2017

Consent Steps

Making a Decision on the Application

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This guidance has been updated to include the changes made to the consenting provisions of the RMA as a result of the Resource Legislation Amendment Act 2017 (RLAA17) which came into effect on 18 October 2017. For more information about the amendments refer to the RLAA17 Fact Sheets available from the Ministry's website.

Sections 104 to 113 of the Resource Management Act 1991 (RMA) regulate the determination of resource consent decisions. This guidance note provides information on how to make a decision, and what needs to be included in a decision report.

Guidance Note

Section 104 - matters to be considered

Section 104 of the RMA sets out the principal matters, subject to Part 2, which all those involved in a resource consent application (both applicant, council and interested parties). The applicant must address these matters in their application and a council must have regard to (and other matters it must disregard) when considering an application for resource consent and any submissions received.

Matters to be considered include:

- any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity
- any actual and potential effects on the environment
- any relevant provisions of a national environmental standard, other regulations, a national policy statement, a New Zealand coastal policy statement

- any relevant provisions of an operative or proposed regional policy statement or any proposed or operative plan
- any other matter the council considers relevant and reasonably necessary to determine the application
- the value of the investment of the existing consent holder when considering an application affected by s124 (exercise of resource consent while applying for new consent).

A council may disregard an adverse effect of an activity on the environment if the plan or a national environmental standard permits an activity with that effect (s104(2)) and this needs to be identified by the applicant.

Section 104(3) sets out what the council must not do when considering an application:

- have regard to trade competition or the effects of trade competition
- have regard to any effect on a person who has given written approval to the application, unless the approval is withdrawn in writing before the hearing or determination of the application
- grant a consent contrary to the provisions of any of the following:
    - s107 (restriction on grant of certain discharge permits)
    - s107A (restrictions on grant of resource consents)
    - s217 (effect of water conservation order)
    - an Order in Council in force under s152
    - any regulations
    - wāhi tapu conditions included in a customary marine title order or agreement
    - s55(2) of the Marine and Coastal Area (Takutai Moana) Act 2011.
- grant a consent if the application should have been notified and was not.

Also, councils must not grant consent for a prohibited activity or a subdivision consent where the circumstances set out in s106 cannot be reconciled.

Councils may decline an application on the grounds it has inadequate information to determine the application (s104(6)). When making an assessment on the adequacy of the information, a council must have regard to whether any further information or report(s) requested were provided by the applicant and provide commentary and reasoning for its decision.

Case law has determined that subject to Part 2 of the RMA, s104(1) does not elevate any of the matters in s104(1) to a primary status, however matters can be given weight as the council sees fit in the circumstances.

Sections 104A-D - decisions on applications

Sections 104A to 104D set out the circumstances in which a council may/must grant or refuse consent, with reference to the type of activity for which consent is sought. Under each of these sections the manner of any grant or refusal is:

- **Section 104A - Controlled activities**
  A council must grant this type of application unless it has insufficient information to determine that the activity is controlled. The council may impose suitable conditions in relation to those matters over which control is reserved as set out in its plan or proposed plan, or reserved in any national environmental standards or other regulations. Councils also need to consider what effect the condition is mitigating and standardised or proposed conditions must be relevant to the application.
- **Section 104B - Discretionary and non-complying activities**
  A council may grant or refuse this type of application; and may impose conditions if it chooses to grant the resource consent.
- **Section 104C - Restricted discretionary activities**
  A council may grant or refuse this type of application, but must only consider the activity based on the matters to which it has restricted the exercise of its discretion under its plan or proposed plan, and in national environmental standards or other regulations. If a council chooses to grant consent, then conditions can only be imposed in relation to those matters over which discretion has been restricted in the plan or proposed plan, national environmental standards or regulations.
- **Section 104D - Particular restrictions for non-complying activities**
  When dealing with non-complying activities, before granting an application a council must be satisfied that either the adverse effects of the activity on the environment will be minor (s104D(1)(a)), or the proposed activity will not be contrary to the objectives and policies of a proposed plan and/or plan (s104D(1)(b)).

This consideration for non-complying activities is commonly known as the 'threshold test' or the 'gateway test '. If either of the limbs of the test can be passed, then the application is eligible for approval, but the proposed activity must still be considered under s104. There is no primacy given to either of the two limbs, so if one limb can be passed then the 'test ' can be considered to be passed.

Sections 105 and 107 - decisions on discharge and coastal permits

Section 105 requires councils to have regard to the following matters when considering a discharge or coastal permit application which will contravene s15 or s15B of the RMA:

- the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and
- the applicant's reasons for the proposed choice; and
- any possible alternative methods of discharge, including discharge into any other receiving environment; and
- if the application is for a resource consent for a reclamation, the council must also consider whether an esplanade reserve or strip is appropriate.

These matters are in addition to the matters listed in s104(1) which a council must take into consideration before making a determination. It is important that the applicant has addressed these matters fully in their application and discussed the matters with Council prior to lodgement.

Section 107 states that councils shall not grant a discharge or coastal permit allowing the discharge of a contaminant or water if it is likely to give rise to all or any of the following effects in the receiving waters:

- the production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials
- any conspicuous change in the colour or visual clarity
- any emission of objectionable odour
- the rendering of fresh water unsuitable for consumption by farm animals
- any significant adverse effects on aquatic life.

Where a proposal results in the above effects, consent may be granted if a council is satisfied that the proposal is consistent with the purposes of the RMA and:

- exceptional circumstances exist, or
- the discharge will be temporary, or
- the discharge is associated with necessary maintenance work

Conditions can be imposed which require the permit holder to undertake work in stages throughout the term of the permit.

Section 106 - decisions on subdivisions

Sections 106 and 220 have been amended by RLAA17 to broaden the range of natural hazards to be considered, to reflect the definition of 'natural hazards' in s2 and include a risk-based approach when considering subdivisions. This reflects the inclusion of "the management of significant risks from natural hazards" as a new matter of national importance under s6(h) of the Act.

Section 106 requires both the applicant, as part of their application with sufficient technical support, and councils to consider the following matters in deciding subdivision consent applications:

- whether there is a significant risk from natural hazards; or

- whether sufficient provision has been made for legal and physical access to each lot created by the subdivision.

Following consideration of these matters, a council can either refuse or grant the application subject to conditions. Conditions can only be imposed in order to avoid, remedy or mitigate effects from the above list and must be in accordance with s108. Section 108 is subject to new s108AA that limits the matters that consent conditions can cover to the following:

- the applicant agrees to the condition;

- the condition is directly connected to an adverse effect of the activity on the environment;
- the condition is directly connected to an applicable district rule, regional rule, or national environmental standard; or
- the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.

In this context, an 'applicable rule' means a rule that is the reason, or one of the reasons that resource consent is required for the activity. These limitations do not prevent:

- consent authorities from refusing subdivision consent to manage risks of natural hazards (section 106) or other subdivision requirements (section 220)
- • regulations to determine the form or content of consent conditions.

The Marine and Coastal Area (Takutai Moana) Act 2011 and customary rights groups

These mechanisms include "protected customary rights" (PCRs) and "customary marine title" (CMT). Iwi, hapū and whānau can apply to have PCRs or CMT recognised either through High Court proceedings or by engaging directly with the Crown.

In accordance with s55(2) of the Marine and Coastal Area (Takutai Moana) Act 2011 (MCAA), a council must not grant an application for a resource consent (including a controlled activity) to be carried out in a protected customary rights area if the activity will have, or is likely to have, more than minor adverse effects on the exercise of the protected customary right, unless the protected customary rights group has given its written approval for the proposed activity, or the activity is one of the exceptions listed.

The exceptions are listed in s55(3) of the MCAA. In summary the activities that are exempt are:

- coastal permits for existing aquaculture activities to continue to be carried out (as long as there is no increase in area or change in location)
- applications for emergency activities under s330A of the RMA
- applications for existing accommodated infrastructure (within the meaning of s63 of the MCAA)
- applications for deemed accommodated activities (within the meaning of section 65(1)(b)(i) of the MCAA.

Schedule 1 of the MCAA outlines what needs to be considered when deciding whether a protected customary rights group is affected by an application. This list could also be used as the basis for a decision regarding whether or not the application would have effects that are more than minor on the exercise of the protected customary right.

If an applicant is applying for resource consent in the common marine and coastal area (see MACA section 9) you need to notify and seek the views of any group that has applied for recognition of **CMT** in that area in accordance with s62(3)(b).

The reason for this is that in the period before the Crown has determined whether an application for CMT is successful, MACA section 62 requires any applicant for resource consent to notify and seek the views of an applicant for CMT in the relevant area, before the resource application is lodged. Council requests that evidence of this is provided with these resource consent applications.

For more information on the MCAA and how it should be implemented by councils refer to the Ministry of Justice's note Provisions for Protecting Customary Interests: Information for local government.

What to include in a decision

Section 113 requirements

Section 113 of the RMA sets out certain matters that must be covered in writing decisions on resource consent applications.

It is important to note that s113 sets out what content is required in decisions and makes a distinction between notified and non-notified applications. Section 113 does not specify a particular structure or order for presenting the content in the decision.

For **non-notified applications**, every decision must be in writing and state the reasons for the decision (s 113(4)).

For **notified applications (publicly and limited)**

(1) *Every decision on an application for a resource consent that is notified shall be in writing and state-*

(a) The reasons for the decision
(aa) *the relevant statutory provisions that were considered by the consent authority*
(ab) any relevant provisions of the following that were considered by the consent authority:
(i) a national environmental standard:
(ia) a national policy statement:
(ii) a New Zealand coastal policy statement:
(iii) a regional policy statement:
(iv) a proposed regional policy statement:
(v) a plan:
(vi) a proposed plan; and
(ac) the principal issues that were in contention; and
(ad) a summary of the evidence heard; and
(ae) the main findings on the principal issues that were in contention

(b) In a case where a resource consent is granted for a shorter duration than specified in the application, the reasons for deciding on the shorter duration.

(2) *Without limiting subsection (1), in a case where a resource consent is granted which, when exercised, is likely to allow any of the effects described in section 107(1)(c) to*

(g), the consent authority shall include in its decision the reasons for granting the consent.

A checklist is a useful tool to ensure these matters are included and considered when drafting decisions. Such a checklist should be tailored to the different requirements of s113 for notified and non-notified decisions. Decision report templates may also be used to ensure these matters are included in the decision.

Section 113(3) states that decisions on notified applications may cross-reference to all or part of:

- the assessment of environmental effects (AEE) provided by the applicant:
- any report prepared under ss41C, 42A or 92; or
- adopt all or part of the AEE or report and cross-refer to the material accordingly.

The ability to adopt and/or cross-reference material that the reporting officer agrees with can avoid duplication and speed up the reporting process.

General principles of good written decisions

Notwithstanding the requirements of s113, there are general principles that should underlie the drafting of every written decision.

The principles are set out below and are presented in no particular order of importance. The principles have been developed from the perspective of the end user (such as the applicant, submitters, or council staff not involved in processing the application), who may not always have an intimate knowledge of the RMA and its processes.

Structure & Appearance

Principle 1: Ensure a professional appearance

The finished decision document must have a professional appearance befitting of the time, effort and expense that the parties have gone to and its status as an important legal document. A professional appearance can be achieved by ensuring:

- the decision is on council letterhead
- formatting is consistent throughout the document
- there are no obvious spelling or grammatical errors (including ensuring names of parties and hearing participants are spelt correctly)
- the decision has numbered pages
- consent conditions are correctly numbered
- the decision has been signed and dated by the decision-maker.

Principle 2: Provide the decision at the start

The majority of consent decision readers want to know immediately the overall consent decision, in terms of either the granting or refusing of consent. This should be provided at the outset, in bold.

Principle 3: Use a logical structure that supports a fluent argument

The finished decision document should be expressed in a fluent manner from start to finish. It should have a logical structure and sequence that supports a flow of argument; one that enables the reader to easily understand the reasons for the decision.

Decisions on notified applications need not follow the sequence of matters as set out in section 113(1) (which relate to the required content for notified decisions). No one single structure or template fits all decisions. However, fluency can be enhanced through the use of descriptive headings and by avoiding the use of large sections of unbroken text. Descriptive headings can help a reader know where they are in a document. A contents page should be used for lengthier decisions.

Content (in no particular order)

Principle 4: The decision length and level of detail should reflect the complexity of application

As a general principle, the length and amount of detail of a written decision should reflect the complexity of the issues raised by the application and the number of participants involved in the hearing (where one is held).

Written decisions should be as succinct as possible and for non-notified decisions this may equate to a concise set of bullet points outlining the reasons for the decision

Principle 5: The written decision should endure over time and involvement

The final written decision should be able to be picked up in five years' time (the normal consent duration) by someone who was not involved in the application or hearing, and be clearly understood. A decision writer should be mindful to record or refer to in the decision any assumptions or knowledge they have that are relevant to the decision, and that may not be immediately apparent in five years' time when the consent may be given effect to.

Principle 6: Be mindful of scope

The final written decision must be worded so that it does not grant consent for an activity greater in scope than that requested in the resource consent application. Similarly, conditions must not extend the scope of the consent or the way in which it is exercised. The written decision must be within the confines of the application, and advice notes must not cover matters that should be conditions of consent.

Principle 7: Provide reasons for the decision

The written decision should give clear reasons why the consent has been granted or refused. The decision must provide a clear overall evaluation, in which a conclusion is reached with reference to the scale and significance of effects and relevant statutory and plan provisions. They must enable the decision reader to understand why the matter was decided as it was and what conclusions were reached on the key issues.

Specific reference should be made to Part 2 of the RMA; in other words, whether the sustainable management purpose of the RMA will be better addressed by granting consent (subject to conditions) than by withholding consent.

Reasons can be briefly stated; the degree of particularity required depending entirely on the nature of the issues being decided. The reasons need not repeat earlier statements but it may be useful to link to a discussion on the principal issues in contention or the main findings on the principal issues in contention, particularly for notified decisions.

It may be appropriate to include reasons for the imposition of certain conditions where this is not immediately apparent. Such reasons can follow the individual conditions to which they relate, or can be referred to in the reasons for the decision (where they relate to the discussion on the avoidance, remedy or mitigation of particular adverse effects - see principle 12 below).

In a case where a resource consent is granted for a shorter duration than specified in the application, the reasons for deciding on the shorter duration should be included.

Principle 8: Include the basic application details

A written consent decision must clearly state:

- the basic application details, which includes the consent number(s)
- the property address and legal description
- consent status of the activity for which consent is required
- the file reference(s)
- the date the decision was made
- the date the consent expires or lapses.

It may also be useful for the decision to record:

- a brief description of the existing environment
- the date(s) of the hearing (if held)
- site visit(s) (when undertaken, who present)
- who or what hearing entity or council has made the decision.

Expression

Principle 9: Take ownership of decision

The written expression of the decision should be that of the decision-maker(s), so they should take ownership of its content and be confident in the final wording and able, if necessary, to defend the decision. The decision should make reference to the decision-maker whether this is an officer with delegated authority, a sole commissioner or a hearing panel (where the members should be referred to and the decision should be signed by the chair).

Principle 10: Use plain English

Good decision writing will result in a simple, concise, well-reasoned and easily comprehensible explanation of why the decision was made. The tone, grammar and flow of the written decision must be appropriate for the audience (i.e, the applicant and submitters and members of the general public), and should be written using plain, simple English. Having said this, it is not necessary to simplify or substitute terms or definitions used in the RMA.

Principle 11: Ensure consistency of expression

Terms or people must be referred to consistently throughout the written decision document. For example all submitters should be addressed consistently, either with or without a Mr, Mrs or Ms before their name. Excessive use of abbreviations should be avoided. Where abbreviations or terms such as "the Act" are used, these should be expressed in full at their first use.

Principle 12: Keep the decision effects-focused

The written decision should reflect the effects-based approach of the RMA in terms of the overall written style. The decision should be expressed in terms of whether actual or potential adverse effects can be appropriately avoided, remedied or mitigated. It is good practice to link those findings to the conditions which have been imposed

Principle 13: Provide an overall evaluation leading directly to the decision whether to grant or refuse consent

The final written decision whether to grant or refuse consent should be immediately prefaced by a clear and compelling overall evaluation, in which a conclusion is reached with reference to the scale and significance of effects and relevant statutory and plan provisions. Specific reference should be made to Part 2 of the RMA.

In practice, where the application lends itself, this part of the decision may actually comprise the entire discussion relating to principal issues in contention and main findings of fact.

There are also some principles which relate specifically notified decisions. These principles reflect the matters addressed in s113(1) to (3) of the RMA.

Notified decisions: additional principles

Principle A: Include objection and/or appeal options, procedural rulings and details of the hearing

In addition to the statutory requirements listed under principle 7 above, information regarding objection and appeal options and deadlines should form part of a written decision. Any rulings on procedural matters (eg, late submissions) should be addressed.

Principle B: Identify the principal issues in contention (s113(1)(ac))

The final written decision for notified applications must clearly identify the principal issues that were in contention and which were considered in determining the application. Where

there is contrary or opposing evidence on these issues, the decision should identify those differences and show which argument or evidence takes precedence and why.

The principal issues that were in contention might include not just arguments over the scale and significance of any actual or potential environmental effects, but differing views on the interpretation and relevance of statutory provisions and the provisions of policy statements and plans, for example.

Principle C: State the main findings on the principal issues that were in contention (s113(1)(ae))

The final written decision must identify the main findings on the principal issues of contention and explain how this has led the decision-maker(s) to their decision. The main findings on these issues will be what the decision maker(s) considers important in reaching the decision on the application. These findings should clearly address the principal issues in contention, and should state which facts are relied on in the event of conflicting evidence.

Principle D: Provide a succinct summary of evidence heard (s113(1)(ad))

When a hearing has been held, the final written decision should provide a succinct but accurate summary of the evidence presented or, as a minimum, refer to the main matters addressed by witnesses during their presentations of evidence (particularly where they relate to the principal issues in contention). Acknowledging appearances and making specific reference to each person who spoke enhances public confidence in the decision and helps satisfy parties (especially submitters) that submissions and evidence have been properly considered.

Setting out in great detail the arguments advanced by the parties and the evidence of the witnesses can obscure the principal issues that have to be decided and can make the reasoning process difficult to follow. Nevertheless, it may be appropriate to include a brief summary of submissions and reference to the decision on notification, for the benefit of those who did not attend the hearing (where one was held). Alternatively, the decision may refer to the relevant officer report in these circumstances.

Principle E: Provide reference to relevant statutory provisions (s113(1)(aa))

The final written decision should make reference to the relevant statutory provisions that were considered by the decision-maker(s) (ie, those on which their decision turns). These provisions must include Part 2 matters as well as those set out in Part 6 (such as the relevant statutory tests). The former may be particularly important where the relevance of particular provisions has been a principal issue in contention.

Principle F: Provide reference to relevant policy statement or plan provisions (s113(1)(ab))

Where appropriate, key RMA policy statement or plan provisions should be specifically referenced supported as appropriate by an explanation as to what the relevant objectives or policies are seeking to achieve. This is especially appropriate in dealing with

applications for non-complying activities, or where the arguments over the relevance of those provisions have been a principal issue in contention.

Relevant provisions can include national, regional and local-level objectives and policies. Where provisions were not a source of contention, it will be unduly onerous to identify every relevant provision. As an alternative, reference to the relevant provisions can be made in the discussion in the officer's report.

Principle G: Avoid repeating material from the application or supporting reports by making cross-references to these reports and adopting them when appropriate (s113(3))

Section 113(3) allows material in the assessment of environmental effects and any report prepared under ss 41C, 42A or 92 to be cross-referenced in the decision. This provision also allows the assessment or reports to be adopted in the decision.

Decisions on notified applications should therefore avoid duplication of material in the assessment of environmental effects, hearing reports or further information reports by making appropriate cross-references. It will only be appropriate to do this when the information in the assessment or report is considered accurate and relevant to the decision. This will help to save time in the reporting requirements for decisions and reduce administration costs.

On occasions, it may also be also be appropriate to adopt part of the assessment of environment effects, hearing report or further information report in the decision. Where this is done, it is important to ensure that that material is accurately cross-referenced in the decision.

Decision templates ***(note these templates have not been updated since the RLAA 2017 changes)***

The example decision templates below fulfil the requirements of s113. They also address the general principles of a good written decision set out above and the required content for decisions on notified and non-notified applications. They can be adapted for use by councils.

- http://qualityplanning.org.nz/images/Forms/notification-template-ta.doc
- http://qualityplanning.org.nz/images/Forms/notification-template-regional-councils.doc
- http://qualityplanning.org.nz/images/Forms/limited-notified-decision-ta.doc
- http://qualityplanning.org.nz/images/Forms/limited-template-regional-councils.doc
- http://qualityplanning.org.nz/images/Forms/notified-template-council-authority.doc
- http://qualityplanning.org.nz/images/Forms/limited-non-notified-decision-ta.doc
- http://qualityplanning.org.nz/images/Forms/non-notified-template-regional-councils.doc