

The Resource Management Act – enabling new infrastructure development?

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Abstract

The Government has recently signaled a range of measures intended to actively encourage and maximise the potential for investment in offshore oil and gas exploration. Part of this package involves recent offers of offshore exploration permit blocks, including relatively lightly explored areas such as offshore East Coast and the Great South Basin. Oil and gas exploration is clearly seen as an integral part of New Zealand's energy future.

While this is encouraging news for the industry, it raises the issue of what to do in the event that there is a major discovery? For example, if gas is discovered in large quantities offshore East Coast, and leaving commercial viability issues aside, how does an explorer get the gas to the market and would the value of such a discovery be reduced because of actual or perceived difficulties, costs, or lengthy delays in securing resource consents for necessary infrastructure under the RMA?

The RMA has long been accused of being a barrier to growth and investment in infrastructure, and has been blamed for the demise of a number of high profile projects such as Meridian Energy's Project Aqua. But does the RMA deserve its reputation as a hindrance to progress and a vehicle for opposition groups?

This paper examines a hypothetical example and discusses risks, opportunities, and lessons which can be put into practice in successfully navigating a project through the RMA process.

The scenario

An explorer announces a major find of gas offshore East Coast, with reserves of sufficient quantity such that they could be used for a significant gas fired power station and/or transmitted and distributed through land based pipelines to consumers. Leaving aside commercial viability issues, what is the process to gain approval to build the infrastructure to get the gas to the market?

Legislative context

In the event of a major find following offshore exploration activities, there are a number of laws which are potentially relevant. It is important to note that the extent of the RMA's jurisdiction extends beyond land-based activities to the coastal marine area (essentially the area from mean high water springs to the 12 nautical mile limit), which is managed by regional councils in conjunction with the Minister of Conservation. In addition to the RMA, the other potentially relevant legislation is set out below and includes:

Maritime Transport Act 1994 ("MTA")

Beyond the 12 nautical mile limit of the coastal marine area and up to the outer limit of the exclusive economic zone (200 nautical miles from shore), the protection of coastal waters and maritime/

navigational safety is the responsibility of Maritime New Zealand (“MNZ”) under the MTA. Maritime safety and marine protection rules are also made under the MTA, and usually reflect International Maritime Organisation standards.

Continental Shelf Act 1964

Section 4 of this Act provides that the Crown Minerals Act 1991 applies with respect to petroleum mining on the continental shelf and states that the Minister of Transport is the relevant Minister of Crown land on the continental shelf for the purposes of section 2(2) of the Crown Minerals Act. Section 8 provides for regulations to be made including in relation to installation of devices on the continental shelf associated with exploration of natural resources, establishment of safety zones and restrictions on entry of ships, protection of shipping lanes or recognised fishing areas, and providing for notice or warnings regard the location of offshore installations. Such regulations have been made in the past imposing a safety zone for Maui A platform and the Waka-Nui 1 drillship installation.

Submarine Cables and Pipelines Protection Act 1996 (“SCPPA”)

The SCPPA will be relevant insofar as gas discovered offshore is likely to be fed to shore-based infrastructure by submarine pipelines. It is possible for an explorer to seek a “protected area” be imposed by Order in Council under section 12 of the SCPPA in respect of a pipeline to prevent fishing or anchoring taking place. The Cook Strait power cables, Southern Cross fibre optic cables, and the Maui A and B pipelines are within protected areas. There are general liability and offence provisions which offer a measure of protection against damage to submarine pipelines irrespective of whether they are within a protected area.

While all of these statutes, as well as the Crown Minerals Act 1991, have some potential relevance, it is the RMA which raises some of the critical legal issues associated with constructing infrastructure to bring gas to the market. It is perceived as a problem because it involves a process which enables public participation, subsequent litigation, and therefore the potential for delays and uncertainty.

In addition, while a wide ranging review of the RMA is a possibility in the event of a change in Government, without radical surgery, the reality is that the RMA will be around in some shape or form and its challenges will need to be confronted by explorers or infrastructure developers.

RMA consents – submarine pipeline

In the event that a gas pipeline is required, while large portions may be beyond the 12 nautical mile limit of New Zealand’s territorial sea, it is only for those parts within the 12 mile limit that consents under the RMA will be required. As noted earlier, the coastal marine area (essentially the area from mean high water to the 12 nautical mile limit) is managed by regional councils in conjunction with the Minister of Conservation.

There is little doubt that a suite of resource consents under sections 12 and possibly 14 of the RMA (known as coastal permits) would be required, with applications made to the relevant regional council. How applications might be classified and processed would be dependent upon their specific characteristics and the associated rights sought by developers, as well as the rules in the relevant regional coastal plan.

There is also the likelihood that a major pipeline proposal might be classified as a “restricted coastal activity”. This would mean that while a consent application would be lodged with and processed by the relevant regional council in the normal manner, the application would be required to be publicly notified and a representative appointed by the Minister of Conservation would sit on the regional council hearing committee assessing the application. The Minister of Conservation would consider the recommendation of the hearing committee and make the final decision.

It is important to bear in mind that section 123 of the RMA provides that the maximum duration for coastal permits is 35 years. Experience has shown however that consent authorities are frequently

reluctant to grant consents for this term. The recently passed amendments to the RMA provide some greater investment certainty by clarifying that existing investment will be a relevant factor where renewals of coastal permits are sought, and that an application to renew will have priority over competing applications for the same resource.

In addition, depending upon the rules in the district plan where land based infrastructure needs to be located, there may be a need for land use consents to be sought from the relevant district council. District councils have jurisdiction under the RMA for controlling the effects of land use activities.

The RMA has a presumption that applications will be publicly notified and open to submissions and, once notified, any person can make a submission on a notified application. An application for a major submarine gas pipeline and associated land-based infrastructure would undoubtedly be publicly notified.

RMA consents and approvals – generation or transmission

Depending upon the end use of the gas, there may be a need for a range of consents and approvals for land based infrastructure. The nature and extent of such consents, and who should be responsible for obtaining them, is likely to depend upon commercial arrangements between the explorer and other entities. Unless an explorer wished to become involved in transmission of gas or generation of electricity, it would be sensible for other entities to assume responsibility for the consenting of these activities, which may include land use consents from district councils and discharge to air consents from regional councils.

If however an explorer was contemplating widespread development of land based infrastructure and pipelines, there would be advantages in seeking approval from the Minister for the Environment as a requiring authority under the RMA. Requiring authorities can seek designations (a type of RMA land use approval, primarily in respect of network utilities) which can in turn give rise to powers to compulsorily acquire land or interests in land (e.g. easements). While there are therefore some advantages to being approved as a requiring authority, similar general principles will apply with regard to planning for seeking approvals for major infrastructure projects.

Preparation in advance

Because of the wide definition of “effects” in the RMA, a wide range of concerns or interests can be raised by participants in the process. Developers of infrastructure projects will generally face a process which involves detailed consent applications to local authorities (sometimes more than one), hearings before local authorities, the need for approvals from the Minister of Conservation, and the potential for appeals to the Environment Court, and then to the superior courts on questions of law. While there are statutory timeframes provided for in the RMA for the local authority stages of the process, these are frequently exceeded on major projects and, in the event that appeals are lodged, much will be dependent upon the ability to bring appeals before the Courts quickly.

It is a reality that the RMA process *does* involve some risk and uncertainty. While this paper has to date addressed the formal requirements of the RMA and the legal process with regard to resource consent applications, the key to reducing uncertainty and risks for a major project of this nature will largely depend upon preparation and planning done *prior* to applications being lodged.

In that respect, it is a mistake to regard the RMA process as a necessary evil or an irritant. Decisions to commence exploration activities will in most instances involve careful planning and preparation, feasibility studies being carried out, and any identified risks being considered and addressed. There is no good reason for an explorer not to carefully assess relevant RMA considerations from an early stage and build them into project planning.

Early preparation and not seeking to cut corners, whilst it may involve time and effort at initial stages (and result in a degree of frustration at a perceived lack of actual progress), can bring its own rewards

such as a smoother process with consequential reduction in delays and costs, effective working relationships with interested parties and key stakeholders, identification and resolution of potential concerns prior to lodging applications, reputational benefits, reduced risk of appeals, effective and workable conditions of consent – and the list goes on.

Scoping a project

Assessing RMA implications at the time of identifying various commercial options will assist in identifying RMA risks and issues, the ultimate scope of the project, and the likely consents which will need to be sought.

This will involve questions such as who are the likely users of the gas, what are their requirements, and where are they located? Will gas be used to generate electricity at an onshore location, will any electricity generated be subsequently fed into the local network or the national grid, or will the gas be transmitted directly to a major industrial user or elsewhere in the country? Does the explorer also wish to be a generator of electricity or distributor/transmitter of gas and seek additional resource consents for land-based infrastructure associated with those activities?

For example, for an offshore East Coast discovery, there would seem to be opportunities for electricity generation, particularly in light of recent speculation that Meridian Energy may seek to use the Mohaka River for hydro-electric generation to assist with identified supply and transmission constraints for Hawkes Bay and Gisborne. Depending upon the end use of the gas, where would be the optimal location for a power generation station? This may in turn impact on where the pipeline should come ashore, which could raise RMA issues such as effects on sensitive environments of areas of significance to tangata whenua.

In short, the best technical or commercial solution may give rise to significant and insurmountable hurdles from an RMA perspective. There would be real value in engaging an experienced environmental consultant to assist with evaluating the RMA implications of different commercial or technical options at the scoping stage.

Beyond the scoping stage, identifying and assembling a carefully selected group of expert consultants to prepare supporting reports and information for inclusion in consent applications, and to present evidence at hearings, will also be critical to the success of a proposal. Forming a team of capable experts can add a significant degree of credibility to a project from an RMA perspective, and the importance of this aspect cannot be discounted.

Consultation

The RMA has recently been amended to clarify that there is no legal duty for an applicant for resource consents to consult with any party. Regardless of whether or not there is a duty to consult, in order for an applicant to adequately assess the effects on the environment of an individual proposal and establish working relationships, consultation is usually the best way to gather the necessary information so as to identify those effects and formulate suitable responses or mitigation measures. Consultation should ideally start well in advance of applications being lodged, and as early as the project scoping stage.

There are a range of parties who should be consulted at an early stage, for various reasons. Government departments and statutory bodies can provide valuable input into the process through advice on government policy, advising on non-RMA matters associated with the proposal, and on the possibility of Ministerial or government support for the applications. Government bodies who should be consulted include:

Department of Conservation (“DOC”)

DOC represents the Minister of Conservation, who has the statutory responsibility for managing the coastal marine area under the RMA (and is the decision maker on resource consent applications for

restricted coastal activities). It is likely that DOC will have information about potentially affected parties and particular issues that should be addressed by an applicant, such as ecological and marine life effects, marine reserves, or areas of significant conservation value that should be carefully considered.

Ministry for the Environment (“MfE”)

MfE is responsible for administering the RMA. As will be discussed in further detail later in this paper, new powers have been introduced into the RMA allowing the Minister for the Environment to intervene in the RMA process on proposals of national significance. It is likely that a pipeline proposal such as this would qualify as a project of national significance, with the prospect of a streamlined consent process. MfE officials should be consulted at an early stage about the proposal and the likelihood of Ministerial intervention.

Ministry of Transport (“MOT”)

The MOT is responsible for administering the Submarine Cables and Pipelines Protection Act and should be consulted about matters such as the possibility of a protected area for the pipeline being created under section 12 of the SCPPA by an Order in Council. In order for a protected area to be created, the Minister of Transport is required to consult with parties who may be affected, and consider submissions from affected parties, before making a recommendation to Cabinet. The need for or desirability of creating a protected area may depend upon the significance of the gas reserves discovered, and hence the strategic importance of a pipeline. MOT may also have a view on the need for regulations under the Continental Shelf Act.

Ministry of Economic Development/Crown Minerals

A discovery comparable with Maui would be a matter of genuine significance for New Zealand’s energy future and for the economy as a whole, meaning any infrastructure required to enable the resource to be utilised would also be nationally important. Consultation with officials could assist in co-ordinating Government support for or recognition of the pipeline proposal through the RMA process.

Maritime NZ

Maritime NZ is responsible for administering the Maritime Transport Act and for navigational/maritime safety matters, and should be consulted about navigational issues regarding the pipeline proposal, as well as any matters relating to the legislation it administers.

Local authorities

Local authorities will also need to be consulted about the proposal. Because a major pipeline proposal will involve both marine and land-based issues, both regional and district councils should be consulted. Regional councils, as the bodies responsible for regional coastal plans and processing and assessing resource consent applications in the coastal marine area, the relevant regional will also hold a significant amount of information and institutional knowledge.

Consultation with regional councils as to the subject matter and level of detail of information included in resource consent applications, and the rules in the regional coastal plan, would be desirable if not essential. Regional councils will also be in a position to advise on likely interested/affected parties. Furthermore, navigation issues at a local level are the responsibility of harbourmasters employed by regional councils, and their views should also be sought.

Similarly, district councils will be in a position to advise on issues raised by their district plans, consent requirements for land based infrastructure, and on likely affected parties. In the event that infrastructure is proposed on or under roads, as owners of local roads, district councils have statutory powers and duties under other legislation which may need to be taken into account.

Interest groups

For a major submarine pipeline proposal, there will be a range of interested parties who should be consulted. These are likely to be:

- The fishing industry – is a strong and generally well organised and resourced industry group, and fishers are no strangers to litigation. As holders of fishing quota, fishers are a key group whose interests will need to be considered, particularly with regard to the possible reduction in their ability to access areas which are included within their quota and/or that they have historically fished. The level of concern *may* depend upon the value of the area and/or target species fished, but usually any possibility of reduced ability to access quota is strongly resisted. Fishers are also extremely concerned about the potential for liability for damage to pipelines under the Submarine Cables and Pipelines Protection Act 1996, and the possibility of protected areas being created. Mitigation measures which may be requested include burial of infrastructure below the seabed to reduce the risk of conflict with fishing activities. Key contacts for consultation with the fishing industry are the Seafood Industry Council, the Treaty of Waitangi Fisheries Commission (Te Ohu Kai Moana), and the New Zealand Fishing Vessel Owners Association.

It should be borne in mind that Maori are often closely involved in commercial fishing, and that fishing and Maori interests can be aligned. The prospect of protected areas under the SCPPA tends to be strongly opposed by the fishing industry and Maori, and would be likely to increase any resistance to a project. Indeed, the mere existence of a submarine pipeline across the seabed will cause concerns for the fishing industry due to the liability provisions of the SCPPA, and it may well be that an applicant would need to satisfy potential civil liability concerns of the fishing industry through some form of private arrangement. This would most likely be in addition to the need to address concerns in respect of practical restrictions upon fishing activities caused by the location of gas infrastructure.

- Recreational fishers - are also likely to be a party that may consider themselves to be affected by a pipeline proposal, depending upon the nature and popularity with fishers of an area where a pipeline is proposed, and because of the liability/protected areas issues that could arise under the SCPPA.
- Recreational interests - aside from recreational fishing, other potentially affected interest groups might include yachting and/or recreational boating, surfing, and windsurfing.
- Conservation groups - there are a range of other environmental and/or conservation interest groups that may usefully be consulted with, including national organisations such as the Royal Forest & Bird Protection Society. There may also be regional or local environmental/public interest groups with particular interests in marine issues which may be worth consulting, and guidance should be sought from regional councils regarding such groups.

As a general rule, consultation is usually more effective when a representative of the applicant for resource consent “fronts up”, rather than consultation being done by consultants, in that parties generally would prefer not to be dealing with the “messenger”. It may also assist an applicant in gaining an appreciation of the depth of, or basis for, a party’s concern or interest.

Maori interests

Part II of the RMA requires a number of matters relating to Maori interests to be addressed or otherwise taken into account when considering the environmental effects of individual proposals. There is also the potential matters under the Foreshore and Seabed Act 2004 to be relevant.

It is good practice for an applicant to consult with Maori to be in a position to identify and potentially respond to any concerns raised. Regional councils should be in the best position to identify the relevant Maori group(s) that should be consulted.

In terms of the *specific* matters statutory matters in Part II of the RMA which provide a basis for consideration of Maori interests, they are as follows:

- the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga - section 6(e);
- the protection of historic heritage from inappropriate subdivision, use, and development ("historic heritage" includes historic sites, structures, places, and areas, archaeological sites, and sites of significance to Maori, including wahi tapu) – section 6(f);
- having particular regard to kaitiakitanga and the ethic of stewardship –sections 7(a) and (aa); and
- taking into account the principles of the Treaty of Waitangi – section 8.

There is a considerable body of case law, some of it conflicting, on what these statutory considerations mean in practice and how they should be applied. Frequently, the application of these matters will be site and fact-specific, and dependent upon the value and significance of the resource which is at issue. There is little value in attempting to distil the case law in this paper; however there is little doubt that that the case law confirms that consideration of Maori interests needs to be taken seriously by both consent authorities and applicants and should, where necessary and practicable, be factored into decision making under the RMA.

RMA amendments and Government policy work

Last year a number of amendments were made to the RMA with a view, amongst other things, to providing for improved and potentially streamlined powers and processes for proposals of national significance. These amendments could well be used to the advantage of an applicant for a major gas infrastructure project, which is likely to be considered to be a proposal of national significance.

As mentioned earlier, under new section 141(1), anyone can now request the Minister for the Environment to “intervene” in a matter of national significance. Section 140A states that where a matter relates only to the coastal marine area, it is the Minister of Conservation who can exercise any of the new powers in section 141. A major gas pipeline proposal is likely to involve land-based considerations and accordingly a request for intervention would most likely be made to the Minister for the Environment.

The Minister can choose from a range of options for government involvement, the most relevant in the present instance being the provision of information about the national interest through a whole of government/Crown submission, or directing that an application be “called in”.

If the Minister decides to call in the application, it can either be referred to a Board of Inquiry or to the Environment Court, meaning that there is no need for a hearing at council level. The first instance decision on the proposal is made by the Board of Inquiry or the Environment Court and that decision can only be appealed to the High Court on points of law. If the matter is heard by a Board of Inquiry, the Board must be selected from a standing body of skilled people and chaired by a current or retired Environment Court judge.

This process has two major potential advantages; the first being the time and costs saving in bypassing the local authority hearing process if it is inevitable that the matter would be appealed to the Environment Court, and the second being the use of highly qualified professionals as first-instance decision makers. There are also potential drawbacks in that, as a relatively untried process, there may be problems in the administration of the process and resistance from local authorities to its use.

Oceans Policy

A further factor which may warrant consideration into the future is the Oceans Policy initiative, which has until recently been stalled for some time. The key role of Oceans Policy is to provide overarching

direction for the use of ocean space and resources. This initiative has very recently been reactivated and it is possible that it may give rise to some important policy changes, or give central government policy direction to resolve conflicting or competing uses of the ocean and allocation of coastal space, primarily beyond the 12 nautical-mile limit of the RMA's jurisdiction.

As a consequence, the Oceans Policy might impact on marine infrastructure and oil and gas exploration proposals. It would therefore be advisable for explorers to keep abreast of developments in this area, which will no doubt be closely monitored by the Petroleum Exploration and Production Association of New Zealand ("PEPANZ") and any necessary lobbying carried out to ensure that petroleum exploration and associated interests are fully considered as part of this process.

Examples of successful projects

Despite the generally negative perception of the RMA with regard to the ability to develop infrastructure, there are relatively few examples of major infrastructure proposals being *prevented* as a direct result of the RMA process. There are however numerous examples of delays and cost overruns to which, partially at least, the RMA process has contributed.

Where there are examples of infrastructure or energy projects being abandoned, such as Meridian Energy's Project Aqua, there are often other issues at play. In the case of Project Aqua, a number of uncertainties led to Meridian's decision to withdraw from Project Aqua and these were widely publicised at the time. According to Meridian, the lack of a water allocation regime in the RMA, and the subsequent introduction of the Resource Management (Waitaki Catchment) Amendment Bill 2003 resulted in uncertainty about the proposed water allocation and consent processes and what they might deliver, and ultimately led to the abandonment of the project.

In some respects, the demise of Project Aqua may be argued to be fact-specific in that it related to the specific resource in question (water in the Waitaki catchment), and the competing interests in that resource. Nevertheless, it demonstrated that there were gaps in the RMA in critical areas. The recent amendments have sought to address some of the concerns and, on their face, provide some optimism that major infrastructure projects which have real merit will be dealt with more efficiently and effectively under the RMA.

There are examples of major projects successfully negotiating the RMA process, such as TelstraSaturn's (now TelstraClear) national submarine cable project, the second tailrace tunnel at Lake Manapouri power station, the Pohokura gas field development, numerous roading projects, new prisons, landfills, and wind generation projects. Where some projects have been the subject of delays and protracted litigation, it has often involved resources of particular significance or social or cultural concerns. In the writer's experience, problems in negotiating the RMA process are frequently a result of inadequate planning/scoping and consultation exercises, with the result that difficult or insurmountable issues arise later in the process and become difficult to overcome, when such issues could (and often should) have been identified at preliminary stages and appropriate strategies adopted or changes made.

There is also a risk that project timeframes are set with no regard for RMA uncertainties, and subsequent time and/or budgetary pressures give rise to the temptation to look for shortcuts or a quick fix. More often than not, a perceived shortcut or quick fix is quite the opposite. Because the RMA involves a public participatory process, such actions will often be exposed and can have disproportionate negative effects in comparison to the perceived benefits they might result in.

Provided Transpower's proposed North Island transmission grid upgrade project receives funding approval from the Electricity Commission, it may well be a test of the new RMA provisions in dealing with major infrastructure projects and its progress will be closely observed. Certainly, Transpower's approach to the RMA process to date has involved significant lead-in times, and considerable emphasis on process matters.

Lessons and conclusion

The RMA is a unique piece of regulatory legislation and does involve complex processes. It may not always make sense to the uninitiated and this frequently leads to frustration. It does not appear that there will be significant changes to the RMA regarding major projects for the foreseeable future and, even if there are, there is a strong likelihood that some form of public participatory process would remain.

In pursuing major infrastructure projects, there are a number of lessons and practical tips that can assist in making the process smoother and reducing exposure to risk:

- work with the RMA process, not against it
- plan well in advance
- take advice from recognised experts
- consult early, openly, and widely to flush out issues
- confront issues, don't bury your head in the sand – the problem will only get bigger
- set realistic timeframes and allow for some delays; and
- be patient.

Author



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James was admitted to the bar in 1995 after graduating with an LLB/BA from the University of Otago, and apart from two years in London he has spent the majority of his working life at Simpson Grierson. He has worked on a range of oil and gas related projects, including obtaining resource consents for offshore and onshore exploration activities, bulk fuel storage facilities, petroleum pipelines, and service station developments. He also regularly advises on electricity transmission issues, submarine cables, and roading projects.

