2017

Consent Support

Setting Charges

THE RMA QUALITY PLANNING RESOURCE

Setting Charges for processing and monitoring consents under the RMA

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

Section 36 of the Resource Management Act 1991 (RMA) enables councils to charge applicants for receiving, processing and granting consents; and consent holders for administering, monitoring and supervising consents. Section 36AAB(4) requires councils to publish their charges fixed under section 36 on a publicly accessible website (usually the council's website).

This guidance note establishes good practice for setting consent processing and monitoring charges and is intended to ensure the process of setting charges is transparent, that uncertainty is reduced, and councils are using appropriate charging practices.

The contents of this guidance note cover seven main topic areas:

This guidance note does not deal with charges established under s36(1)(c) to recover the costs of a council's s35 functions aside from consent monitoring i.e. it does not cover plan effectiveness research costs.

There are four key terms that need to be defined at the outset of this guidance note:

Fixed charges
These are charges that cover the total cost of an application or compliance monitoring activity and which are levied at the start of the process. Fixed charges are not supplemented by additional actual and reasonable charges once the consent or compliance monitoring process is complete. Fixed charges are deemed to be 'actual' charges which are not subject to the rights of objection and appeal (s357B to s358).

Fixed initial deposit charges
These are charges levied at the start of the application process (or preceding a compliance monitoring activity). Fixed initial deposit charges are supplemented by

additional actual and reasonable charges once the consent process is complete. Fixed initial deposit charges are not subject to the rights of objection and appeal (s357B to s358), but they need to be developed using the public consultative procedure set out in s83 of the Local Government Act 2002 (LGA).

Additional charges
These are actual and reasonable costs that are charged at the end of the consent application process (or completed compliance monitoring activity) under s36(5) that recover the council's full costs, less the fixed initial deposit charge already paid. Additional charges are subject to the rights of objection and appeal (s357B to s358).

Occasioned
A charge that is related to some required actions of a local authority due to the actions of those persons. s36AAA(3)(b).

Statutory basis for charges

Resource Management Act 1991 (RMA)

The statutory basis for setting charges for consent processing and monitoring activities is found in s36 of the RMA. Section 36(1)(b) provides for fixed charges for the 'receiving, processing, and granting' of resource consents (including certificates of compliance and existing use certificates). Case law has established this includes consent hearings and the costs of any independent commissioners used by a council at the hearing. Section 36(1)(a)(aa) to (ad) specifically addresses the fixing of charges for requests for independent commissioners made under s100A. Section 36(1)(a)(ae) specifically addresses the fixing of charges for deemed permitted activities under s87BA and s87BB. Section 36(1)(a)(af) relates to fixing charges for the costs of an objection on a resource consent decision, where the objection is being heard by an independent commissioner at the request of the person making the objection.

The term 'processing' also includes the declining of an application.

Section 36(1) provides for fixed charges for the 'administration, monitoring and supervision' of resource consents (including certificates of compliance and existing use certificates – s36(1)(c)), review of consent conditions (s36(1)(cb) and monitoring of permitted activity standards specified in an NES (s36(1)(cc).

Section 36AAB(2) allows a council to not act on certain matter(s) until to when the charge(s) relating to that matter(s) has been paid in full. For example, a council could legitimately not proceed with notifying a resource consent application until the required fixed fee set under s36(1) is paid in full.

However note that s36AAB(2) does not apply to the non-payment of charges by submitters who requested independent commissioner(s) (s 36AAB(3)). Therefore, a council would have no grounds not to continue processing an application when a submitter is required to pay for the use of independent commissioner(s).

Councils must have regard to the criteria set out in s36AAA (Criteria for fixing administrative charges) when setting fixed charges. Additional charges under s36(5) should also meet the criteria set out in s36AAA. Additional charges may be levied under

s36(5) where a fixed initial deposit charge is insufficient to cover the actual and reasonable costs incurred by the council. Section 36(6) requires council to provide an estimate of additional charges likely to be imposed under s36(5) if requested by the person liable to pay that charge.

In addition to consent processing charges, councils should develop fixed initial deposit charges for compliance monitoring activities. This is necessary as the Court has stated that actual and reasonable monitoring charges levied in arrears are effectively s36(5) additional charges. As such, additional monitoring charges can only be levied once initial monitoring deposit charges have been fixed under s36(1).

The s36AAA criteria should be strictly adhered to when setting either fixed charges, fixed initial deposit charges, or additional charges for consent processing and monitoring. The most relevant part of s36AAA reads:

1. *When fixing charges under s36, a local authority must have regard to the criteria set out in this section*

2. *The sole purpose of a charge is to recover the reasonable costs incurred by the local authority in respect of the activity to which the charge relates.*

3. *A particular person or persons should be required to pay a charge only-*
   a)To the extent that the benefit of the local authority's actions to which the charge relates is obtained by those persons as distinct from the community of the local authority as a whole; or
   b) Where the need for the local authority's actions to which the charge relates results from the actions of those persons; or
   c) in the case where the charge is in respect of the local authority's monitoring functions under s35(2)(a) (which relates to monitoring the state of the whole or part of the environment)…

4. *The local authority may fix different charges for different costs it incurs in the performance of its various functions, powers and duties under this Act –*
   a) *In relation to different areas or different classes of applicant, consent holder, requiring authority, or heritage protection authority; or*
   b) *Where an activity undertaken by the persons liable to pay any charge reduces the cost to the local authority of carrying out any of its functions, powers and duties.*

The Resource Management (Discount on Administrative Charges) Regulations 2010 (Discount Regulations) requires councils to give a discount on administration charges for consent applications where processing time frames have not been met. The regulations apply to resource consent applications or applications to change or cancel conditions under s127.

The Discount Regulations require a discount of one percent of consent processing charges for each day that the timeframe is not met up to a maximum of 50 percent. Under s36AA councils may alternatively adopt their own discount policy. This policy must specify the discount and the procedure an applicant must follow, and must be more generous than that provided through the Discount Regulations.

For more information on the Discount Regulations and how they should be implemented refer to the Ministry for the Environment's Resource Management (Discount on Administrative Charges) Regulations 2010 - Implementation Guidance.

Local Government Act 2002 (LGA)

Under s36(3)(a) of the RMA, charges for a council's s36(1) activities must be fixed in accordance with s150 of the Local Government Act 2002 (LGA), and after using the special consultative procedure set out in s83 LGA. Section 150(3) of the LGA provides that fees and charges may be prescribed either by way of bylaw, or following consultation that accords with the principles set out in s82 of the LGA. The special consultative procedure must also be used if a council proposes to adopt their own discount policy under s36AA.

Section 150(4) of the LGA additionally requires that any charges must not recover more than the reasonable costs incurred by the council for the matter for which the fee is charged. This is consistent with s36AAA(2) of the RMA.

While it is acknowledged that s150 of the LGA provides the option of setting consent charges by way of bylaw, it is good practice for the setting of charges for consent processing and compliance monitoring to occur as part of the council's normal annual plan development and notification process. A schedule of charges should be included as part of the annual plan developed under s95 of the LGA. This is consistent with the LGA requirement to include a funding impact statement in the annual plan.

Section 83 of the LGA requires that the proposed charges be set out in a written proposal which is considered by the council, publicly notified and held open for public submissions for at least one month. Submissions are to be heard at an open meeting of the council.

Councils are also required to prepare Long Term Plans (LTPs) under s93 of the LGA. These are higher level documents with a ten year planning horizon.

The amount of annual revenue anticipated from consent charges will need to be included in the LTP at an activity level, noting that this is cost recovery income based on an estimated amounts of RMA consenting and compliance activity. However, it is not generally necessary to include the detailed schedule of charges in the LTP as this would involve unnecessary duplication with the contents of the annual plan.

Regional and district plans

In the past some practitioners have queried whether or not consent application and compliance monitoring charges should be set out in regional and district plans. It is inappropriate to do this for three reasons:

1. it duplicates schedules that must be prepared under the LGA
2. any charges specified would effectively be fixed for the life of the plan and could only be changed through the RMA First Schedule plan change process.
3. There is now a requirement under s36AAB(4) where councils must publish and

maintain, a freely accessible Internet site (usually the council's website), an up-to-date list of charges fixed under section 36.

4. Some councils have established s108 financial contributions to cover the compliance monitoring of permitted activities. In such cases it is necessary to specify the level of such annual contributions (or charges) in the regional or district plan, or at least the method by which those contributions will be determined. However, such charges are quite distinct from the more typical s36 charges dealt with in this guidance note.

Funding policy decisions

Local Government Act requirements

Under s102 of the LGA councils must adopt funding and financing policies, and in particular a revenue and financing policy. The revenue and financing policy must set out the council's policies for funding operational activities from all sources including fees and charges. These various policies may be included in the LTP and adopted as part of that plan.

Public and private good split

Each council must decide the revenue sources for its RMA consent processing and compliance monitoring activities. This will generally involve a split between consent charges and general income (general rates and investment income). This has traditionally been couched in terms of a private good/public good funding split.

Consent activities funded by charges should have the attributes of a 'private good', namely the activity should be 'rival' and 'excludable'. A good is rival if there is a marginal cost in supplying it to someone else. A good is excludable if its receipt can be withheld from someone who refuses to pay for it.

Using s36 RMA terminology, consent applicants or holders should fund those 'private good' activities as they either:

- occasion the work (the council needs to do the work because of the actions of consent applicants or holders); or
- benefit directly from the work (e.g. processing and approving a consent enables development to proceed).

Activities that are not funded by consent holder charges are either 'public goods' which are non-rival and non-excludable, or 'merit goods' which the council has decided it is meritorious for the community to receive. Merit goods could be primary and secondary education for example.

Previous studies of council funding policies for consent activities have identified a wide variation in the level of funding from charges versus rates.

The consent process has a number of distinct components which have different underlying public good/private good attributes. The consent process could be broken down as indicated in Table 1 with appropriate recoveries from charges (representing the

private good attributes of the activity) being as shown.

Table 1: Consents funding policy

Activity	**Proportion recovered from charges (%)**
Responding to general consent enquiries *	0 – 25
Pre-application advice if application subsequently lodged	0 – 100
Pre-application advice if application is not subsequently lodged	0 - 100 (suggest councils seek legal advice on the legality of any charges)
Responding to consent enquiries, where these proceed to an application	100
Receiving, processing and granting or declining consents	100
Processing s357 – 357D objections	0 - 100 (suggest councils seek legal advice on the legality of any charges)
Responding to appeals	0
Administration – consent systems maintenance	100
Routine consent supervision, compliance monitoring, inspections and auditing	100
Routine abatement notice and environmental infringement notice proceedings **	100

Abatement notice appeals, enforcement orders and prosecutions	0

* Note that the partial costs of this activity may be recovered through charges set under s36(1)(e) which is "charges for providing information in respect of plans and resource consents".

** Council activities involving the identification of non-compliance with consent conditions, determining the appropriate level of enforcement response, and undertaking abatement notice and environmental infringement notice actions, are all reasonable components of the monitoring and supervision of consents. However, once such matters escalate to the level of the Environment Court the council should cease directly charging the consent holder for staff time as the Court will award costs based on the submissions of all parties.

The funding splits in Table 1 are considered realistic based on both economic principles and current practice. The splits recognise:

- the activities in the consent process are predominantly occasioned (caused) by consent applicants. In that regard, the Court has concluded that "the local authority's actions in processing any individual consent application is a specific application of the structure from which (generally) only the applicant for the resource consent can derive a definable benefit." Furthermore, "there is, therefore, no presumption in the section [s36(1) and s36(5)] that all, or any portion of, the costs of processing resource consent applications are to be absorbed by the council as part of its general overheads" (Redvale Lime Company Limited v Auckland Regional Council A132/2005)

- the provision of information on the consent process is generally a merit good, however potential consent applicants will derive some benefit from that information

- there is some uncertainty about charging for s357 – 357D objection proceedings. It is recommended that legal advice be obtained should a charging regime be considered.

- maximum charges because infringement notices are fixed in regulations

- enforcement order and appeal proceedings cannot be charged for, however the Courts may award costs if these are sought by the council.

If the Table 1 categories and funding splits are used for the consent activities then an overall or aggregate charge funded figure can still be derived for reporting purposes. Note that the various elements of Table 1 are discussed in more detail in following sections of this guidance note.

As described above, it is unlikely that any council can or should seek to realistically fund 100 per cent of its consent activity wholly from charges although some purport to do so in their annual plans.

When establishing funding policies for consent activities, the level of sub-activity detail disclosed in the annual plan, and in the LCP revenue and financing policy, should be in the order of that shown in Table 1.

Some councils may prefer a figure for consent processing that is in the range of 80-90 per cent, given that processing costs can be increased as a result of vexatious submitters, or submissions that are more about disputes between neighbours and the like. Such realities are recognised. However, they should be dealt with on a case-by-case basis through a documented remissions process, rather than through a distortion of the funding policy. For example, a council could stipulate that it will charge between 60 per cent and 100 per cent of hearing costs to applicants, with the actual amount charged being set after taking into account the nature of the hearing as assessed against a range of established criteria.

This approach is supported by the Court who concluded that a hearing of any length and at any cost could not be properly charged under s36, as it was not occasioned by the resource consent application in terms of s36AAA(3)(b). This is because it would not be a reasonable cost in terms of (5) and s36AAA(2). Councils should, therefore, always consider the reasonableness of charging 100 per cent of hearing costs to an applicant, particularly for unusually lengthy or costly hearings.

Budget setting

There are basically two approaches to setting the consent activity operating budget.

The top-down approach involves determining an operating budget based on existing staff numbers and fixed overhead costs.

The bottom-up or cost recovery approach involves making an estimate of the number of consents likely to be received and monitored during the year and the resources required to undertake those tasks. This determines the consent activity operating budget for annual plan purposes.

The bottom-up approach more closely aligns with the requirements of s36AAA and should preferably be used.

The bottom-up approach can have practical difficulties if the council's human resource inputs are not flexible. This is particularly relevant in the context of the Resource Management (Discount on Administrative Charges) Regulations 2010 (Discount Regulations) which require councils to give a discount for late consent processing. Where there is a high workload and processing officers are unable to meet processing time frames, the operating budget may effectively be reduced through discounted charges on individual consents.

The use of external contractors can greatly increase that flexibility and is recommended where the workload within an activity is relatively unpredictable or can vary at short notice. Permanent staff can undertake predictable base load tasks, with peaks in workload being met by contractors.

It is acknowledged that in practice many councils will have relatively fixed input costs for the consents activity, mainly comprising permanent staff salaries and fixed asset costs. If there are not enough chargeable hours accrued to generate the necessary annual revenue from charges then a funding shortfall will arise that must be funded from rates. This will distort the funding policy decisions of the council. Funding policies may also be distorted by the Discount Regulations.

For this reason, councils should accurately record the actual time spent on various consent activities, consents staff should accurately fill in time sheets, and councils should record the number of consents received, monitored and processed, and the associated statutory time frames taken to process applications. This is also important for the purposes of the Discount Regulations, reporting responsibilities under ss35 and 35A RMA, and to improve the efficiency of internal processes.

Accurate recording of time spent and consent time frames will enable consent activity operating budgets to be more accurately determined from year to year. This will also allow funding policies to be adhered to when using the recommended bottom-up approach to setting the operating budget.

Administering the plan

There has been debate about whether or not there is any public benefit in administering a district or regional plan. Clearly the development of planning instruments is a public good or perhaps even a merit good and therefore plan development should be funded from general revenue (e.g. rates).

In terms of administering the plan, it is important to define exactly what the term 'administering' means. It can include answering inquiries on consent requirements, processing consent applications, and monitoring consents that are granted. The public/private good attributes of those functions where a potential applicant may benefit have been discussed above.

Other plan administration activities might include policy or technical research to underpin plan reviews, collating complaints, or identifying issues that point to plan deficiencies that might be rectified through plan changes or variations. These activities would generally be public goods funded from general revenue unless, for example, the research was targeted at a specific activity or group of consent holders. In that latter case, it might be appropriate to recover some costs through annual s36AAA(3)(c) charges.

Recoverable activities and overheads

Councils must decide which elements of the consent process are cost recoverable. Case law has also determined that a broad view should be taken of the parts of the consent activity that are able to be charged for. Cost recoverable consent activities should include:

- Staff time, including planning, engineering, scientific and other 'in house' staff hours. This in turn may include:
    - costs of notification, such as advertising
    - site inspections
    - meetings with the applicant
    - pre-hearing meetings
    - preparation and circulation of draft conditions
    - section 42A report writing
    - consulting with iwi and other interested or affected parties
    - consulting with submitters

- hearing attendance
- decision drafting
- consent process related administration.

- Consultant costs, where they are used to process or monitor consents on behalf of council
- Consultant reports commissioned under ss92(2), 41C or 42A to provide extra information not provided in an applicant's AEE, or to peer review material supplied by an applicant
- Legal costs
- Disbursements, including photocopying, postage, travel costs (km travelled), advertising costs, and laboratory costs
- Hearing costs, including councillor and/or commissioner costs, and venue hire
- Administration costs associated with consent database management and compliance monitoring

The above list of activity areas / tasks (or as adjusted by the council) could usefully be used when recording time spent on timesheets of council processing staff.

Good practice recommendations for costs recovery for some of these activities are provided below.

Pre-application activities

Time spent by council staff discussing proposed applications with applicants or their consultants should be charged if an application is subsequently lodged. This pre-application activity is occasioned by the applicant and there is no reason for it being funded by the general community (through rates).

However if pre-application advice is given and an application is not subsequently lodged with the council, there is some uncertainty whether there are means to charge for pre-application advice under s36. We suggest councils seek legal advice on the legality of those charges if intending to charge for such advice.

Some councils provide for a small amount of 'free' pre-application advice (such as a half to one hour), and this is appropriate if a council has a policy of funding environmental or RMA advice in that manner.

It is also appropriate to charge for the reasonable costs of retrieving information from databases, records or files, as well as copying costs in order to provide any currently available information in respect of plans and resource consents requested by an applicant or their consultants prior to an application being received, as provided for by s36(1)(e).

It would not be appropriate to charge for the costs of undertaking the research, resource investigations or state of the environment monitoring as those costs are 'sunk', having

already been funded from other sources. These costs are also not occasioned by the applicant and there is unlikely to be any direct benefit to them.

Consultant costs

In many cases councils use external consultants to process or monitor consents. In some cases contracts are negotiated whereby the consultant's charge-out rate is fixed at a level similar to that of equivalent internal council staff. However, an issue arises if a consultant has a higher charge-out rate than equivalent council staff. A decision needs to be made on whether or not to charge those higher costs to an applicant. This is where s36AAA(2) provides useful guidance in terms of 'reasonable' costs.

The additional costs of consultants (over and above equivalent council staff charge-out rates) should only be passed on to applicants where the applicant has occasioned the use of the consultant. Such situations would include:

- the applicant has requested urgency in processing the application and additional external resources are required by the council to meet the applicant's deadlines
- the application involves complex technical matters that are beyond the skill and expertise of council officers and the applicant agrees to the commissioning of a report under ss92(2) or 41C(4)
- the applicant has provided technical information that is controversial or unorthodox and it requires external peer review to verify its authenticity.

A council should communicate with an applicant if a consultant is required to be used for any reason. In other situations, it is not good practice to charge the additional cost of consultants to applicants. Such situations would include:

- council staff are fully committed to other work and external resources are required to meet statutory consent processing time frames
- the regulatory arm of council has a conflict of interest because another arm of council (or a council-controlled organisation) is the applicant, or because council staff have shown bias or predetermination by making public statements on the consent.

In these situations the consultant's time should be charged out at the equivalent rate as for council staff.

Council staff will spend time managing consultants and undertaking consent processing tasks for which consultants do not hold delegated authority. Where a large amount of contracting out occurs this time commitment can be substantial. Decisions need to be made on whether or not to recover that time.

In terms of tasks for which consultants do not hold delegated authority, such staff costs should be recovered provided there is no 'double dipping', such as might occur where a staff member duplicates a task already undertaken by a consultant.

The criteria discussed above for managing consultant costs should also be applied to managing the costs of consultancy input to the consent compliance monitoring process.

Travel costs

In order to avoid penalising applicants and consent holders in outlying areas, it is not appropriate to automatically charge full travel costs and staff time for site visits or locally held hearings.

A 'reasonable' nominal travel and time cost should be charged based on what an average travel time within the region or district might be.

Councillor and commissioner fees

Where there is a hearing, the appropriate charge will depend on whether councillors or independent commissioner(s) are hearing and deciding the application, and whether a request was made under s100A by the applicant and/or submitter(s) for the application to be heard and decided by independent commissioner(s).

Where councillors hear and decide the application, the actual costs of councillors sitting as hearing committee members should be included in consent charges. The Remuneration Authority establishes resource consent hearing fees. These are set out in determinations each year (called Local Government Elected Members Determinations). These Determinations can be found on the New Zealand Legislation website. It is the hearing fee costs for councillors that are specified in regulation. These charges should be passed on to the consent applicant as they are occasioned by the need for a hearing.

Councils should develop policy which clearly outlines how the councillors' hourly rate applies to ensure there is no confusion between time charged for the actual hearing, as opposed to preparation time (reading material), site visits, deliberations and travel time. Note the Remuneration Authority has stated it is not appropriate to pay separately for preparation time as members can take greatly different times to read the same material.

Where independent commissioners are used and their hourly rate is higher than that set by the Remuneration Authority for elected members, then a decision needs to be made on whether or not to pass on those additional costs to the applicant.

Where an applicant has made a request to have the application heard and decided by one or more independent commissioners under s100A, the additional charge should be passed on to the applicant as they have clearly occasioned their use. The charge is payable by the applicant even if one or more submitters also make a request for independent commissioners (s36(1)(aa)).

Where one or more submitters make a request under s100A but the applicant does not, they (the submitter) should be charged the additional costs of having the application heard by independent commissioner(s) over and above that if it was heard by councillors. If there is more than one submitter, the additional costs should be charged equally to each submitter (s36(1)(ab)).

There may be other situations where the additional cost of using independent commissioners should be passed on to the applicant. However, where an independent commissioner is required because of some issue related to decision-making on the council's part (conflicts of interest, or lack of in-house expertise) then independent commissioners should be charged to consent applicants at the same hourly rate as elected members. Examples include where a councillor has some personal involvement in

the application, or where the council was the applicant or a submitter.

Council staff can spend a significant amount of time organising councillors and/or commissioners onto hearings committees, or deciding the composition of committees. This may be time consuming due to internal 'political sensitivities' associated with ensuring an equitable spread of hearings amongst councillors. Such organisational activities are not directly occasioned by the applicant and should not be charged to them.

Staff overheads

It is important that a council's method of allocating overheads and setting staff charge-out rates ensures that the costs charged to consent applicants are transparent, justified and lawful. The Court found that it is appropriate to charge a proportion of the overhead costs associated with running the Council's Resource Consents Division (Barfoote Construction Limited v Whangarei District Council A80/01).

Any organisational or corporate costs included in staff overheads not relevant to the consents activity will need to be separated out and recovered elsewhere.

The recommended good practice starting point for determining staff charge-out rates is to use an annual number of chargeable hours that exclude annual leave, sick leave and general staff training. A commonly used number is 1560 hours based on a 40 hour week. The staff member's salary is then divided by this number of hours to derive a base hourly rate. Appropriate overheads are then added to the base rate.

Section 36(4)(b) provides that a council's overhead costs can only be recovered from consent applicants if they either occasion them, or they receive benefit from them distinct from the general community. For example, the lodging of a consent application causes a council to have to employ consent processing staff and provide office space, office equipment and other resources to enable those staff to do their job. These are legitimate overhead costs that are sanctioned by s36(4) of the RMA.

However, other overhead costs generated by a council that are not caused by consent activities do not fall within the bounds of s36(4). It is difficult to list such overhead activities with precision as they will be many and varied and described differently in different councils.

Some examples of activities that should not generally be included in consent staff overheads would include:

- council secretariats
- CEO support sections
- financial services and financial management planning (non-consent related)
- LTP and annual plan development
- information centres
- copy centres (non-consent related)

- records management (non-consent related)
- library (non-consent related)
- customer service centres (non-consent related)
- community or public relations
- general environmental education (non-consent related)
- human resource management activities such as leadership training
- health and safety initiatives
- business practice improvement initiatives
- information technology management and development
- general staff training
- council-wide depreciation.

However, while such overheads may not be caused by the consent applicants, it is possible they might still receive some benefit from them distinct from the community as a whole. This might arise where the overhead activity results in a better quality consent process; in terms of timeliness, cost, or quality of outputs.

Each council overhead item or category should be passed through a two-stage test before being included in the charge-out rates for consents staff. The two-stage test is:

1. 'is the overhead occasioned by the applicant or consent holder'
2. 'does the overhead activity benefit the consent applicant or holder distinct from the community as a whole'.

This test will enable decisions to be made and recorded on which council overheads (and what proportion of them) should be included in the overhead component of the charge-out rates for consent processing staff. This will determine what actual overhead costs should be added to a staff member's base salary cost.

Staff management

Decisions need to be made regarding the amount of staff management time recovered from consent applicants.

Time spent on general staff or team management activities are more akin to 'overheads' and are not directly occasioned by any one applicant. Such time should not be charged for. However, management time directly related to a specific consent, such as peer reviewing or checking a s42 report, is occasioned by an applicant and will often be of direct benefit to them. Such costs should be recovered.

Use of standard or council-wide salary multipliers

Some councils use charge-out rates solely based on standard or council wide multipliers of base salary costs. These multipliers typically range in value from around 1.8 to 2.9. It is not good practice to use this standard approach to setting charge-out rates for consents staff. The charge-out rate (and thence multiplier) should be determined on the basis of actual salary costs together with any overheads that meet the requirements of s36(4)(b). In that regard, the Environment Court stated in Wightman v Waipa DC A062/97 in relation to a council employee planning witness:

"The witness deposed that she understood the charge for her time at $50 per hour was intended to represent 2.1 times her salary, though she was not sure about that...we observe that a charge for planner's time at double the rate of her annual salary does not represent an actual cost, and we have no evidence on which to judge whether it is reasonable."

If a multiplier approach to determine consent staff charge-out rates is used it should be a 'consent activity' specific value based on a robust determination of appropriate overhead costs that comply with s36(4). Caselaw supports this practice and the Environment Court stated in Harrison v Northland Regional Council W67/2003 that "it has long been accepted that consent authorities may apply on-cost multipliers to basic salary costs to cover the costs of a consents department".

Discount Regulations and Section 357B objections

The Resource Management (Discount on Administrative Charges) Regulations 2010 and s36AA introduces a discount policy for late consent processing. The Discount Regulations require a discount of one percent per day for every day a resource consent is not processed within the timeframes up to a maximum of 50 days. Council may also adopt their own discount provided it is more generous than the Discount Regulations.

Section 357B of the Act also provides for consent applicants to lodge objections to additional charges (charges over and above fixed initial deposit charges) levied by councils under s36(5) in relation to resource consents in general or 149ZD(1) in relation to applications for proposals of national significance. Section 357B objection rights also apply to additional charges required by the EPA or Minister under s149ZD(2) to (4) with respect to applications to the EPA and costs incurred in relation to a board of inquiry.

It is good practice to use independent commissioners to hear and decide on s357B objections as opposed to council officers and councillors.

Decisions on s357B objections should be clearly based on the criteria set out in s36AAA and those criteria should be referenced in the written decision.

For s357 [to s357D] objections council's obligations are more formal and are of a quasi judicial nature.

Charging for section 357 objections

General practice is that councils do not charge applicants to process s357 objections to resource consents. The councils function in considering an objection is not generally within the scope of s36(1)(b), (i.e. receiving, processing and granting of resource consents) or any other part of s36(1).

Commented [1]:
Note that this is different from CSup Administering Resource Consent Charges document, which simply states charges are recoverable.

In spite of this, it may be possible for councils to charge for processing s357 objections if the requirements of s36 are met. Overall, given the situation is not clear, councils that intend to fix charges for objections should seek legal advice on the legality of those charges. The exception to this is the costs associated with the objection being heard and decided by a hearings commissioner (if requested by the objector), which can now be charged under s36(1)(af) RMA.

Section 127 applications and section 128 reviews

The Courts have determined that a broad view should be taken of the parts of the consent activity that are able to be charged for. In terms of s127 applications the matter is clear. The consent holder has, of their own volition, lodged an application and has occasioned the council to respond to that application. This is no different from a normal consent application lodged under s88 and the council's processing costs should be fully recovered.

Section 36(1)(cb) allows councils to charge for the undertaking of s128 reviews of consent conditions when:

- such reviews are requested by the consent holder, or at times specified in the consent (s128(1)(a))
- the supporting information for the original application was materially deficient (s128(1)(c))
- the review has been required by an Order from the Court following a conviction for an offence that involved contravention of consent (s128(2)).

However, s36(1)(cb) does not provide for charging for reviews under s128(1)(b), (ba) or (bb), as these reviews are initiated in response to rules in operative regional plans or national environmental standards. In these cases the need for a review has not been occasioned by the consent holder, but by the council or central government. In such cases, it is unlikely the outcome of the review will be of more benefit to the consent holder compared to the community as a whole. Consequently, the council should bear the cost of such reviews.

The following approach to s128 reviews should be adopted:

- the cost of processing applications under s127 and consent reviews initiated under either s128(1)(a)(i) to (iii), s128(1)(c) or s128(2) should be cost recovered from the consent holder in the same manner as primary consent applications received under s88
- the cost of processing consent reviews initiated under s128(1)(b), (ba) or (bb) must be solely borne by the council.

Setting the charges — fixed fees versus actual costs

Consent processing

There are two options available to councils for setting consent application charges:

1. set fixed charges that are payable in advance for the entire consent processing activity; or

2. set fixed interim or preliminary deposit charges payable in advance with the balance of actual and reasonable costs being charged in arrears at the completion of the consent process.

It should be noted that fixed charges paid in advance under option 1 are not deposits. They are full and final total charges for the entire processing component of an application.

There are advantages and disadvantages with either option.

Setting fixed charges

Option 1 has cash flow advantages for the council as the charges are received at the start of the process. It is also easy to administer. It provides absolute certainty for the applicant as the Environment Court has determined that a council cannot set and receive a fixed fee payable in advance and then charge additional actual and reasonable costs at the end of the process (refer to Aviation Activities Ltd v Mackenzie DC C015/98).

A major disadvantage for the council in setting fixed charges is that actual costs can exceed the fixed charge and the difference will need to be met from general revenue. Consequently, it is very important that any fixed charge structure is based on a sound understanding of what actual consent processing costs are.

Option 1 also has potential equity problems. The fixed charges will ideally be based on average processing times for different categories of consent. Simple or well compiled applications will take less than the average time to process. Such applicants will effectively be subsidising applicants with more complex or less well compiled applications that involve extra time and cost.

Option 1 is also more likely to result in a complex system of charges as a council tries to cater for the wide range of conceivable consent applications and compliance monitoring regimes. This may result in a lower level of transparency as potential applicants could find it difficult to ascertain which category of fixed charge relates to their intended activity.

Another disadvantage of this approach is that the fixed charges will generally be large which may act as a disincentive to small scale applicants. This can be overcome by using a series of fixed charges payable say:

1. at the time of application lodging to cover the costs of determining sufficiency of the application and the AEE supplied

2. for the costs of notification once it has been determined whether there will be no notification, limited notification or full notification

3. for the preparation and holding of a hearing.

Setting deposit charges

Option 2 has a disadvantage for the council as the activity costs must initially be borne by the council prior to them being charged to the applicant. However, this disadvantage can be reduced, particularly for large or contentious applications, by issuing interim (say monthly) invoices for actual costs incurred to date. Councils can also ensure fixed interim deposit charges are set as close as possible to the actual likely costs of processing such applications. This also reduces the chances of a council having to invoice or refund applicants the balance of actual and reasonable costs, which in itself, also has the benefit of reducing council's administration costs.

Estimates

Under option 2, the applicant does not know in advance what their costs will be. However, this can be overcome by councils providing applicants with written estimates for the likely costs of the consent process. The merits of this practice are recognised within the RMA as s36(6) requires councils to provide estimates of likely additional charges upon request.

- Councils should go beyond that statutory obligation and advise applicants when costs are likely to exceed the initial deposit and let them know an estimate is available on request. They can even be asked if they wish to continue with the application in light of any likely increase in costs.

- Estimates should be realistic and should not be inflated to provide a council with a 'cushion'.

- Estimates for complex, large or contentious applications should be provided

irrespective as to whether a request for a cost estimate is requested.

Choosing an approach

Each council will need to decide for itself the most appropriate option for setting charges. When selecting the option, councils must have regard to s36AAA(2) which states 'the sole purpose of a charge is to recover the reasonable costs incurred by the local authority in respect of the activity to which the charge relates'. Option 2 can more easily comply with this statutory requirement and is consequently recommended as good practice.

If option 1 is used then it should be limited to situations where a council has a very clear appreciation of the costs of processing particular types of consents.

- If option 1 is selected, councils should:
    - Record the actual costs of processing relevant categories of consents so the appropriateness of the fixed charges can be periodically reviewed.
- If option 2 is selected, councils should:
    - Record actual staff time spent on specific consent activities so actual additional charges can be accurately determined. The time recording interval should be no more than 30 minutes, and ideally it should be 15 minutes and could usefully time recorded should be against the areas identified as being chargeable in this guidance.
    - Refund the balance of any initial application deposit fee if actual processing costs are less than the deposit.
    - Advise applicants in advance where it appears that actual processing costs will exceed the estimated costs.

Combined approach

It is possible to combine options 1 and 2. This would entail setting fixed charges for a clearly defined part of the consent process, such as the process up to the point of notification, or up to the point of the hearing. Any costs incurred by the council for the remainder of the process would then be covered by a further fixed initial deposit charge (such as a hearing deposit for example) together with actual and reasonable additional charges levied in arrears.

The use of such a complex approach would need to be very clearly set out in the council's Schedule of Charges so that applicants were not led to believe the first fixed charge covered the entire consent process.

Setting the level of deposit – consent applications

If a council opts to use a system of setting deposit charges (option 2 above), then it needs to decide the level at which the deposit will be set.

There are two approaches to this:

A. set the deposit at a nominal sum, usually somewhere in the range of $100 to $500 depending on whether or not the application will be publicly notified

B. set the deposit at an amount that is likely to be close to the total processing cost.

Option A is currently by far the most common approach.

Some councils give themselves the discretion of negotiating a deposit for large applications. This may not be legitimate unless the council's Schedule of Charges contains an appropriate scale of charges of variable deposits for large applications. The reason for this is that deposits must be fixed in accordance with s36.

The advantage to the council with option B is simply one of cash flow, as the applicant will be required to pay the likely cost of their entire application process in advance. It also reduces the exposure of the council to under recover eventual actual costs (and the burden of chasing 'bad debts' from people who don't pay invoices levied at the end of a consent process. Recovery of actual costs for processing consents is particularly important in light of the Discount Regulations.

Hearings

The costs of hearings are recoverable under s36(1).

To facilitate transparency, the costs of a hearing should be separately detailed in the annual plan schedule. Hearing costs may be based on whole or part day charges and should detail the costs per councillor or commissioner, the fact that attending staff will be charged for, and the rate at which relevant disbursements will be charged.

The details on hearing costs should outline any difference in costs between hearings heard and decided by councillors and hearings heard and decided by independent commissioners. This is important as applicants and/or submitter(s) may request applications to be heard and decided by independent commissioner(s) under s100A, and s36(aa) and 36(ab) allows charges to be fixed for these costs.

Invoicing

When sending out an invoice for the processing of a consent application, or for the compliance monitoring of a consent, a detailed and itemised invoice should be prepared. Simple one-line invoices with a total amount payable are not considered good practice.

The time of all staff involved with the consent activity should be accurately recorded and invoiced. The only exception to this would be the avoidance of charging twice for the same service. An example of this would be administration staff time which is already funded through annual administration charges, or councillor salaries which are being paid regardless of whether or not the councillor sits on a consent hearing.

When preparing invoices councils should:

- List the staff member positions (e.g. planner, scientist, engineer) or external consultants used to process or monitor the consent, the hours incurred by each

person, their charge-out rates, and resultant total costs per staff member or consultant.

- List disbursements, together with their unit rates and the number of units incurred.
- Separately itemise hearing costs, with councillor or commissioner costs being noted together with a list of disbursements as set out above.
- Note rights of objection (s357B) and appeal (s358) on the invoice to additional charges under s36(5).
- Note any remissions made at the time the invoice is generated. Examples might include staff time or hearing costs not charged due to wider community matters dominating the hearing.
- Note whether a discount has been given on the application and if so how much the discount of additional fees is.
- Itemise any fixed compliance monitoring costs payable in advance or include these on a separate invoice.

Invoicing for any additional fees and any discount should be done at the same time and as soon as possible after the notice of decision has been issued. The discount should be deducted from any additional fees at the time of invoicing, and a single notice sent to the applicant. Combining the two will reduce the likelihood of a refund being required.

Ideally the invoice should be prepared by the consent processing or monitoring officer, or a staff member from the consent administration team, using a standard template. This will ensure important subjective decisions, such as whether all actual hours incurred will be charged, can be properly made before the invoice is generated.

- A senior manager should check and approve any large invoices before they are dispatched. Councils should have formal policy on such matters and staff delegations should reflect that policy.
- If interim invoicing is used for large applications, then the invoices should be issued on a monthly basis. This is consistent with normal private sector business practice, it ensures large costs are not accumulated, and also provides the applicant with regular updates on the cost of their application process.

Withholding the consent

It has been the practice of some councils to withhold the issuing of a consent until such time as the applicant has paid their application charge in full. Under s36AAB(2), a council is able to stop processing a consent until a fixed fee is paid. This section only applies to fixed fees, such as a consent application fee or notification fee and does not apply where independent hearings commissioners having been requested by submitters or reviews required by a court order; nor does it apply to additional charges under s36(5) , such as the cost of additional time spent by officers to process a consent application. Therefore refusing to issue a consent until additional fees are paid is not contemplated by the RMA.

The Court has noted that the RMA does not contemplate councils withhold~~ing~~ decisions on consent applications as a way to place pressure on applicants to pay fees

Remissions and refunds

Section 36AAB (1) provides for a council to remit the whole or any part of a charge at its discretion.

Councils should develop formal policy or criteria used to guide decisions on remissions. The simple test for remissions should be where the applicant or consent holder did not solely occasion the work or directly benefit from it.

Examples might include:

- where a hearing involved a large number of submitters pursuing a political agenda rather than focusing on the actual effects of the activity and this greatly lengthened the hearing time
- where much of the cost of processing an application is caused by a vexatious or frivolous submitter
- where the activity for which consent was sought involves a public facility that will be available for general community use
- where processing staff had to change part way through an application which meant there was more council time spent overall familiarising themselves with the application.

In relation to refunds, the overriding principle to be followed is that if a council collects money to undertake a service for a consent holder (such as compliance monitoring) and that service is not actually undertaken, then the council has an obligation to refund the money and should do so.

Some councils have established a minimum level of refund such as $50 (refunds lower than that sum are not actioned). The reason for this is that the transaction costs of actioning smaller refunds may be higher than the refund itself. Consequently, this is considered to be a reasonable practice.

Councils should develop accounting systems that allow the need for refunds to be highlighted and indeed for them to actually occur.

Consent monitoring and supervision

Section 36(1)(c) enables councils to charge for the cost of 'its functions in relation to the administration, monitoring and supervision of resource consents'. The same funding policy and legal constraints therefore apply to monitoring charges that apply to consent application charges.

In terms of funding policy for consent monitoring and supervision, these costs should be fully charged to consent holders as the monitoring activity is solely occasioned by the existence of the consent.

Types of monitoring

Some compliance monitoring activities will be routine, involving a simple site inspection and the filling in of a site visit form. These inspections might be one-off post commencement or construction events, or occur annually. In these cases monitoring fees could be fixed and charged in advance.

Other compliance monitoring activities will be more complex, involving the taking of samples, or multiple visits each year. In these more complex situations any charges levied in advance should be limited to fixed initial deposit charges. These charges should be calculated based on the actual time and disbursements anticipated to be spent on monitoring the consent. Any additional actual costs can then be charged in arrears.

Where a simple post-commencement or construction monitoring inspection is required, it is acceptable practice to invoice for that monitoring inspection at the time the consent is deemed to commence, if such charges payable in advance have been fixed and included in the annual plan. Councils should note however that this would preclude them charging additional costs incurred if the inspection takes more time than was estimated when setting the fixed charge.

It is important that councils clearly identify what the fixed initial deposit charge for compliance monitoring is designed to cover. If the charge is based on the cost of undertaking a site visit and associated file maintenance for a compliant site, then this should be stated in the Schedule of Charges. The costs of dealing with any non-compliance would then be recovered through actual and reasonable additional charges.

Council monitoring charge requirements

Councils should ensure that:

- Standard fixed compliance monitoring charges payable in advance for different types of consents are only set for routine consents requiring simple, one-off or annual site inspections. Such charges can not be supplemented by additional actual and reasonable charges in arrears.
- Standard fixed compliance monitoring charges payable in advance are levied at the time a consent is deemed to commence.
- Standard fixed compliance monitoring charges payable in advance are listed in an annual plan schedule by consent category or activity type.
- Fixed initial compliance monitoring deposit charges payable in advance for the monitoring of complex consents are calculated based on the actual time and disbursements anticipated to be spent on monitoring each particular consent.
- Fixed initial compliance monitoring deposit charges payable in advance for complex consents are listed in an annual plan schedule which names the consent holder and their initial fixed deposit charge. A statement should be made in the

plan that any additional costs over and above the initial fixed deposit will be charged in arrears.

- Fixed initial compliance monitoring deposit charges payable in advance are levied once the annual plan is adopted, preferably in July or August each year.
- If compliance monitoring does not occur as planned, any fixed monitoring charge or fixed initial deposit charge payable in advance is refunded.
- If the compliance monitoring of complex consents incurs less costs than the initial fixed deposit charge payable in advance, then a partial refund of the deposit is made.
- Dealing with non-compliance is covered by additional charges levied in arrears.

Consent holder input

Fixed initial monitoring deposit charges payable in advance can total several thousand dollars for large or complex consents. As these charges are set through the annual plan process and the special consultative procedure under s83 of the LGA, they are not subject to RMA s357B objection and s358 appeal rights. This raises an issue of procedural fairness for the consent holder.

Consent holders should be advised early in the annual plan process what their monitoring charges are likely to be for the next year. They should be invited to comment on the charges. Councils should be willing to take on board any concerns expressed and act on them in a reasonable manner.

Consent holders should also be given the opportunity at this time to undertake self monitoring for some activities. An example would be the routine collection and analysis of water quality samples. If an applicant can do these tasks at less cost and to the same quality standards as the council, then they should be allowed to do so. This might particularly apply where there are significant travel and time costs for council staff in visiting remote sites.

When the annual plan is notified, all named consent holders liable for fixed initial compliance monitoring deposit charges payable in advance should be written to, advised of their charge, and informed about the annual plan submission process. It would also be helpful if the new charge was compared to the previous year's figure, and the reasons for any significant changes listed. This does not mean that they need to be sent a copy of the entire annual plan, but simply informed about their compliance monitoring charges for the coming year.

Public good monitoring?

Some councils consider that consent compliance monitoring and supervision is a public good as it protects the environment and the community from potential adverse effects arising from the resource use or development activity authorised by the consent. In those cases compliance monitoring is largely or totally funded from general revenue (e.g. rates).

Such an approach may not be appropriate. It is important that the approach responds to

s36AAA(3)(b) criteria which advises that the costs with monitoring activity solely occasioned (caused) because a consent has been granted are recoverable. In other words, if there was no consent there would be no need to do any compliance monitoring. Therefore, councils need to consider if it is appropriate for the wider community bear any of the monitoring costs?

There may be situations where the consent holder's compliance monitoring programme yields 'public good' information that can be used by other parties (e.g. ground water levels or river water quality data). In such cases it may be appropriate to recognise that fact by reducing the compliance monitoring charge to the consent holder and accounting for the costs of the public good monitoring activities in other council programmes such as SOE monitoring.

Annual administration charges

Under the provisions of s36(1)(c) some councils levy an annual administration charge on consent holders. Such charges are typically in the range of $30 to $80 per consent per annum. The charges cover the routine administration costs of the consent activity that are not able to be charged directly to consent applicants for consent processing, or to consent holders for compliance monitoring.

Annual administration charges are quite legitimate. However care needs to be taken in determining their magnitude. It is not appropriate to use such charges as a simple top up between the total operating costs of the consents unit and the revenue received from application charges for example.

If annual administration charges are to be levied then they should be based on a careful analysis of the actual costs of consent related activities that are either occasioned by the applicant or consent holder, or are of direct benefit to them over and above the general community (the s36AAA(3) tests). Such activities might include:

- consent computer database maintenance
- consent file system maintenance
- correspondence to consent holders advising their consents are soon to lapse or expire
- dealing with enquiries related to generic types of consented activities (e.g. dairy shed discharges)
- the preparation of education material for consent holders on complying with their consent conditions, or of reducing their compliance costs.

Reviewing charges

There is a basic requirement to periodically review consent charges to ensure statutory compliance and to only recover actual and reasonable costs more properly met by consent applicants or holders, as opposed to the community as a whole. This is particularly the case for fixed application charges, fixed compliance monitoring charges, and fixed initial deposit charges for the compliance monitoring of complex consents.

Such reviews should be aimed at utilising actual records of consent processing and monitoring costs to ascertain whether or not the fixed fees or fixed initial deposit charges are representative of actual costs.

Fixed application charges, fixed monitoring charges, and fixed initial deposit monitoring charges for complex consents should be reviewed annually as part of the annual plan development process. In this way actual historical recorded costs can be used to validate existing charges and there would be no need to apply inflation adjustments.

In the absence of the recommended annual reviews, reviews should occur no less frequently than every three years. In that case the review period should be aligned with the three yearly LTP review cycle. In the intervening years it would be acceptable practice to simply increase the charges by the same percentage rate that staff salary costs have increased by in the preceding year. This recognises that staff costs will largely underpin actual charges.

However, if a council uses a system of nominal ($100 to $500) fixed initial deposit charges with actual and reasonable additional charges in arrears for processing consent applications, then there is no need to review the application charges so frequently. In fact such a charging system should have a relatively long shelf life and might only need reviewing every six years or so.

A formal charging policy

There are many options open to a council in terms of its approach to setting consent and compliance monitoring charges. There is a need to record the approach taken by a council to these matters, for the purposes of transparency, internal continuity and for informing the public. Having a formal consent charges policy will also assist in meeting the LGA requirement for a revenue and financing policy for the LTP.

Councils should prepare and adopt formal consent charging policies that as a minimum record:

- funding policy decisions on overall consent holder recovery levels for relevant components of the consents activity
- whether the council will use a system of fixed consent application fees payable in advance, or fixed initial deposit charges with full actual cost recovery in arrears
- the details of how consent charges will be made up, including a list of activities that will be charged for, how staff charge-out rates are set, and what overheads are included in staff charge-out rates
- a list of consent related activities that will not be charged for as they do not meet the s36AAA(3) criteria
- disbursement rates
- criteria upon which remissions will be granted under s36AAB(1)
- whether independent commissioners will be used to hear and decide s357B objections on additional charges
- whether annual administration charges will be levied and what such charges comprise
- how compliance monitoring charges will be determined
- categories of consents for which monitoring charges will be fixed and payable in advance
- categories of consents for which monitoring charges will be based on fixed initial deposit charges payable in advance with additional actual and reasonable costs charged in arrears
- whether refunds will be given where actual costs incurred are less than fixed initial deposit charges payable in advance

- any difference in fixed deposit costs between hearings that are heard and decided by councillors versus hearings heard and decided by independent commissioner(s).

This charging policy should be formally considered and adopted by the council and reviewed no less than every three years. It may be appropriate to include these policy matters in the revenue and financing policy required for the LTP.