MANAGING RESOURCE USE ACTIVITIES: CONSENTS RULE!

Richard Matthews, Program Manager, Environment Waikato

INTRODUCTION AND BACKGROUND

During each of the last three years Environment Waikato has received between 1400 and 1700 resource consent applications a year. At one end of the scale, activities for which consent has been sought include small-scale activities like whitebait stand structures on West Coast riverbanks or bore hole drilling throughout the region. At the other end of the scale, the activities for which consent has been sought include major activities like new dairy factories, geothermal power stations, pulp and paper mill discharges, and gold mine extension projects. The more minor activities are typically dealt with through a non-notified process while the more major applications are predominantly notified. On average, Environment Waikato has normally notified about ten percent of the applications it receives. Most of those notified attract submissions, in some cases in excess of 1000 submissions to individual applications. As an example of the minor type of application, approximately 400 bore consent applications were dealt with in the 1997/98 financial year, all through a non-notified process. As an example of one of the more significant cases dealt with, proposals to develop the Tauhara Geothermal field near Taupo attracted more than 2000 submissions to the Regional and District Councils, necessitating a hearing lasting in excess of four weeks.

A situation as described above leads easily to a question of whether there is a better way. Could, for example, these consent applications be dealt with by way of a Regional Plan rather than through individual consent processes? Is there an easy way to simplify the approval process to ensure that those who have a right to have their say get their say, while those who have a right to get on with their business can get on with their business? A review of Environment Waikato practices suggests that there is a better way – but the solution may be found in using all of the mechanisms available in the Resource Management Act rather than focussing on those that may suit one particular sector.

CONSENTS THROUGH THE AGES

The Resource Management Act is now approaching eight years of existence, although the concept of issuing transferable authorisations has been around in New Zealand legislation

for a lot longer than this. In the time before 1971 (and before the 1967 Water and Soil Conservation Act) discharges to the Waikato River, which had been classified in the early 1960's under the 1963 Waters Pollution Regulations, were authorised by permits issued by the Pollution Advisory Council. A full permit, subject to few conditions, was normally granted for an indefinite term, limited only by a provision that allowed for some review every three years. The process was not open to public participation. Such permits were deemed to be water rights under the 1967 Act, but still did not have a definite termination date, and were only subject to review to ensure that classification standards were met.

Under the 1967 Water and Soil Conservation Act, a new regime of water rights was introduced. The process introduced left little procedural discretion, all applications for water rights had to be publicly notified, and once a water right was granted the regulatory authority had no ability to update the approval or adjust it as time went by. The public notification provisions were in part a response to growing demands for involvement in the process, leading to changes from the previous situation where there was no public participation. The regulatory authority response to indefinite terms and inability to review Pollution Advisory Council permits was to grant short term rights to ensure that the regulator could update the approval to keep up with improving knowledge about waste treatment, the effects of such discharges and changing public expectations. A fairly draconian condition theoretically enabling cancellation of the right if adverse effects occurred was also developed. This approach appeared at first to have some benefit in terms of allowing time for improvements in areas such as waste treatment, while giving regular reviews of performance. It soon became clear however that with growing public involvement in the process and the need for greater certainty and security for investment that the uncertainty associated with short term water rights was not compatible with long term development opportunities.

From this background, regulators began to see opportunities in taking a Planning approach to managing the effects of activities like waste disposal and taking of water. Catchment management plans were born in this environment, where in the ideal world everyone would know what the limits were and what they could and could not do in relation to water. The reality was somewhat different with difficulties in defining what the limits were and how to allow for many different types of use.

THE RESOURCE MANAGEMENT ACT

It was into the above context that the Resource Management Act (the Act) was introduced in 1991. Here was a new piece of legislation designed to allow everyone to do everything they ever wanted in whatever way they liked – at least that is what it seemed to be promoted as at the time! Again the reality is somewhat different, what might be good for the regulator is not necessarily good for the developer is not necessarily good for the general public (at least in each ones eyes).

Regional Plans have been promoted as the way to give certainty to all, to enable developers to get on and do what they do best, while at the same time giving the public the assurance that there are limits to what can be done. The process provides for extensive public involvement, and can prescribe permitted activities and criteria to provide some reassurance to the general public that all is under control. The consultation process for the soon to be proposed Waikato Regional Plan involved more than 2000 people and lasted for more than three years. To ensure that the plan is up to date and that community wishes are taken into account, the process provides for regular (five yearly) plan reviews and for any party to seek a private plan change. These processes also are subject to wide public consultation and notification. In addition, almost any party can seek a change to the plan at any time to ensure that the plan can be kept up to date with community wishes. Such changes are subject to the procedures detailed in the first schedule to the Act, involve extensive consultation and which can be a time and other resource consuming activity.

The Act has provided for resource consents to be granted for a term of up to 35 years, includes provision for consent holders to seek changes to conditions, and has recognised the consent authority desire to keep the consent up to date by providing a review mechanism. The provisions for review of a consent are more explicit than those in previous legislation, including for example, provision for public participation in the process. The provisions also limit the timing and scope of such reviews.

PLANS VERSUS CONSENTS – WHICH IS BEST?

Resource Consents – An Unnecessary Imposition or a Useful Tool?

As noted above, a consent can be granted for a term up to 35 years. This means that a consent applicant has the opportunity to seek the security of an authorised activity for a period of up to 35 years. In general terms this privilege cannot be revoked provided certain minimum requirements are met. If the consent is exercised before the lapse period defined in the consent (normally a minimum of two years), and there is no break in the exercise of the consent for a period longer than two years, then the consent holder can retain the consent. If the consent conditions are complied with, and there are no adverse effects that result in s17 of the Act being invoked, then the consent holder can continue to enjoy the privilege for duration of the consent. If there is a change of circumstance, the consent holder can seek a change in the conditions of the consent. An option not often sought by applicants is the inclusion of a condition allowing the consent holder to apply for a change to the conditions at specified intervals without the requirement to show a change in circumstances.

There are few opportunities for the consent authority to seek a review of the conditions of a consent:

- if a Regional Plan sets new air or water quality standards or minimum flows, then the conditions could be reviewed for the purpose of ensuring that those standards are maintained. One would expect that if such standards or flows are set in the Plan, then there would be widespread support for them, and the consent holder would be well aware of the need for a change as well having plenty of time to prepare for a change. Such a process would be subject to public participation, however it would be expected that public involvement would normally focus on the Plan change, not the consent change;

- if the application contained errors that may have affected the consideration of the application or the outcome of the application process, then the consent and its conditions could be reconsidered. Once again, it would be expected that such a review would only be necessary and successful when there was a clear and widely accepted justification for it. Only major errors would be capable of leading to a conclusion that the outcome of the process was affected;

- if the consent includes a condition providing for review of the conditions at a particular time for a particular purpose. Such a condition would be agreed to through the process, either by negotiated agreement or simply acceptance of a decision. On this basis it would not be a surprise to the consent holder and is something that can be planned for.

There is little or no opportunity for a third party (that is, other than the consent holder or the consent authority) to initiate a change to the consent conditions. Such third parties may participate if the change or review is publicly notified, but this is not required if the change is minor and no one is adversely affected.

It is quite clear that a review process can be used to keep resource consent conditions up to date while at the same time retaining the integrity and security of the consent term. A consent cannot be rendered unusable by a review process (see *Medical Officer of Health v Canterbury RC [1995} NZRMA 49*), in effect limiting the scope of a consent review even where the consent provides for a review of the conditions. A review process could not for example, impose a condition that the consent holder could not comply with. Even consideration of the "best practicable option" in a review for that purpose may have to include consideration of whether implementation of that option is sufficient to tip the balance against the continued operation of the activity. The scope of the consent review process is limited to what has already been defined as important issues to review and cannot be used to take away the privilege given by the consent.

Given that the initiation of a review is an optional process for a consent authority (see *Queenstown Adventure Park (1993) Ltd. v Queenstown Lakes DC C96/94*), it is also likely that such reviews will only be used where there is likely to be significant agreement on the process and even the outcome. Most consent authorities will have plenty to do keeping up with the demand for new consents without initiating their own processes!

Regional Plans – Secure and Permissive or Contestable?

A Regional Plan can be used to establish permitted activities, allowable minimum flows and quality, and to identify important consent authority policies and objectives. A Plan could for example define certain activities such as discharges to water as permitted activities. But how practical is this? Could, for example, rules be developed to cover all possible effects of discharges? Would the costs of undertaking such an exercise justify this approach? What security would this give to a developer? These are questions that do not have simple answers.

For a planning process, there are potentially significant savings to be made if the rules introduce affect a broad cross section of the target audience. In the Waikato region, there are more than 5000 farm dairies all discharging a similar effluent. The discharges vary in quantity and quality at each site dairy site depending on herd sizes, treatment processes, chemical use in the dairy and so on, however the predominant contaminants remain consistent for all of the discharges. Here is a significant opportunity to set some standards and define some rules. The effects of such discharges must then be considered. In the case of farm dairy discharges the receiving waters could range from a small trout-spawning stream in Reporoa with a flow of less than 100 litres per second, through to the Waikato River with a flow in excess of 300 cubic meters a second. The range in effects possible means that such standards need to be carefully chosen. The benefits in minimising the bureaucracy involved by minimising the number of consents required could easily exceed the costs of developing such standards. A significant disadvantage however is that there is no mechanism for cost recovery where permitted activities must be monitored and audited.

Where standards are set for, for example, receiving water quality, and an existing discharge can be accommodated within those standards, what happens when a new discharge is introduced and the standards are not met? From a sustainable management perspective, both discharges need to upgrade. For the existing user there is obviously little security in this situation, and little investment incentive.

Once a plan is established and operative, anyone can seek a change to the plan, which could potentially put at risk any reliance on the plan provisions. Such changes to a plan are unlikely to be promoted by third parties often, however the potential is there for well-organised groups to initiate change and lobby politicians to make a change. While it is

not a straightforward process to make a plan change, any such change could cost some resource users significantly just to defend their position.

THE ENVIRONMENT WAIKATO MODEL

As noted earlier, Environment Waikato considers up to 1700 consent applications annually. It has approximately 7500 current consents on record at present, ranging from older "existing use" authorisations given under previous legislation, through to consents for relatively short term activities such as farm forestry block harvesting. In more recent years, consents have tended to be granted for longer terms, in many cases for the full 35 years provided under the Act. These longer terms have been prompted by a number of factors, the most important being:

- better information provided with applications and improved consideration by applicants of the longer term implications of their proposals;

- better overall assessments by applicants of the effects of their proposals enabling more appropriate terms and conditions to be imposed to minimise the risks to the environment;

- a greater level of public consultation and acceptance of an applicants proposals;

- greater demand by applicants for longer term security for resource consent terms;

- acceptance by Environment Waikato that issues of concern, such as compliance with future standards or establishment of appropriate limits after construction and operation, can be dealt with by way of review conditions.

In general, Environment Waikato will consider shorter terms for consents where there is clearly a likelihood of different circumstances existing in the foreseeable future that may result in a different decision on a consent application. Such circumstances could include:

- a likely future requirement to change the type of activity proposed, such as a change from discharge to water to a discharge to land;

- inadequate consideration of the long term effects of the proposal, for example where a mine plan does not consider the effects of activities beyond a short term;

- inadequate assessment of, or uncertainty about, the long-term effects of an activity.

Where a long-term consent is given, consideration is given to the need for the option to review conditions at a later date. In some instances, there may be little need to review the conditions, as the risks to the environment are small. In such cases either no review provision is included, or a long review period is provided for (for example, a review after 20 years). In other situations, in order to keep abreast of changing technology and standards, a shorter period review may be appropriate such as every five or seven years (or sometimes after a specified occurrence such as the commissioning of new plant). In some instances an applicant will seek inclusion of a condition under s127 of the Act, to enable the consent holder also to seek a change of consent conditions on a regular basis.

Environment Waikato is also using a Regional Plan approach to try to focus the issues under consideration. The Plan will be proposed at the end of September 1998 and will make a number of activities permitted that formerly required consents, reducing our application load by at least a quarter. Many activities will be made controlled activities, again limiting the scope of consent applications. These changes focus on the smaller but more numerous activities for which it is easier to get consensus on how they should be managed, and for which the risks of getting it wrong are likely to be less severe. The Plan also establishes mechanisms such as water classifications to give some certainty to resource users who need to seek consents so that the criteria for consideration of applications can be limited and understood by all. One difficulty in developing a regional plan has been in getting some consensus on what activities should be considered and how they should be dealt with. It is clear that an approach where many activities can be influenced by simple, agreed rules and provisions is favoured for a regional plan. One off issues, relating mainly to larger industries, are better dealt with by individual negotiation and consensus via a resource consent process within a regional plan framework.

Together the above approach provides a reasonable model for managing resource use in the Waikato region. It allows for the consent authority to focus its attention on the issues that really matter, providing both equitable solutions across the board through regional plan provisions and on a site-specific basis through specific consents. It allows consent holders to have the security of a long term authorised use that cannot be arbitrarily removed, while at the same time allowing the consent authority the opportunity become involved at discrete intervals to review the adequacy and effectiveness of the consent conditions. The scope of such involvement is limited, both in terms of what can be reviewed and also in terms of who can initiate the review.

SUMMARY AND CONCLUSION

The Resource Management Act provisions relating to resource consents and regional plans provide a model for managing resource use in a way that can account for the needs

of regulators and industry alike. A combined approach using both tools is the preferred option for Environment Waikato. Under previous legislation, in some instances users obtained authorisations with indefinite terms and little opportunity for them to be reviewed or kept up to date with changing society interests. In other cases, resource users were given authorisations with little long-term security. The Resource Management Act provisions have provided some balance where industry needs and consent authority/community needs can be met at the same time, without compromising each other.

Using regional plans to provide guidance and standards for more widespread, minor activities, while retaining consent application processes (combined with extended terms and review conditions) seems to be a useful way of managing resource use activities. In this way, a flexible yet secure authorisation regime can be established, protecting the interests of the consent holder in retaining a consent, providing some mechanism for review when it is needed. At the same time, some of the bureaucracy associated with the consent process for activities with minor effects or environmental risk can be avoided through the appropriate use of regional plans. Consents can be drafted in such a way as to enable industries to keep up with modern technology, processes and market demands without going through a complete consent application process which may put at risk the grant of the consent. At the same time, consent authorities can retain sufficient flexibility in a consent to ensure that the consent does not become out of date with respect to environmental standards.