

Report to the Collaborative Stakeholder Group – For Information

File No: 23 10 12

Date: 19 August 2014

To: Collaborative Stakeholder Group

From: Bill Wasley – Interim Chairperson, Collaborative Stakeholder Group

Subject: **The addition of review conditions on consents applications prior notification of the Waikato Regional Plan Change 1**

1 Purpose

The purpose of this report is to clarify the use of review conditions on consent applications for activities that currently require a consent between now and public notification of the Waikato Regional Plan Change 1 Waikato and Waipa River catchments.

Recommendation:

That the report “The addition of review conditions on consents applications prior to notification of the Waikato Regional Plan Change 1” (Doc #3140943 dated 23 July 2014) be received for information.

2 Background

At Collaborative Stakeholder Group (CSG) workshop 5, during the approvals session about workshop paper (Doc 3123622 dated 7 August 2014)¹ there was some discussion by the CSG of consent timeframes and imposing consent review clauses prior to plan notification. Following on from this the CSG asked the council to report back on:

- 1) the use of s128² of the Resource Management Act 1991 to impose review conditions on any consents prior to notification.

There was some discussion on the use of direction in the National Policy Statement for Freshwater Management (NPS-FM) and Vision and Strategy by consent officers.

3 The consent application process

Prior to public notification of Proposed Plan Change 1, the Operative Waikato Regional Plan is a starting point for discussion of consent applications. In accordance with the

¹ Titled ‘Response to consent application prior to notification of the Waikato regional Plan Change 1 Waikato and Waipa River catchments’ Distributed prior to CSG 5 DM 3123622

² Under the RMA, s128(1)(b) enables the Council to review the conditions of a consent when a regional plan has become operative which sets limits or standards relating to water quality and the Council considers it appropriate to review the conditions in order to enable those standards to be met. See Appendix 1

Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2012, the Vision and Strategy was deemed to be part of Regional Policy Statement. Both the Operative and Proposed Regional Policy Statements are relevant to applications for resource consents under section 104 of the RMA and accordingly, when it comes to implementing existing rules in the Waikato Regional Plan, the council is required to have regard to the Vision and Strategy when it considers applications for resource consents.

Resource consent officers will follow an RMA prescribed process for applications for resource consents between now and public notification of Waikato Regional Plan Change 1 Waikato and Waipa River catchments³. The application will go through the stages laid out in the RMA. At that point the consent authority makes a decision after consideration of all relevant matters in the NPS-FM, the Vision and Strategy, the Operative and Proposed Regional Policy Statements and the Operative Waikato Regional Plan.

Consents may be granted for any term up to a maximum of 35 years from date of granting as specified in the consent⁴ (s123 of the RMA), with conditions. For example for the variation to the Waikato Regional Plan to manage the allocation and use of freshwater (Variation 6) the council reserve control over the consent duration for taking water, and provisions for when consents may be reviewed⁵.

4 The addition of review conditions on consents in the interim

Review under s128 enables conditions of consent to be reviewed however does not allow review of any conditions that pertain to the consent term. The general purpose of the review provision is to enable consent conditions to reflect changes over time, whether in relation to the incidence of adverse effects from the activity, the means by which adverse effects are avoided, remedied or mitigated, or, as in this case, changes to the policy framework.

The scope of a review is limited. The law is clear that a review cannot remove the benefit of the consent – in other words render it unusable for the purpose for which it was granted. Neither is a review an opportunity to re-litigate the original grant of consent.

There are two specific mechanisms available in s128 of the RMA that would enable the conditions of a resource consent to be reviewed for the purpose of enabling integration or alignment with a regional plan. They are s128(1)(a) and s128(1)(b). These operate in different ways.

S128(1)(a)

This provision allows the consent conditions to be reviewed “at any time specified for that purpose in the consent” for purposes including “any other purpose specified”. Hence, a review under s128(1)(a) can only be triggered if there is a condition that specifically enables it and it must be specific as to timing and purpose. That purpose can be specified with whatever degree of particularity is required.

S128(1)(b)

This provision enables conditions to be reviewed by councils as of right, when a regional plan has been made operative which sets rules relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water or air quality etc and it is appropriate in the council’s view to review the conditions in order to enable those

³ For more on the key decision points when resource users undertake activities that result in discharges of contaminants where they may affect water refer to (Doc 3123622) titled ‘Response to consent application prior to notification of the Waikato regional Plan Change 1 Waikato and Waipa River catchments’.

⁴ If period not specified the consent is granted for 5 years from date of commencement.

⁵ Waikato Regional Plan, 3.3.3 Policy 15: Consent Duration for the Taking of Water

levels/flows/standards etc to be met. Unlike s128(1)(a), no condition needs to be imposed on these permits to enable review in this circumstance. However, s128(1)(b) can only be triggered when the regional plan is “operative”. This means that the relevant part of the plan must have gone through the Schedule 1 planning process to the extent that it is past the point of any further challenge. Council’s experience suggests this could potentially be several years after the plan has been notified (i.e. “proposed”).

Whether there is reliance on s128(1)(a) or (b), neither enables the outcome of the review to be pre-determined. When a review is initiated, the process follows something similar to that for an application i.e. the council is required to consider whether it is notified or non-notified, and if it is notified, it may require a hearing to hear submissions. The consent holder and any submitters can appeal the outcome of a s128 review.

Current practice is to routinely include review provisions particularly in relation to the more significant resource consents. Generally, the review clause follows a standard format that is sufficiently broadly worded so as to enable review for a range of purposes. More specific review conditions are applied where specific circumstances may apply. For example, some significant discharge permits that apply within the Waikato catchment, have a review condition that links with the Vision and Strategy for the Waikato River.

Summary points about consents

- A review condition is a way of providing councils with the flexibility to review conditions to reflect changes over time, including changes to policy.
- Review of consent applications under s128 is a tool available to the council, which can be imposed when the consent is granted, and provides an opportunity for review, to be used at the discretion of the consent authority.
- Review under s128 enables conditions of consent to be reviewed however does not allow review of any conditions in relation to consent time frames.
- The scope of a review is limited. The law is clear that a review cannot remove the benefit of the consent – in other words render it unusable for the purpose for which it was granted. Neither is a review an opportunity to re-litigate the original grant of consent.
- There are two specific mechanisms available in s128 of the RMA that would enable the conditions of a resource consent to be reviewed for the purpose of enabling integration or alignment with a regional plan. They are s128(1)(a) and s128(1)(b). These operate in different ways.
- The extent and choice of review mechanism would depend on the overall purpose for applying a review condition. For example:
 - s128 (1) (a) provides latitude to specify a specific purpose for the consent review (e.g. to meet water quality standards) but must specify the time(s) at which review may occur;
 - s128 (1) (b) can be used as of right i.e. without review conditions on consents if the purpose is alignment of consents with changes in policy when the plan becomes operative.
- It should be noted that consents are unable to take account of future policy, except by way of imposition of review conditions.

5 Additional points to consider

Some land use activities that result in non point sources discharges are controlled by the rules in the Waikato Regional Plan, e.g. the application of fertiliser onto or into land, however the Plan is silent about many activities that result in adverse effects from excessive amounts of sediment, bacteria and nutrients entering water bodies, for example the use of sacrifice paddocks for grazing, large scale cultivation adjacent to water bodies.

The CSG has expressed interest in and discussed the matter of trying to influence landowners in regard to activities before the plan becomes operative. To date the discussion has focused on resource consents, specifically resource consent review conditions.

Reviews provide councils with the flexibility to review consents to reflect changes over time, including changes to policy. However, consents are unable to take account of future policy, except by way of imposition of review conditions for resource consents. Also the law is clear that a review cannot render a consent unusable for the purpose for which it was granted.

Given these limitations the CSG is interested in exploring other options to influence landowners prior to notification of the plan change. Any exploration of options would probably involve working with primary industry bodies or organisations, district councils, iwi and community groups. In regard to this matter the group might consider the following:

- That primary industry bodies are responding, setting goals and taking actions that aim to make a difference to water bodies.
- That any intervention taken by the CSG might trigger landowners to take action which could be counterproductive. There is the danger that actions taken by the CSG could raise awareness and generate concern among landowners regarding the outcome of the plan change. This may trigger landowners to take precisely the actions the CSG wishes to prevent.

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Appendix 1 –excerpt from section 128 RMA 2014

128 Circumstances when consent conditions can be reviewed

(1) A consent authority may, in accordance with section 129, serve notice on a consent holder of its intention to review the conditions of a resource consent—

(a) at any time or times specified for that purpose in the consent for any of the following purposes:

(i) to deal with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage; or

(ii) to require a holder of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or 15B to adopt the best practicable option to remove or reduce any adverse effect on the environment; or

(iii) for any other purpose specified in the consent; or

(b) in the case of a coastal, water, or discharge permit, when a regional plan has been made operative which sets rules relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality or air quality, or ranges of temperature or pressure of geothermal water, and in the regional council's opinion it is appropriate to review the conditions of the permit in order to enable the levels, flows, rates, or standards set by the rule to be met;