

Memo

Date: 24 February 2015

To: Hearing Chairs and Commissioners
OPUS Environmental Training Centre - Making Good Decisions
Ministry for the Environment – Quality Planning Website

From: Phil Doole (CMG Convenor) - Tasman District Council
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on behalf of the Consent Managers Special Interest Group (CMG)

Subject: **Review of Resource Consent Hearing Practice Guidelines**

1. Introduction

The Consent Managers Group (CMG)¹ has been preparing to implement the changes to the Resource Management Act 1991 that take effect from 3 March (next week)², particularly those concerning procedural matters and processing timeframes for resource consent applications.

As part of that work, CMG has identified a need to update or review "A Practice Guide for the Conduct of Resource Management Hearings at First Instance", to reflect the RMA changes. This practice guide, dated September 2011, was compiled by "Forum 104", a group within the Resource Management Law Association whose membership consisted of 17 RMA lawyers and consultants.

The following comments, on behalf of CMG, are therefore intended to assist in a revision of the practice guide. While the practice guide applies to practice across both plan-making and consenting functions, the following comments are focussed on issues relating to processing and decision-making for resource consent applications.

It should be noted that, notwithstanding the comments herein, CMG is strongly supportive of the practice guide generally. We consider that the guide provides sound and robust guidance and should be promoted as being an effective means of facilitating a nationally consistent approach with regard to the conduct of hearings, and the associated steps in the consent processing pathways. It is in fact for these reasons that we think it important to ensure the practice guide remains current and up to date.

2. General Comments:

a. Timeframes

All consent authorities should now have systems in place to maximise their compliance with statutory timeframes. Many consent authorities have organisational and/or officer KPIs around levels of compliance. Current levels of regional/unitary sector compliance with statutory timeframes are extremely high reflecting both the priority given this matter and the resources/efforts made to comply. The incentive to comply is further enhanced by the fact that breach of statutory timeframes also incurs a financial penalty under the "discount regulations" (that have applied since August 2010).

¹ CMG membership includes all of the 16 mainland Regional and Unitary Councils, including Auckland Council, that collectively manage 60% of resource consent processing activity.

² Refer to Resource Management Amendment Act 2013, Section 2 and Part 3.

The RMA approach to defining timeframe requirements for the processing of publicly and limited notified applications will change on 3 March 2015. It is assumed that readers are familiar with the current approach.

For applications received on or after 3 March 2015, timeframe compliance will be based around the total elapsed time for the whole process: 130 working days for publicly notified applications; 100 working days for limited notified applications, both from lodgement date. Of particular significance to the practice guide, the full duration of any hearing, including any adjournments, will be included in the total elapsed time. (Currently, the timeframe clock stops for the full duration of a hearing). This means that procedural decisions made during the overall process that may, for example, lengthen the overall time for providing evidence, or the duration of a hearing, are now of critical concern to consent authorities.

Procedural decisions made by hearing chairs or panels in the course of a consent hearing may potentially result in breach of statutory timeframes. The practice guide should acknowledge this and emphasise the need for chairs/panels to liaise with the relevant Council officer(s) prior to making decisions where this potential exists.

b. Processing Costs

The other aspect of processing practice which is of potential concern to consent authorities, and which is not currently recognised in the practice guide, is that of cost. This is a potential concern because, while consent authorities are able under s36 RMA to recover the costs of consent processing (including those associated with hearings and engagement of Commissioners), that ability is limited by s36(4)(a) to recovery of the "reasonable costs" only. Section 36(4)(b) imposes further limitations including that the local authority's actions must be "occasioned by" the persons subject to the charge. These provisions mean that consent authorities must carefully examine all costs incurred during the processing of an application and ensure that only those that are consistent with s36(4) are sought to be recovered from the applicant. Any costs that cannot be so recovered will generally fall to be recovered from the general rate. All consent authorities have an interest in recovering reasonable costs from applicants; hence, it follows that consent authorities also want to ensure that, as much as possible, the actual costs incurred fall within the bounds of "reasonable costs" so that they can be recovered.

Directions or requests made by Chairs/Panels before, or during a consent hearing may potentially result in costs for a consent authority which are not recoverable under s36. The practice guide should acknowledge this and, where applicable, Commissioners will need to liaise with the relevant Council officer(s) prior to making decisions where this potential exists.

c. Management of hearing process

Further to the points made above, the role and powers delegated to Chairs/Panels need to be understood in terms of the overall process that a consent authority has to manage when processing notified applications. Two examples of best practice for consent authorities that may influence the hearing process are: (1) estimates of processing costs should be provided to applicants before they commit to a hearing; and (2) late submissions should be dealt with when they are received, not left until the hearing. Commissioners also need to be conversant with the powers and requirements that apply to extensions of timeframes (s37 and s37A RMA). Commissioners' actions need to align with the actual powers and responsibilities of a consent authority, including s41A regarding the "scale and significance of the hearing", without interfering with the independence in their decision-making role.

It is noted that the Hearing Panel for the Auckland Combined Plan has been given some additional powers to direct procedures that apply only to that specific plan-making process. The powers for all other hearings by consent authorities have not been changed, except that pre-circulation of reports and evidence will now be mandatory per the new Section 103B.

3. Specific comments on the Practice Guide content

1. With reference to the comments above regarding timeframes and costs, it is suggested that the practice guide could reflect these matters by way of general comment, for example, following the "Introduction" section. The alternative would be to insert appropriate comment/advice in those specific parts of the document where it is relevant.
2. Another matter that applies across several sections of the guide is that all procedural decisions should be issued in writing.
3. Section 1.1 Initial Appointments

An additional best practice point is that both the Consent Authority and the Commissioner appointees need to be clear as to what decision-making delegations are being given to the latter.

4. Section 1.2 Membership of the Hearing Panel

The Best Practice section suggests the possibility of a meeting of Commissioners prior to the hearing. Given the possible added cost of such a meeting and with reference to the matters raised above regarding the "reasonableness" of costs, it is recommended that the decision to meet be made in consultation with relevant Council staff.

5. Section 2.1 RMA Section 41B and 41C Orders

The title of this section will need modification to reflect the new section 103B.

The discussion in the Issue section will require significant rewriting in light of the pending legislative changes. Specifically, as noted above, these changes provide for mandatory pre-circulation of all evidence, including the s42A report, for all hearings of applications for resource consents that have been notified.

In light of these requirements, we consider that the guidance should address the Panel's procedural options in the event of any of the parties failing to comply with pre-circulation requirements. For example, we consider that the use of s37 or 37A to extend timeframes may be (subject to other logistical considerations) an appropriate means of providing sufficient opportunity for potentially disadvantaged parties to familiarise themselves with late evidence.

The reference to adjournments in the last paragraph of the same section should be qualified to encourage liaison with the consent authority regarding any timeframe compliance issues.

Caucusing

Item 7 of the Best Practice section refers to expert witness caucusing to narrow the issues. While this tool has been used recently by some Commissioners, we consider that there is no statutory power to direct the parties to carry out caucusing prior to, or during a hearing. There are various powers in s41C to request further information, but no powers in either s41C or the new s103B to direct expert witness caucusing. That said, we strongly support caucusing as a useful option that can assist the decision-making process. When circumstance indicate that caucusing of expert witnesses would be desirable, prior to the hearing agreement should be sought at a pre-hearing meeting or via written request, or by seeking agreement during the hearing. Both situations would also require agreement on extending timeframes if required.

The handling of rebuttal evidence, addressed in Section 3.7 of the Practice Guide, is also relevant to directing the overall order of business at the hearing – see (10) below.

6. Section 2.2 Deferral or Adjournment of Hearing

The commentary should note that a further relevant factor to consider when deciding whether to defer or adjourn is timeframe compliance. It is therefore recommended that the decision to defer or adjourn be made in consultation with relevant Council staff.

7. Section 3 Hearing Procedure

A useful addition to this part of the Guide would be a section on techniques for streamlining the hearing process (eg, avoid repetition, focusing on points of difference, taking evidence as read); and for retaining the informality of smaller hearings. This links to the s41A expectation that the scale and significance of a hearing should influence how it is conducted.

8. Section 3.4 Role of S42A Report Author

The role of the s42A author(s) should be well understood by those people. It would be useful to hear from practicing Commissioners whether the concerns expressed in the opening paragraph of this section are still an issue.

9. Section 3.5 Legal Advice and the Role of the Local Authority Legal Advisors

The last paragraph of the Issue section requires rewriting in light of the pending RMA changes. The commentary should also note the need to consider cost and timeframe implications when seeking further legal (or any) advice.

With regard to item 3 of the Best practice section we suggest adding the word “explicitly” prior to “relied on”. This distinguishes those opinions that have been explicitly brought into the proceedings from those that have not.

10. Section 3.7 Reply – Allow rebuttal evidence

Given the pending changes to timeframes and evidence circulation, the commentary and best practice guidelines relating to management of rebuttal (and supplementary) evidence need review.

11. Section 3.9 Adjourn or Close?

This section should note that a further relevant factor to consider when deciding whether to adjourn is timeframe compliance. Again, the decision whether to adjourn should be made following liaison with the Consent authority staff.

12. Section 4.2 Interim Decisions

This section raises a significant concern for Consent authorities in relation to the implications of Interim Decisions on timeframe compliance. Specifically, the issue is – when does the “clock stop”: at the issue of an interim decision or the eventual “final” decision? This is not an issue that, we think, has had any consideration let alone viewpoint expressed, by MfE. We consider that until this question has been clarified, Commissioners should avoid the use of interim decisions wherever possible, unless there is clear agreement from the applicant if a timeframe extension is required.

13. A further matter we would like to see included in the document relates to aligning decision report formatting and structure with that of the relevant Councils. Many Councils have established formatting for their consent documents. This might include number referencing systems (for files, consent and conditions) and standard document layout as well as more detailed things like font type and size.

For some Councils, these matters may be integral to their quality systems. We therefore advocate that Commissioners work within each Council's requirements (if any) as to the format and reference system of the consent decision documents that they issue.

Consistency in the formatting of resource consent documents generally has been identified by CMG as a Best Practice topic.

We note that many, if not all of the matters outlined above are likely to be considered when consent authorities are reviewing their procedures for appointment of Commissioners (including delegation of powers) and the conditions in contracts of engagement. Health and Safety in employment is another matter which should be covered in contracts, with attention paid to site visits.

4. Review Process

Consent authorities have a need to review procedures for notified resource consent applications to take account of and implement the RMA amendments that take effect from 3 March 2015.

CMG is seeking to work with the RMLA Forum 104 members, as well as other Commissioners and others involved in developing RMA Best Practice such as the Opus Environmental Training Centre (that delivers the Making Good Decisions Programme) and the Quality Planning Website, to produce a revised and expanded Practice Guide for Consent Hearings.

Our aim is to have a draft ready for consideration by CMG members at its next formal meeting scheduled for early May.