



Resource Management Amendment Act 2005 – Improving decision making

This is one of a series of information sheets giving an overview of the amendments to improve the Resource Management Act (RMA).

WHAT WERE THE ISSUES?

The amendments address concerns about resource consent decision making, including:

- a lack of consistency between councils
- delays and costs
- a lack of certainty for applicants
- abuse of the process for personal gain, trade competition or vexatious litigants
- a lack of clarity about consultation requirements.

HOW HAS THE RMA BEEN IMPROVED?

Improving decision making at the council level

A number of improvements are made at the local authority level. New sections 41A – 41C of the Act clarify the range of powers available to consent authorities in conducting hearings. When deciding whether to use these powers, councils must consider under new section 41A whether the scale and significance of the hearing makes exercise of the power appropriate.

Applications on hold, requests for further information and commissioning reports

There are changes to the process for further information requests and commissioning reports under section 92, and clarification on when the processing clock stops under section 88. New sections 88B and 88C provide clear direction as to when an application can be put on hold, and when the clock restarts. Section 88B makes it clear that notices of requirement can be put on hold whilst further information is sought.

Councils are now required to give written reasons for further information requests. An applicant is able to refuse to provide further information and to refuse a request for the commissioning of a report, and may request the council to

proceed with the application on the basis of information already provided. The consent authority must then process the application and either grant or refuse the application. New section 92A(3) makes it clear that a consent authority can decline an application if it has insufficient information to make a decision.

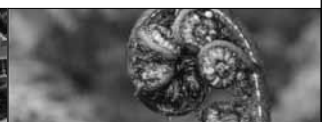
The right of objection to requests for further information, in section 357, remains. In addition, if the consent authority declines an application because of insufficient information, the applicant can appeal that decision to the Environment Court. Section 92A requires the Environment Court to first determine whether the consent authority had sufficient information to decide the application. If the Court considers the consent authority's decision was justified, then it must decline the application. If the Court finds that the consent authority had sufficient information to decide the application, then the Court will consider the entire application and make a decision on whether to grant or refuse consent.

The new provisions should help with those situations where the applicant and consent authorities have been attempting to negotiate over further information requests for long periods of time. The amendments impose a timeframe on the process and clarify the powers of consent authorities and applicants in respect of requests for further information.

Consultation about resource consent applications and notices of requirements

New section 36A clarifies that for resource consents and notices of requirements, neither an applicant nor a consent authority has a duty to consult any person about the application. However, both parties must still comply with a duty under any other enactment to consult any person about the application.

The applicant and the consent authority may still choose to consult any person about the application. Depending on the complexity of the proposed activity and its



environmental effects, consultation may be helpful in resolving issues before the application is lodged or set down for a hearing.

While there is no duty to consult, consultation with specific iwi or their representative group could still remain useful to help identify any effects of the application on tangata whenua, especially where there has been little consultation or involvement of tangata whenua in the relevant operative or proposed plan provisions. For more information, see the *Improving certainty for consultation and iwi resource planning* information sheet.

If an applicant does choose to carry out consultation, it must provide details of the persons consulted, as well as identifying those affected by the application, in the assessment of environmental effects that is submitted with its application.

Pre-hearing meetings

A new section 99 provides a more detailed process for pre-hearing meetings focusing on achieving better outcomes from meetings. Councils may now invite attendance at pre-hearing meetings or, if the applicant agrees, require attendance. Under new section 99(5) if a person required to attend a meeting fails to do so and does not give a reasonable excuse, the consent authority may decline to process the person's application, or to consider the person's submission. If the consent authority refuses to consider the person's submission or application, then that party has no right to appeal the decision on the resource consent or to become a party to someone else's appeal. However, there is a right of objection under section 357A.

The chairperson of the meeting must prepare a report and circulate it to all parties who attended the pre-hearing meeting, five working days before the hearing begins. This report must set out those issues that are agreed and those that are outstanding. It may also set out the nature of evidence to be called, or a proposed timetable for the hearing. The consent authority must have regard to the report in determining the application.

The decision whether to invite or require parties to attend a pre-hearing meeting could depend on a number of factors. These might include the number of parties involved, the timing and location of the meeting, the level of formality considered appropriate and the types of issues involved. If requiring parties to attend, then there will need to be adequate notice provided to all parties. The consent authority will also need to consider whether they need to extend the statutory timeframe for holding the hearing.

Whether or not an excuse for failing to attend a meeting is reasonable will need to be considered on a case-by-case basis. Factors might include employment constraints and personal and family commitments or health. The purpose of any pre-hearing meeting should be to clarify matters or issues, rather than being a mini-hearing in itself.

Any pre-hearing report should provide the hearing committee with broad guidance as to issues (whether these have been resolved or are outstanding) and help the parties prepare their cases. There does not need to be a fully minuted record of the pre-hearing meeting. The level of direction provided for the hearing in the report will generally depend on the nature and significance of the issues. The extent to which the consent authority has regard to the pre-hearing meeting report in determining the application will differ on a case-by-case basis. For example, issues may be raised at the hearing, which were not addressed at the pre-hearing meeting.

Mediation

Mediation is now provided for in new section 99A. Mediation may occur if the parties to an application agree. The person who conducts the mediation must report the outcome of the mediation to the consent authority.

Mediation can help parties identify common ground and define, narrow and resolve issues. It may reduce hearing time, negate the need for a hearing and lessen the chance of subsequent appeals. However, mediation could also lead to delays in the processing of the application. Councils should provide advice to parties entering into mediation about its purpose, limitations, and how any outcomes will be used in decision making.

Pre-circulation of evidence / Provision of evidence within timeframes

The consent authority now has the discretion to direct the applicant to provide briefs of evidence to it before the hearing. Pre-circulation of evidence has been staged to fit with circulation of the officer's report. If the consent authority directs pre-circulation of evidence, then the officer's report must now be circulated to parties 15 working days before the hearing. An applicant must present briefs of evidence to the consent authority 10 working days before the hearing, and a submitter using expert evidence must present briefs of evidence to the consent authority five working days before the hearing. To facilitate the pre-circulation of evidence in these cases, the time period for beginning the hearing has been extended to 40 working days after the close of submissions.

Pre-circulation of evidence will not be appropriate in every case. It could be useful where the application is complex or where there are conflicting opinions between experts. The length and associated cost of any hearing could be reduced by narrowing the scope of evidence and identifying the matters remaining in contention. Pre-circulation of evidence may enable a hearing committee to be better prepared and to assume a more inquisitorial role.

It is important to note that where consent authorities do not direct pre-circulation of evidence, then the alternate provisions in the RMA operate, requiring the officer's report to be circulated five working days before the hearing, and that the hearing begin within 25 working days of the close of submissions.

Accreditation of council hearing members and chair

Chairs of hearing panels and the majority of members of any hearing panel must be accredited (chairs within 12 months, and hearing panel members within 24 months of enactment). However, no decision of a consent authority will be rendered invalid because the decision maker(s) were not accredited (section 39C). The requirement for the majority of a hearing committee to be accredited allows non-accredited people to continue to take part in local decision making.

Hearing processes

The consent authority now has the express ability to direct the order of business at a hearing, including the order in which evidence and submissions are presented. The authority may also direct that evidence and submissions be recorded or taken as read, or that evidence be limited to the matters in dispute.

An authority may also request a person who has made a submission to provide further information. This can occur before or at the hearing. The authority may direct a person presenting a submission not to present the whole or part of the submission, if all or any part of it is irrelevant or not in dispute.

The decision whether to direct the order of a hearing, direct and/or limit the evidence, and to record or take submissions as read, would generally be guided by the information and recommendations in a pre-hearing report or mediation, the scale and significance of the application, the issues involved, and the consideration of any pre-circulated evidence.

Exercising one or more of these powers might be useful where the application is complex; the hearing is likely to be lengthy; evidence is of a technical and highly complex nature; there are conflicts in evidence between expert witnesses; several submitters have raised similar issues;

and other similar factors. It allows the committee to hear from witnesses on the same matter immediately following each other, providing for more effective questioning of witnesses, and testing and weighing of comparative evidence, and ultimately more streamlined hearings. The level of evidence recording could range from preparing a summary of significant issues, keeping minutes, to a full transcript. The extent of recording chosen would generally be based on the complexity and level of contentiousness of the application and if it is likely to be appealed.

Strike out powers

Under new section 41C(5), a consent authority can, before or at a hearing, direct that all or part of a submission be struck out if the authority considers that the submission (or part of it) is frivolous or vexatious; or that it discloses no reasonable or relevant case; or that it would otherwise be an abuse of the hearing process to allow the submission to be taken further. Under section 41C(6), the consent authority must record the reasons for striking out a submission (or part). The submitter has no right to appeal the decision on the resource consent, or to become a party to someone else's appeal. However, they have a right of objection under section 357. The strike out powers can not be used until two years after the commencement of the Act. This aligns with accreditation requirements for hearing panels.

There will be training and guidance provided to consent authorities as part of the Ministry for the Environment's *Making Good Decisions* programme before the commencement of the strike out powers. Matters that would need to be considered when deciding whether to strike out a submission (or part) include, amongst others, the content of the submission, the behaviour and attitude of the parties involved, and the degree of understanding and familiarity of the submitter with resource consent and hearing processes. The consent authority will need to bear in mind the RMA's inclusive approach to public participation. To help submitters make useful submissions, the consent authority could provide information on how to make submissions when notifying applications or direct people to where they could find out more information.

Basis for councils' decisions

Along with giving reasons for their decision under section 113, councils must now also list the main findings of fact, the principal issues in contention, a summary of the evidence heard and the relevant plans and policy documents considered. This new requirement is linked to the requirement for the Environment Court to have regard to the council decision when considering an appeal.



This provision applies to all decisions on resource consent applications, not just notified applications. Many councils already issue comprehensive decisions and will not need to change their practices. Other councils will want to consider the level of reasoning and information they provide in their decision letters, and may choose to increase the amount as required, or append the officer's report to provide the justification. The level of reasoning required will generally depend on the complexity of the application and how it was processed (notified, limited notified or non-notified).

Improving decision making at the Environment Court

Since the introduction of the case management system, the Environment Court's backlog has substantially reduced. Hearing dates can now be set within six months and the Court will now contact parties within weeks of an appeal to refine issues and decide if mediation is appropriate. The Court will continue to regulate its own procedure and, as they are increasingly doing so, take evidence as read. Under new section 290A, the Environment Court must have regard to the decision that is being appealed. The Court is given explicit powers to accept evidence that was submitted at the consent authority hearing and to direct how evidence is to be given to the Court. This enables the Court to take evidence as read.

Having regard to the primary decision and taking evidence as read should help the Court focus on the issues of contention and shorten hearing times, rather than the Court having to fully rehear every application. It also places increased emphasis on more comprehensive and robust decisions at the council hearing.

Decisions on notification

Decisions on notification may in the future be challengeable in the Environment Court, rather than the High Court. This recognises that the Environment Court as a specialist court is best placed to make decisions about RMA processes. However, the amendment is deferred until such time as the Environment Court has the capacity to absorb an increase in its workload as a result of this new function. The amendment will be brought into force by an Order in Council at a later date. The powers of the Environment Court are aligned with those of the High Court on judicial review.

OTHER INITIATIVES TO IMPROVE DECISION MAKING

The Ministry for the Environment is working on a number of training programmes to improve the quality of decisions made at the local level.

The very successful *Making Good Decisions* training programme, run in partnership with Local Government New Zealand, gives councillors and independent commissioners vital skills for sitting on council resource consent hearing panels. Five hundred and forty-six people have attended the course so far. The course will fulfill the new accreditation requirements that are part of the amendments. The workshop material will be updated to reflect the changes to the RMA and additional workshops will be run to deal with the high level of demand for certification.

Training workshops for reporting officers on their role at resource consent hearings, are being run as a complement to the *Making Good Decisions* programme.

The Ministry for the Environment is also developing an RMA practitioner training programme. This programme is intended to improve the quality and consistency of decisions, advice and actions of RMA practitioners, build capacity in RMA-orientated professions, and improve public confidence in RMA implementation by practitioners.

In addition to these training programmes, the Quality Planning website, www.qualityplanning.org.nz, provides up-to-date guidance and best practice examples for processing resource consents.

OTHER RMA INFORMATION SHEETS

Other information sheets in this series include:

- Overview
- Summary
- Improving national leadership
- Improving local policy and plan making
- Improving certainty for consultation and iwi resource planning
- Improving natural resource allocation.