

What the amended Resource Management Act will mean for the petroleum industry

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Abstract

The purpose of the Resource Management Amendment Bill 1999 was to reduce duplication, uncertainty and costs of compliance without compromising environmental outcomes or reducing opportunities for public participation. The process of review began in 1997 when the Minister for the Environment appointed a reference group of practitioners to advise on amendments to improve implementation. This was followed by the McShane report on the scope of regulatory controls on land use along with commentaries on that report. Submissions were called for, received and published. And the reference group published its recommended amendments. Further submissions were received, which culminated in the 1999 Bill.

However, that was over two years ago, and in the interim the Bill was referred to Select Committee which recommended more changes. Since the Committee reported back to the House, further changes have been included, to take account of the Business Cost Compliance Report.

So what are we getting from this four year process, and what will it mean for you? And, perhaps more importantly, what are we not getting?

This session will provide a review of the most significant amendments to the RMA, and will highlight the implications for the petroleum industry of specific amendments including:

- limited notification (where a proposal could be processed on a non-notified basis but for written approval of affected persons, the application only needs to be notified to those persons who have not given their written approval)
- operation of plans (all rules will become operative when there are no longer any challenges to them, and there will also be a discretion for the Council to resolve that particular rules in a proposed plan have no interim effect)
- processing applications (Councils will have the power to reject an incomplete application, and there will be a provision to 'stop the clock' for events such as further information requests)
- process for changing consent conditions (a reason will no longer be required before applying to change a consent condition, and all such applications are treated as discretionary activities).

However, there were a number of amendments that had been proposed but are not carried forward into the final amendments. A number of these would have had a significant impact on the petroleum industry in its operations under the Act and will be discussed, such as:

- direct referral of applications to the Environment Court
- clarification of the assessment of social and economic conditions
- deletion on non-complying activity category with current non-complying activities being deemed discretionary
- contestable consent processing, where the applicant would have a choice of who processed the consent application
- giving the applicant the choice of decision-maker (between councillors or independent commissioners)
- Environment Court assessment of notification decisions through powers of declaration and enforcement orders, as an alternative to judicial review.

There are also other initiatives in place that will affect how the RMA is implemented, and those of particular relevance to the petroleum industry will be discussed, including:

- ratification of the Kyoto Protocol and the proposed clarification of the role of the RMA in reaching climate change targets
- draft Energy Efficiency and Conservation Strategy
- draft Waste Minimisation Strategy
- proposed Transport Strategy.

Introduction

The Resource Management Amendment Bill 1999 ('the Bill') is finally before Parliament for final approval. This is after over 5 years of consultation, consideration and contemplation of what was wrong with the Resource Management Act ('the Act') and how best to fix it. Given that the Bill in its current form (along with the Supplementary Order Paper) includes provisions that are significantly different to the Bill introduced to Parliament in 1999 let alone the concepts raised when the process for review began in 1997, it is useful to briefly traverse the reasons for the Bill, some of the reasoning for the changes along the way and a consideration for what is not included in the current Bill.

Then the Paper will consider what will be the likely impacts on the petroleum industry of the amendments in their current form. Finally, we note that there are other initiatives which will have an impact, such as the measures needed to ratify the Kyoto protocol.

History of the Amendment Bill

The process of review of the Act which has culminated in the current Bill was started in 1997 when Simon Upton (as Minister for the Environment) appointed a Reference Group of practitioners from central and local government and the private sector to advise on amendments to improve implementation of the Act and commissioned a 'think piece' on land use controls written by Owen McShane and critiqued by Ken Tremaine, Bob Nixon and Guy Salmon. This think piece was aimed at sparking debate and the Ministry called for submissions in response. Seven hundred and fiftyseven submissions were received on the McShane report coming from a wide range of people and groups and covering a broad range of the issues raised.

The Ministry provided an analysis of all the submissions received and this formed one of the base documents for preparing proposals to amend the Act. The overarching themes identified from these submissions were that there was considerable support for the Act and that given the costs of change, there was widespread support for incremental change to the Act rather than wholesale review. There was little support for the Act to be solely biophysically based although a narrowing of focus for the Act was supported. There was criticism of the lack of national guidance, particularly with National Policy Statements and National Standards. Further, many submissions raised the concerns over the implementation of the Act, as much as with the legislative wording itself.

Following the McShane think piece, and the Ministry's analysis of submissions, the Reference Group provided its Report to the Minister covering a number of topics and providing options for resolving problems as well as recommending amendments to the Act. The topics considered in detail included:

- the definition of environment and amenity values

- the purpose and principles of the Act
- compensation
- subdivision controls
- contestable consent processing
- categories of consent
- land use presumption
- other proposals including limited notification, limited status of proposed Plans, enforcing time limits for consent processing, and direct referral to the Environment Court.

The Ministry then released a document including the proposals for amendment to the Act and again comments were called for to assist in the final drafting of the Bill.

In 1999 the Bill was introduced to Parliament along with the release of the Minister's explanation of key policy decisions. Submissions were then called for and a long period of hearing these submissions through Select Committee commenced. A change of Government meant that the Select Committee was briefed on the new Government's position in respect of the Bill where it was indicated that the Government would be unlikely to support amendments relating to contestable processing of resource consent applications, the mandatory use of independent Commissioners on request, or the direct referral of consent applications to the Environment Court. It was on this basis that the Select Committee considered submissions and then released its Report in May 2001 which included a number of significant changes to the Bill as introduced.

The consideration of the amended Bill was further delayed in order to take into account the Government's response to the Ministerial Panel on Business Compliance Costs which was released in December 2001. The RMA was a particular focus for the panel and the Government's response addressed matters such as the management of the resource consents process, audit or accountability measures, meeting obligations with respect to Maori, and delays in the Environment Court. As a result of this Report, it was decided to reintroduce limited notification and to remove the powers of the Environment Court to hear appeals on notification decisions. These changes will be introduced to Parliament by way of Supplementary Order Paper when the Bill is considered by the House.

Impact on industry

In determining the effect on industry of the Bill, it is important to look not only at what will be included, but also what has fall by the way side during the time of consultation and debate on the Bill.

Proposals which were raised during the consideration process, but have not been carried forward in the amendments include:

- direct referral of applications to the Environment Court
- clarification of the assessment of social and economic conditions

- deletion of the noncomplying activity category
- contestable consent processing
- choice of an independent Commissioner
- Environment Court review of notification decisions through powers of Declaration and Enforcement Orders.

Of these 2 of the more significant ones are:

- direct referral
- choice of independent Commissioner.

Direct referral

Direct referral was raised in the Reference Group Report in response to concerns that there was a tendency for big projects to be fully reheard in the Environment Court which meant that there was the extra expense of experts appearing at Council level and then being duplicated in the Environment Court. Further, there was a concern that small Councils were not set up to be able to determine the complex issues and contradiction of evidence which arose in such cases. It was noted that the number of such direct referrals would be very limited with a set criteria considering not only the size and complexity of the project, but also a requirement to show a reason for needing the fasttrack process.

In the analysis of submissions it was noted that this proposal was generally put forward by business and industry interests and was not supported by NGOs or local government groups due to the public expectation of participation.

The option of direct referral was included in the original Bill, and in the Minister's explanation of the key matters in the Bill, it was acknowledged that there were concerns over the potential for dilution of local democracy and the potential for increased expense and difficulty for members of the public to participate. It was stated that the few cases which would be eligible for direct referral might indeed impose further costs on the public, but that was to be compared with the significant cost on the applicant of a duplicate hearing. It was also noted that submitters would not be likely to be the subject of a costs award given that it would be a first instance hearing. Further, since such matters would be likely to go on appeal, the Environment Court experience may well be inevitable anyway.

The Select Committee decided (not unanimously) to drop the direct referral provisions from the Bill. The negative effects referred to included the impact on public participation, impact on local democracy, costs for participants and expanding the Court workload. All these points were considered valid by the Government and Green Party members of the Select Committee and the proposal was dropped given that the RMA is based on the idea that local authorities are best placed to decide resource management issues.

The loss of the opportunity for direct referral means that there is no way an applicant can avoid the duplication of

proceedings with a full case needing to be presented before both local councils, and the Environment Court on appeal.

Independent hearings commissioners

When the original proposal came forward to exclude de novo appeals to the Environment Court the issue was raised as to the quality of decision making at Council level. One proposal to ensure consistency and high quality in the decision making at Council level was to use independent commissioners. The benefits of using independent commissioners was seen as improving the independence and quality of resource consent decisions at primary level which could reduce overall costs by reducing the need for appeals to the Environment Court. Further it was seen as positive to separate the role of policy in rule making from the quasi judicial role that Councils play when deciding resource consent applications. The Reference Group supported the proposal to have mandatory requirements for independent commissioners to decide resource consents. It was envisaged that the Commissioners would be appointed either by Councils or the Minister.

This proposal was one of the amendments that went through to the Bill as initially introduced to the House. It was noted that no evidence had been brought forward to show that an overwhelming majority of Council hearings are not objective and professional. However it is acknowledged that just because Councils are political and prepared the plans means there can be a perception that decisions on resource consents are not made at arm's length. When promoting the proposal within the amendments the advantages were seen as removing any suggestion of political interference in decision making, freeing up elective representatives to then assist their constituents in applying for resource consents. However the difficulties that were identified included the problems in setting up a national regime including setting suitable remuneration to attract qualified people, the limits on availability with implications for timing for hearing resource consent applications as well as the costs in staffing the pool of Commissioners.

Two options were proposed. Firstly that it be mandatory that an independent Commissioner decide all resource consent applications. The second option is to make it optional for an applicant or any submitter to request an independent Commissioner hear the matter. Currently only the Council has that option.

The MFE report noted that advantages were seen in setting up a group of full time salaried Commissioners in any event. It was seen that this would reduce the cost for individual applicants needing a Commissioner and would provide for greater consistency in decision making.

The Minister's explanation of key policy decisions states that the mandatory use of Commissioners was strongly opposed by Local Government and was expected to prove more expensive for applicants than the current system.

The Select Committee report rejected, by majority, the proposal of using hearing Commissioners at the request of the applicant or submitters. They cited a number of reasons for the rejection including that there was no evidence that independent Commissioners could provide higher quality decisions, the increased formality would be bad for public participation, it would remove local input and would be contrary to the principle of the Act that environmental decisions are best made by those closely effected by them. Further it was thought that Councils can be more aware of how a policy is working if they are making the majority of the decisions on the policy themselves. Since many of the Commissioners used are independent consultants, it was suggested that they may not in fact appear as neutral as would be expected. Further it was expected to add costs to the proceedings.

The omission of the option for applicants (and submitters) to request that an independent commissioner hear the application means that applicants are reliant on the council involved to appoint a commissioner. This means the opportunity has again been lost to have a nationwide pool of trained commissioners available to make decisions in an informed and consistent (and neutral) manner.

Proposed amendments

This brings us to the current provisions of the Bill and how they will affect the petroleum industry.

There are a number of amendments proposed to the Act which have come out of the consultation process and we now outline those which will have the most significant implications for the petroleum industry, namely:

- the shortening of the Christmas 'black out' period to end on 10 January
- the introduction of historic heritage as a s6 matter of national importance
- changes to the timing and way plan provisions become operative
- changes to the requirements for resource consent processing
- limited notification
- financial contributions may now be imposed under proposed plan provisions
- alteration to the bond provisions
- the lapsing period extends to 5 years by default
- change to resource consent conditions no longer need to specify a reason for the change
- subdivision now applies only for 35 years and over leases rather than 20 years
- clarification of the participation rights for s271A and 274 parties.

Three of the most significant changes are:

- limited notification

- operative plan provisions
- processing of applications for consent.

Limited notification

The issue of limited notification has had a rocky ride through to the current form of the Bill. The current presumption for resource consents is that all applications should be notified unless there is a particular reason why they can proceed on a non-notified basis. However when the Reference Group looked at the matter only 5% of resource consent applications proceeded on a notified basis. Therefore it seemed appropriate to reverse the presumption to that of non notification unless there were reasons why the application should be notified.

The Reference Group discussed the issues of concerns regarding time delays with processing notified consents as well as the additional costs involved. Limited notification was seen as 1 option to reduce the costs and time delays in the cases where the applicant could not get written approval from all affected parties.

The proposed amendments require a full re-write of the notification provisions to reverse the presumption and provide for limited notification. It was intended that this would increase certainty with respect to notification decisions as well as reducing delays and costs. However, concerns were raised regarding further loss of public input into the resource consent process. The original proposal also included a definition of the word 'minor' (which was in line with current case law).

The Minister's explanation of the proposed amendments stated that the limited notification process was expected to be cost effective and to reduce the 'green mail' whereby one affected person could hold up the process and in doing so demand significant compensation out of proportion to any legitimate resource management concerns. It was expected that having limited notification would mean that there would be fewer fully notified applications but also fewer non-notified applications given that applicants would no longer have pressure on them to obtain written approval from every person.

There were concerns that limited notification puts even more emphasis on the Council's discretion over whether effects on the environment are more than minor, and the identification of affected persons. It was intended that any disadvantage to the public of limited notification would be offset by the provision for the Environment Court to hear reviews of notification decisions. Also Councils would be required to keep a public record of all applications and notification decisions to allow interested persons to monitor when applications were made.

The Select Committee by majority struck out the limited notification provisions but kept in the reversal of the presumption and also the provisions for Environment Court review of notification decisions. However this has since been

reversed by a supplementary order paper which will be introduced to Parliament this year which reinstates limited notification but strikes out the option for Environment Court review of notification decisions. Hence the final wording for limited notification has yet to be seen.

The introduction of limited notification is expected to have a significant impact on the approach of applicants to proposals where there are affected persons.

Operation of plans

Currently s19 of the Act provides that where a rule creates a permitted activity and that rule is beyond challenge then that rule is deemed to be operative. The amendment that is proposed would mean that any rule (not just for permitted activities) would become operative once it is beyond challenge.

A further amendment is proposed where the Council will have the option of resolving that a particular rule is to have no interim effect while it is in the proposed plan, but would only have effect from the time the plan itself is made operative.

This amendment means that s19 will be of much wider effect, applying to rules for any activity status. However, it remains to be seen how these rules will work with the objectives and policies of both the proposed and transitional plans, as both plans will remain relevant for consideration until the whole proposed plan is made operative.

Method of processing resource consents

It is proposed that Councils be given the power to reject applications if they do not meet the criteria for applications and force the applicant to make a new application. Currently such shortfalls are generally corrected by further information requests or even less formally.

It is also proposed that new 'official' stop the clock provisions would be provided which would allow both Councils and applicants to keep a closer eye on the time periods used in resource consent processing. The clock would stop when further information is requested, when objections or appeals are being pursued regarding s92 requests or when applicants are obtaining written approvals of adversely affected parties as identified by the Council.

This will in some cases clarify the position which is now informally taken by Councils and will also provide some consistency in how such matters are dealt with between councils. It should be noted that no penalty has been proposed for Councils which exceed the timeframes, so there is no guarantee that practice will in fact change.

There are also 2 new matters added by the Select Committee, again by majority, which had not been subject to the previous process. These are biodiversity, and abolishing security for costs.

Biodiversity

The Select Committee saw it as appropriate to promote the profile of indigenous biodiversity through the Act by creating a new function for regional councils. It was noted that territorial authorities have already taken on responsibility for biodiversity under s31(a) and this was seen as a positive step. It was also noted that most regional councils also take on a biodiversity function either through pest management responsibilities or other matters. The proposed definition of biological diversity is intended to reflect the meaning set out in the United Nations Convention on Biological Diversity.

The impact that this will have on the petroleum industry will depend on how the change is taken up and implemented by the regional councils. It will take some time to filter through into plans, and some councils may regard their current provisions as sufficient.

A draft discussion document for a National Policy Statement on biological diversity has already been released for discussion. It is proposed that this NPS would address the resource management effects on indigenous biodiversity, providing a nationally consistent approach for plans. This would be the first NPS other than the NZ Coastal Policy Statement, which was a mandatory requirement under the RMA. An extensive public consultation process is required once the NPS is publicly notified.

Security for costs

In considering this issue, the Select Committee noted that the Resource Management (Costs) Amendment Bill should be taken into account which deals with the issue of awarding costs against public interest groups. The Select Committee, by majority, recommended that a new provision be included which takes away the power of the Environment Court to order a party to give security for costs. It was noted that this in itself would not affect the Court's power to award costs after the matter had been decided. It was also proposed to amend the Bill to clarify that the prohibition applies despite s17 of the Incorporated Societies Act 1908.

Progress of the Bill

The Bill has not yet had its final Reading in the House, and remains on the Government Order Paper. It is intended that the Supplementary Order Paper, which amends the Bill by reinstating limited notification, and striking out review of notification decisions by the Environment Court, will be introduced to the House when the Bill reaches its Third Reading.

The amendments to the Bill were not all passed unanimously through the Select Committee and while the National Party have not yet released their detailed policy on the Resource Management Act, they have indicated that they intend to introduce changes to the Resource Management Act aimed at reducing time delays and costs. ACT has also indicated its opposition to a number of the amendments. Therefore, it is

likely that a number of provisions will be vigorously debated when the Bill finally gets to its Third Reading in the House.

Other initiatives

There are also other initiatives in place that will affect how the Act is implemented and those of particular relevance to the petroleum industry include:

- ratification of the Kyoto protocol
- energy and efficiency conservation strategy
- draft waste minimisation strategy
- proposed transport strategy
- Local Government Bill
- Resource Management (Aquaculture Moratorium) Amendment Bill.

The Government has signalled its intention to put in place the required measures to allow it to ratify the Kyoto protocol, in spite of widespread concern with this approach given the reticence of a number of our major trading partners to signal any intention to take similar measures. The Government has indicated that it will release the climate change preferred policy package for public consultation in March this year.

The National Energy and Efficiency Conservation Strategy was released in September 2001.

The draft National waste minimisation strategy was intended to go to Cabinet for approval in January 2002, with a launch in March 2002.

In mid January this year the Government announced that it would be releasing its transport strategy shortly. We are still waiting for this to happen.

The proposed Local Government Bill was introduced to Parliament on December 2001, and submissions on the Bill closed on 22 February 2002. The implications of the Bill are going to be discussed at another session.

The primary effect of the Resource Management (Aquaculture Moratorium) Amendment Bill is to prevent any regional council considering or granting an application for a coastal permit in relation to aquaculture (where a hearing has not yet begun or is not required) for a period of 2 years. The concerns for the petroleum industry arising from this Bill relate to the flow on effect of putting on hold other applications for activities that could potentially conflict with the aquaculture activities.

Conclusion

The Resource Management Amendment Bill 1999 has had a long gestation period. The question begging to be answered is whether the changes proposed really go anywhere towards addressing the issues raised by Owen McShane, the Reference Group and the hundreds of submitters who participated in the process.

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