a new rule in a regional plan, may be continued for a limited period in the circumstances defined in s20A(2).

An application for a resource consent must be made within six months of the rule becoming operative. Where an application for resource consent has been lodged, the activity can continue until such time as the final decision on it is made.

General duty to avoid adverse effects – Sec 17 of the RMA

Section 17 of the RMA provides that every person has a duty to avoid, remedy, or mitigate adverse effects on the environment. Section 17 is not enforceable in and of itself (refer s17(2)), but can provide a basis for seeking an enforcement order or issuing an abatement notice.

As outlined by the Court in *Sayers v Western Bay of Plenty District Council [1992] AO98/92*, an enforcement order or abatement notice may require a person to cease, or prohibit a person commencing, anything that is or is likely to be: offensive, objectionable, dangerous or noxious enough to have an adverse effect on the environment. Alternatively, the order or abatement notice may require a person to do something that is necessary to avoid, remedy or mitigate adverse effects on the environment caused by, or on behalf of, that person.

Section 17(3), read together with s322, allows enforcement officers to enforce the s17 duty in a limited way. An abatement notice can require that an activity cease if it is having adverse effects and is noxious, dangerous, offensive, or objectionable s322(1)(a)(ii). Specific actions to cure the effects cannot be stipulated, unless a breach of a rule or consent also exists. An enforcement order provides a greater scope for action (for more information see the Mandatory Directives Guidance Note).

Importantly, the duty under section 17 applies *whether or not* the activity is in accordance with a national environmental standard, a rule, a resource consent, a designation, s10, s10A, s10B or s20A.

In *Donkin v Board of Trustees of Sunnybrae Normal School* [1997] C044/97, the Environment Court made a declaration that an existing school building contravened s17 because it was too close to the boundary of a neighbouring residential property. The Court stated that the Board of Trustees of the Sunnybrae Normal School and the Minister of Education had a duty to remedy or mitigate the adverse effects.

Costs

Court filing fees and expenses for witnesses

Various court fees apply to enforcement action:

- Local authorities prosecuting under the RMA are not required to pay a filing fee to the Court - Summary Proceedings Act 1957 s207(3):

  Except as provided in regulations made under this Act, no fee shall be received or demanded from any constable or from any duly appointed officer or employee of the Crown or of any local authority or other statutory public body or Board in respect of proceedings instituted by him in the execution of his duty.
- The filing fee for an application for an enforcement order, an interim enforcement order or a declaration is $56.22 per application.
- If the recipient of an abatement notice applies for a stay or appeals the notice, then the filing fee payable to the Environment Court is $56.22 - Resource Management (Forms, Fees and Procedure) Amendment Regulations 2009.

A witness attending the Environment Court under summons by a party or call of the Court is entitled to expenses for travel and maintenance while absent from his or her usual residence under s284 of the RMA. Expenses are determined by scale for civil cases under the District Courts Act 1947.

A witness in a prosecution is entitled to receive witness fees, allowances, and travelling expenses according to the scales prescribed by regulations made under the Summary Proceedings Act 1957. The schedule to the Witnesses and Interpreters Fees Regulations 1974 also provides for fees for expert witnesses and interpreters. Regulation 8 of the Witnesses and Interpreters Fees Regulations provides that a Court may authorise the amounts payable pursuant to the Regulations to be increased where the circumstances are exceptional.

Recovery of costs

Overview

There are three categories of cost recovery by a local authority in RMA enforcement matters. These three types of costs are:

1. Costs incurred by a local authority in the taking of a prosecution (e.g., solicitor fees and witness expenses) and recovered before the District Court.
2. Costs borne in the investigation of an offence and recovered in proceedings before the Environment Court pursuant to its general discretion to order reasonable costs paid.
3. Costs resulting from any direct action taken to remedy effects where there is non-compliance; as well as the indirect costs of investigating and monitoring those effects, recovered by way of an enforcement order under s314(1)(d). These costs can be recovered either before the Environment Court or in the District Court upon prosecution under the RMA.

Costs on prosecution

In prosecution proceedings, where a defendant is convicted by a Court of any offence, the District Court may order the defendant to pay such sum as it thinks just and reasonable towards the costs of the prosecution. Costs are defined as *"any expenses properly incurred by a party in carrying out a prosecution"* and are limited to costs incurred after the decision to prosecute has been made. The costs are ordinarily scaled in accordance with the *Costs in Criminal Cases Regulations 1987* unless the Court is satisfied that the difficulty, complexity or importance of the case is significantly greater than is ordinarily encountered.

General costs recovered before the Environment Court

The Environment Court has a general discretion to order costs paid by one person to any other person, which it considers reasonable. The principles for awarding costs have been articulated by the Courts as follows:

- An order for payment of costs is not a penalty against the unsuccessful party, but compensation for the successful party.
- Costs incurred by local authorities in enforcement fall on public funds, which should be protected.
- A party should pay a higher-than-usual amount of costs where it has contributed to the need for or duration of the hearing.
- It is appropriate to include costs for council staff time, but expenses incurred by officers preparing for the prosecution cannot be claimed.
- There is no scale of costs, and the Court has discretion, but an award of one-third to one-half of actual costs is usual. Solicitor and client costs are rare. Witnesses' costs are usually allowed in full.

In *Waikato Council and Waikato District Council v Campbell and Others* [2003] A198/2003, the councils claimed for in-house officer costs relating to monitoring and enforcement. The respondents contended that such costs were part of the role of salaried

officers and would have been incurred regardless. The Court accepted that councils were entitled to recover, under s36, costs of salaried officials regardless of whether their salaries are budgeted for; and that the councils would have been able to recover such costs if the work had been done outside of the councils. The respondents also contested that they should pay the charge-out rates for council staff and that the direct costs (hourly rate) of their salaries would be reasonable. The Court accepted that, in principle, the costs incurred by a council in having an employee carry out duties in avoiding, remedying, or mitigating adverse effects on the environment include proportionate overheads. The overheads, on a case-by-case basis, could be challenged in terms of fairness and reasonableness.

Recovering costs by enforcement order - for avoiding, remedying or mitigating adverse effects

Under s314(1)(d) of the RMA, an enforcement order may be sought from the Environment Court to require a person to reimburse other parties for 'actual and reasonable costs and expenses' incurred in avoiding, remedying or mitigating adverse effects. The recovery of costs under s314(1)(d) deals directly with the expense in protecting the environment or indirectly monitoring the effects of an activity.

'Actual and reasonable costs and expenses' are described in s314(2) as including those associated with investigation, supervision and monitoring of effects, and the costs of actions required to avoid remedy or mitigate adverse effects. Such costs may include:

- Inspections
- meetings in an attempt to reach an agreement and/or achieve cessation of an activity that was likely to have adverse effects on the environment
- research of data bases for information relating to the land/activity to assist in avoiding, remedying, or mitigating adverse effects
- external witness expenses, if the expenses would not have been incurred had the offender avoided or remedied the effects.

The Court will not necessarily order payment of all costs that qualify. In setting appropriate awards of costs under s314(1)(d), the Court has regard to the:

- application of the 'polluter pays' principle (as the starting point)
- nature of the environment and the effect on the environment
- deliberateness of the person responsible for the pollution incident
- degree of cooperation with a local authority
- efforts made to rectify any damage done and to ensure that the activity requiring the enforcement order does not recur or continue
- actions of the territorial authority through its officers.

Monitoring costs

Costs related to monitoring consents including investigation of breaches can be claimed as charges pursuant to section 36 of the RMA if an appropriate mechanism has been set in place. For more information on cost recovery associated with monitoring resource consents, see the guidance note on setting charges for processing and monitoring consents under the RMA.

Service of documents

General procedure for service

The procedure for service of documents is set out in s352 of the RMA which states documents may be served by any of the following:

- delivering the notice in person; or
- delivering it to the usual or last known place of residence or business of the person; or
- sending via pre-paid post to the address of the person at their usual or last known place of residence or business of the person; or
- posting it to the Post Office box address that the person has specified as an address for service; or
- leaving it at a document exchange for direction to the document exchange box number that the person has specified as an address for service; or
- sending it to the fax number that the person has specified as an address for service; or
- sending it to the email address that the person has specified as an address for service; or
- serving it in the manner that the Environment Court directs in the particular case.

Where a notice or other document is to be served on a Crown organisation, it may be served by any of the following:

- delivering it at the organisation's head office or principal place of business; or
- sending it to the fax number or email address that the organisation has specified for its head office or principal place of business; or
- a method agreed between the organisation and the person serving the notice or document (refer section 352(4A)).

Where a notice or other document is sent by post to a person it is, in the absence of proof to the contrary, deemed to be received by the person at the time at which the letter would have been delivered in the ordinary course of the post. If a notice has been posted out but returned to the sender, it may not be deemed to have been served.

This issue was highlighted in *Wellington City Council v Taylor* [1997] CRN 6085018671 where a charge against Taylor for not complying with an abatement notice was dismissed, because the notice had been served by post via the Council's internal mail system. The council could not prove that the letter had been sent out the day on which it was dated nor could it prove when the defendant had received the notice.

In *Farrell v Manukau City Council* [2008] A056/08 the presumption of service was rebutted. The Court held that an appeal was filed within time even though there was undoubtedly prejudice to the Council in the circumstances as the Council had relied on the resource consent and progressed with the tendering process.

Service of a document on a Minister of the Crown

Where a notice, or other document, is required is to be served on a Minister of the Crown, then service on the Chief Executive of the appropriate government Department or Ministry is deemed to be service on the Minister.

Service on an organisation

Where a notice or other document is to be served on a body (whether incorporated or not), then service on an officer of the body, or on the registered office of the body, is deemed to be service on the body. If the organisation happens to be a partnership, the notice may be served on any one of the partners, and this is deemed to be service on the partnership as a whole.

Service of documents for prosecution

The laying of the information (charge) is the commencement of criminal proceedings. The procedure for service of a summons is set out in the Summary Proceedings Act 1957.

An 'information' (charge) and a summons are almost identical. The summons is the copy of the information that is served on the defendant. The summons states the date and time of the hearing. Constables and officers of the Court are authorised to serve a summons, but service by any other person requires authorisation from the Registrar for process servers (refer s25 of the Summary Proceedings Act).

The method serving a summons on a defendant is set out in s24 of the Summary Proceedings Act.

Where the master or owner of a ship is a defendant in any prosecution for an offence against s338 of the RMA for contravention of sections 15A, 15B or 15C, the procedure for service given in s352A must be followed. Section 352A(2) provides that the District Court Judge or Justice or Registrar may direct that the summons be served in accordance with s24 of the Summary Proceedings Act, where he or she is satisfied that it would not be impracticable to do so in the particular circumstances.

Good practice examples

Scenarios

Enforcing plans and consents

Scenario 1: Spray drift and enforcement orders

Council receives a complaint of a spray-drift incident. Staff inspect immediately and collect evidence to establish:

- the applicator is Sea Helicopters Ltd and the application is an aerial application
- Sea Helicopters Ltd has breached a permitted activity rule in the proposed plan.

The concentration of pesticide applied exceeds the manufacturer's instructions and there are significant adverse effects of off-target drift. Plants on neighbouring properties have been damaged. Sea Helicopters informs council that s20A of the RMA applies, that it has been spraying pesticides for 20 years, and that council cannot take enforcement action because Sea Helicopters is not required to comply with the proposed plan until the plan is operative.

Q1: What can council do?

A1: Council can apply for an interim enforcement order or an enforcement order, or issue an abatement notice requiring Sea Helicopters to comply with the s17 duty.

Q2: In the above scenario, Sea Helicopters sprays pesticide for five months each year. Can council argue that s20A does not apply because the activity has been discontinued for a continuous period of more than six months?

A2: No. The Environment Court has noted that care is required in applying the six-month discontinuity test to seasonal activities like fruit picking. The Court has held that an absence of activity at a time of year when none would normally be carried on anyway, would not be evidence of the use having been discontinued (refer *Wairoa Coolstores (1994) Ltd v Western Bay of Plenty District Council* [1998] A16/98).

Scenario 2: Taking of water

The Transitional Regional Plan general authorisation 3 allows up to 15 cubic metres of water per day to be taken for reasonable domestic needs and the needs of animals. The proposed plan rule 3.3.4.8 allows 30 cubic metres per day of groundwater to be taken. Joe Bloggs takes 30 cubic metres of water per day. Mr Bloggs's neighbour complains that Bloggs is not complying with the general authorisation 3.

Q1: Is Mr Bloggs required to comply with general authorisation 3?

A1: Mr Bloggs is required to comply with the Transitional Regional Plan and the Proposed Plan. The Transitional Regional Plan is the more restrictive, and therefore Mr Bloggs can only take up to 15 cubic metres of water per day without resource consent.

Scenario 3: Water discharges and existing use rights

Transitional Regional Plan general authorisation number 14a provides that the discharge of clean stormwater to the ground is permitted subject to certain conditions. Under the Proposed Plan, discharge of stormwater onto or into land from a quarry is a controlled activity.

Q1: Is a quarry that was operating before notification of the Proposed Plan allowed to continue to discharge stormwater to land without a resource consent?

A1: Section 20A applies if the quarry meets the conditions in s20A(1)(a), (b) and (c), and the quarry can continue to discharge stormwater to land without a resource consent.

Relevant case law

For a list of relevant case law, refer to the RMA enforcement manual case law summaries when appropriate.