PROPOSED RMA CHANGES – HOW WILL IT AFFECT YOUR TRANSPORT ASSESSMENTS?

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ABSTRACT: What topic is more appropriate for a session on Collaboration in Education and Training than a lawyer collaborating with transport engineers to help with their own education? The Technical Advisory Group (TAG) released its report on proposed changes to Part 2 of the Resource Management Act 1991 (RMA). If put into place, these changes will considerably change sections 6 and 7, and the part 2 considerations that form a part of every RMA assessment for resource consent applications. That, in turn, will have an impact on the transport and traffic impact reports prepared by transport engineers for resource consent applications – and the way that they are assessed.

Want to know more, but the topic sounds dry? Don’t worry, the topic will be presented in a light-hearted way. This is something that you must know about.
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INTRODUCTION
The Abstract for this paper states that it will consider the proposed amendments to Sections 6 and 7 of the Resource Management Act, and consider the implications of those for transportation engineers. At the date on which this paper was due, no progress had been made on this part of proposed resource management reforms. However, the Resource Management Reform Bill 2012 was introduced to Parliament on 5 December 2012.

The Bill had its first reading in Parliament on 11 December 2012 and submissions will now be considered by the Local Government and Environment Committee. This paper highlights parts of that Bill.

Then, on 28 February 2013, Environment Minister Amy Adams announced further proposals for a revamp of the resource management system. She released a discussion document "Improving Our Resource Management System". That discussion document sets out the Government's proposals to improve New Zealand's resource management system. Comments on the discussion document are invited prior to 2 April 2013. I will, therefore, comment on the discussion document.

Overall, this paper provides an update on resource management reform.

THE BILL
The Bill is part of the phase 2 RMA reforms. Phase 1 resulted in the Resource Management (Simplifying and Streamlining) Amendment Act 2009, which contained a number of amendments aimed at improving the operational efficiencies of RMA processes.

The Resource Management Reform Bill 2012 is a part of the Phase 2 reforms and provides for:

1. six month limits on Council processing of medium sized consents;
2. a one off streamlined hearing process for the first Auckland Unitary Plan;
3. a choice for major regional projects to be consented directly through the Environment Court;
4. enhanced requirements for Councils, designed to ensure that Councils base their planning decisions on robust and thorough cost benefit analyses; and
5. other amendments aimed at improving RMA processes.

SIX MONTH CONSENT TIME
The explanatory note to the Bill highlights that one of the primary objectives is to introduce a six month time frame to streamline the consenting process. Whilst the explanatory note states that this provision will apply to "medium sized" projects, there is no definition of "medium sized" in the Bill.

Putting that aside, the Bill intends to ensure that resource consents are processed more quickly. To achieve this, the Bill makes changes to the time periods for notification, submissions, evidence exchange and the completion of the hearing¹.

¹ Clauses 97-100
These changes include:

1. The proposed overall time limit for processing these applications is 130 working days (6 months) for public notification or 100 days for limited notification. The 130 and 100 working day timelines will not be absolute as they are subject to “stopping the clock” and extension of time provisions.

2. Amending Section 95 to allow a Consent Authority 20 working days (instead of 10 working days) to decide whether to notify an application.\(^2\)

3. Where an application is limited notified, allowing the Consent Authority to bring the closing date for submissions forward. In such instances, the Council may deem the closing date to be the day on which the Consent Authority has received submissions or written approval from all affected persons. This may be earlier than the 20\(^{th}\) working day after notification.\(^3\)

4. Increasing the time period for a hearing, following the lodging of an application with the Consent Authority, to 35 working days instead of 25 working days.\(^4\)

5. Changing time limits relating to hearings. In particular, Section 103A is broken up into two sections, being Sections 103A and 103B:\(^5\):
   a. The new Section 103A replaces the time limit for completing certain adjourned hearings and, instead, sets a time limit for completing a hearing for a notified application:
      i. if public notification was given, the hearing must be completed within 75 working days after the closing date for submissions on the application; and
      ii. if the application was notified on a limited basis, the hearing must be completed within 45 working days after the close of submissions.
   b. The new Section 103B also applies to a hearing for a notified application and requires:
      i. the Section 42A report to be provided at least 15 working days before the hearing;
      ii. the applicant to provide its evidence at least 10 working days before the hearing; and
      iii. submitters to provide their evidence at least 5 workings days before the hearing.

Whilst this provision allows for the earlier provision of the Section 42A report, it reduces the time within which the applicant can consider the Section 42A report from 10 working days to 5 working days.

**SECTION 42A REPORTS**

The Bill proposes that section 42A is amended so that a report may adopt any information, and not just an assessment of environmental effects, included in an application for a resource consent.

\(^2\) Clause 97
\(^3\) Clause 98
\(^4\) Clause 99
\(^5\) Clause 100
STOPPING THE CLOCK

The clock will only stop for the first further information request, provided it is made before the Council's notification decision. Even then, the clock can only be stopped three working days after the further information request. Therefore, if an applicant quickly provides the requested information, the clock won't stop.

This is proposed to be implemented by replacing Section 88B with new Sections 88B and 88BA. New Section 88B tries to clarify how the clock is stopped for certain processes and how deadlines are consequently differed. A number of definitions are included, together with a table to assist in these calculations. New Section 88BA contains the table listing the provisions with deadlines and those that specify the time allowed for processes that affect each deadline and which can result in deadlines being differed. This applies to deadlines for:

a. notification;
b. a consent authority report on direct referral to the Environment Court;
c. the commencement of a hearing of a non-notified application;
d. the completion of a hearing for a notified application;
e. notification of the decision of a non-notified application where no hearing was held; and
f. notification of a decision of a notified application where no hearing was held.

Section 88C provides that a deadline is affected by only the first request for further information that is made before notification.

DIRECT REFERRAL

The Bill attempts to increase applicants' access to the direct referral process in the Environment Court. These changes apply to the request that the application skips the Council level and is considered by the Environment Court. The Bill provides that, where the value of investment involved in a particular consent application or designation requirement meets or exceeds a specific threshold, the consent authority cannot reject the request for direct referral and must directly refer the application to the Environment Court. This is unless exceptional circumstances exist. The threshold and exceptional circumstances will be specified in regulations, yet to be prepared. There will be no discretion for the Environment Court to refuse to hear a directly referred application. The Environment Court will still consider the application and may grant or decline it, once heard.

AUCKLAND COMBINED PLAN

The Bill also amends the Local Government (Auckland Transitional Provisions) Act 2010, by making significant changes to the process for the first combined planning document for Auckland Council under the Resource Management Act.

This involves a one off streamlined process, meaning that there will be only a single hearing on the Auckland Combined Plan. The hearing will be conducted by Independent Commissioners appointed by the Minister, with the only ground of appeal being on points of law to the High Court.

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6 Clause 91
7 Clauses 13 - 15
8 Also referred to as the Auckland Unitary Plan.
This is unless the Auckland Council rejects the hearing panel's recommendation, in which case parties will be able to appeal those parts of the decision to the Environment Court.

The Auckland Council will still be responsible for the preparation and notification of the proposed plan. The first period for submissions will run for 60 working days, with a further submission period running for 30 working days.\(^9\) Once the proposed Combined Plan has been publicly notified, the Council will not be able to make any amendments or variations until after it becomes operative, unless those changes are in response to the hearing panel's recommendation or are for inserting designations under Clause 4, Schedule 1 of the RMA.\(^{10}\)

The Bill proposes that the Plan has legal effect, in that it must be taken into account by Auckland Council when considering resource consent applications, once the Council has issued its decision following the hearing on the panel's recommendation.

The independent hearings panel will be appointed by the Minister for the Environment and the Minister of Conservation, in consultation with the Auckland Council and the independent Maori Statutory Board.\(^{11}\) The panel will comprise 3 – 7 members, led by a Chair Person, who collectively have knowledge and expertise in relation to the RMA, regional and district planning documents, Tikanga Maori and Tamaki Makaurau.\(^{12}\)

At the hearing, parties may question other parties or witnesses and cross-examine them. The Council, itself, must attend the hearing sessions to: assist the hearing panels; clarify or discuss matters in the proposed plan; give evidence; speak to submitters, or address issues raised by them; and, provide any other relevant information as requested by the hearings panel.

NEW APPLICATION REQUIREMENT

Section 88 will be amended, and a new Schedule 4 inserted into the Act. Schedule 4 covers Assessment of Environmental Effects ("AEE") requirements and more general matters for inclusion in a consent application.

The amendments require that the listed matters "must" be included in AEEs, whereas the current requirement is that the application is "in accordance with" Schedule 4. Applications must include Part II matters, assessments against Section 104(1)(b) statutory documents, as well as specific information for certain applications. As a part of this, the application must demonstrate why any associated permitted activities are permitted. Additional information for subdivision and reclamation applications are also outlined, as well as the information required, and matters that must be addressed, in an AEE.

The consent authority will have 10 working days, not 5, to reject an application for being incomplete. If the information in the (new) Schedule 4 is not included, the application may be rejected.

SECTION 32

The Bill proposes amendments to Section 32, including "more robust cost-benefit analysis". The existing Section 32 is proposed to be replaced with two new sections, being Section 32 and Section 32AA.\(^{13}\) The new Section 32 outlines requirements for preparing and publishing

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\(^9\) New Section 120
\(^{10}\) New Section 121
\(^{11}\) New Section 155
\(^{12}\) New Section 155
\(^{13}\) Clause 69
evaluation reports in relation to plan changes or variations; and the new Section 32AA sets out the requirements for undertaking and publishing further evaluations.

The new Section 32 requires the quantification of the benefits and costs of the environmental, economic, social and cultural effects anticipated from the implementation of the proposed provisions. There is now an additional requirement to assess the opportunity costs to economic growth that are anticipated to be lost as a result of the proposal. Interestingly, there is no requirement to analyse the opportunities for economic growth that are likely to be gained from the proposal. For traffic and other transport assessments it will be easier to quantify the benefits and costs than it will be for some other disciplines.

The details of the Section 32 report must be commensurate with the scale and significance of the effects anticipated from the proposal.

ENVIRONMENT COURT PROCEDURE

The inherent power of the Environment Court to regulate its own proceedings will remain, however, the Bill makes an amendment to require the Environment Court to regulate its proceedings in a manner that "best promotes the timely and cost effective resolution". This may place a different emphasis on how the Environment Court chooses to conduct appeals and other proceedings before it.

BOARDS OF INQUIRY

The Bill provides for Boards of Inquiry to become more aligned with the Court process, enabling cross-examination and the removal of the requirement to comply with rules around releasing documents under the Local Government Official Information and Meetings Act 1987.14

SECTIONS 6 AND 7

This Bill does not include the significant amendments that are proposed to Sections 6 and 7 of the RMA. However, recommendations from the TAG report have been included in the most recent discussion document.

CONCLUSION - SIGNIFICANCE OF BILL FOR TRANSPORT ENGINEERS

If implemented, these amendments will result in changes to existing practices, including:

a. If your client doesn’t want the clock to stop on processing times, they should provide any requested further information within three working days of the request being made.

b. Care will need to be taken to ensure that all information required by Schedule 4 is included both within traffic impact assessments forming a part of applications, and in the applications themselves. Before preparing any assessment that will form part of a resource application, you should read Schedule 4 and ensure that all relevant aspects are covered off in your report.

c. If an activity that forms a part of the operations is a permitted activity, the reasons for that will need to be outlined in the application. This practice was being followed in many cases but will need to be adhered to if the legislation is implemented in this form.

14 Clause 127-129
d. Transport input into Section 32 reports will need to adhere to the new analysis requirements.

e. Those of you working for Councils will need to be familiar with, and work within new timeframes when assessing and reviewing applications or parts of applications.

f. If preparing Section 42A reports, you may adopt any information in a resource consent application. This will prevent reproduction of information already provided.

g. With regard to the Auckland Plan process:

i. You will need to prepare your evidence to Environment Court standards at the Council level. There will only be one chance to "get it right", and no second chances in the Environment Court. This will demand a more proactive approach.

ii. You will need to be aware of the change in dynamics created by this very different hearing regime. There will be greater onus on submitters, and the Council, to present a case of a very high standard to the hearings.

iii. The ability to allow cross-examination will mean that witnesses providing evidence will essentially need to be experienced in the Environment Court. It may remove the ability for less experienced experts to be involved as clients opt for seasoned experts to provide their evidence.

iv. Witness conferencing is also specifically provided for, meaning that experts may be encouraged to meet and try to establish a common view on some issues. Traffic and transport evidence is amenable to this approach.

These amendments focus on a more structured approach, from defining the matters to be included in a resource consent application, to the timeframes and the processes. It is all aimed at removing the 'wriggle room' for both consent authorities and applicants, which has led to applications languishing for months. This will mean that all persons involved in applications – whether it is a "medium sized" application within a six month consent period, or a standard application – should prepare well and ensure that all matters are attended to before an application is lodged. That will allow for the smooth processing of the application and compliance with the proposed amendments.

Although it is not guaranteed that these amendments will be implemented as drafted in the Bill, it is highly likely that the concepts will be enacted, after the Bill has been through the Select Committee, albeit that there may be some drafting amendments. It is, therefore, a good idea to keep the proposed amendments in mind, and to consciously think now (including while preparing applications or reports in the meantime), how you might approach these tasks differently when the amendments are enacted.

**RESOURCE MANAGEMENT DISCUSSION DOCUMENT**

The Discussion Document proposes to make a number of improvements to the RMA across planning, consenting and appeals.

The reforms within the package are divided into six core objectives:

1. Greater National consistency and guidance;
2. Fewer, better resource management plans;
3. An effective and efficient consenting system;
4. Better natural hazard management;
5. Effective and meaningful Maori participation; and
6. Working with Councils to improve the RMA service performance.

The intention beyond the proposals is to encourage more active planning for community needs upfront, rather than the consent-by-consent planning that has become prevalent in many places. The Government is still saying that the proposals will "streamline" decision making.

Greater National Consistency and Guidance

The discussion document recognises that, as a general principle, central Government should provide clear direction for:

1. Matters that are nationally important;
2. Where decisions involve nationally significant issues; or
3. Where consistency outweighs the value of local specificity.

Local Government should play a key role in decision making where:

1. There are local circumstances that demand a more site or community specific approach;
2. The costs and benefits are localised; or
3. Local authority is best placed to make the decision.

The proposals would amend Part 2 of the RMA by updating the matters identified as being nationally important. Mechanisms for providing national direction to Councils would also be amended to improve their clarity and effectiveness.

The intention is to increase certainty for Councils and the public on matters that are important across New Zealand and to take them into account in resource management decisions at a local level. Central Government would provide clear direction on important contemporary issues such as housing affordability and natural hazards. The intent would be to improve the clarity and predictability of the system and reduce costly re-litigation of national matters at a local level.

Proposal to Achieve This

In order to provide stronger national guidance and tools to promote greater national consistency, the discussion document proposes to:

1. Change the principles contained in sections 6 and 7 of the RMA;
2. Improve the way central Government responds to issues of national importance and promote greater national direction and consistency where needed;
3. Clarify and extend central Government powers to direct plan changes; and
4. Make NPS's and NES's more efficient and effective.

It is proposed that current sections 6 and 7 be combined into a single section that lists the matters that decision makers would be required to "recognise and provide for". The use of a single list aims to remove the current hierarchy between sections 6 and 7, and to achieve more balanced decision making.

The discussion document takes up the recommendation of the RMA Technical Advisory Group (TAG) of inserting a new section 7, setting out principles to guide decision makers on how to manage resources sustainably.
It is envisaged that decision makers will be reminded to have regard to a balance of environmental, social, economic and cultural values and priorities for resource management. The matters listed in the new proposed section 6 would better reflect today's values and priorities. It is intended that decisions would better reflect the mix of national and local values and priorities regarding resource use and protection. It is acknowledged, in the discussion document, that the changes would involve some costs and may increase uncertainty in the short term, as they would require the review of plans and render some existing case law obsolete. This would provide interpretation challenges until new case law emerges.

**Fewer and Better Resource Management Plans**

It is intended to combine all the planning instruments in a defined area into an easy to use format. This would provide applicants with a "one stop shop" for the planning rules affecting their properties and activities. A national template would be imposed for planning documents. Planning would be future focused, making provision for important matters such as housing affordability, infrastructure development and urban growth management.

District and Regional Councils would be able to choose to group together and jointly prepare a single integrated plan for each district or area. There would be changes to appeal provisions to encourage effective participation in the development of plan content while retaining the role of the Courts as a safe-guard for procedural rigour, natural justice and the quality of outcomes.

Communities and businesses would be encouraged to actively engage early in the process.

**Proposal to Achieve This**

In order to change the current planning system, which is considered to be too complex and costly for councils and stakeholders alike, the discussion document proposes to:

1. Require single resource management plans using a national template that would include standard terms and definitions;
2. Impose an obligation to plan positively for future needs including land supply;
3. Enable preparation of single resource management plans via a joint process with narrowed appeals to the Environment Court; and
4. Empower faster resolution of Environment Court proceedings.

The discussion document is aimed at overcoming the tendency, in planning, to focus on managing the negative effects of development (for example, traffic or air quality impacts) and to under-emphasise the consideration of how it might provide for the social, economic or cultural wellbeing of the community.

It is proposed to advance a range of legislative and non-legislative changes to encourage a more positive, future-focused approach to planning. Changes are proposed to sections 30 and 31 of the RMA to state that managing positive effects is one of the council's core functions and to require councils to ensure there is adequate land supply to provide for at least 10 years of projected growth in demand for residential land in their plans.

District and Regional Councils could choose, where appropriate, to group together and jointly prepare a single integrated plan for each district or larger area. A streamlined plan development process with limited rights of appeal would be made available to councils if the proposed grouping met the following criteria:

1. One set of rules per area;
2. Enables effective catchment management (eg, water, land); and
3. Brings material efficiency/cost gains.
Regional and District Councils would continue to retain separate functions under the RMA which would mean the Regional Council content of the plan would need to be signed off by the Regional Council(s) and the District Council content signed off by the District Council(s).

Changes are also proposed to increase the Environment Court's existing power to enforce agreed timeframes, and to strengthen existing provisions to require parties to undertake alternative dispute resolution.

**More Efficient and Effective Consenting**

The proposals in the discussion document would introduce a simple 10 working day time limit for processing straightforward, non-notified consents, accompanied by a proposed national requirement for some types of application to be processed as non-notified. It is proposed to introduce a new process called "approved exemption" from consent requirements for technical or minor rule breaches.

It is also proposed to:

4. Limit affected parties' opposition to the specific effects that projects will have on them;
5. Amend the scope of potential submissions and appeals on consents;
6. Introduce the potential for an alternative Crown body to undertake consent processing functions in areas facing particular growth management pressures; and
7. Provide consenting authorities additional tools to guard against land banking.

The following is also suggested:

1. Transparency around consent processing fees;
2. The introduction of memorandum accounting for resource consent activities;
3. The imposition of constraints on the scope of conditions councils can place on consents; and
4. Reduction of the costs associated with the Environmental Protection Authority's nationally significant proposals process.

**Proposal to Achieve This**

To address complaints about increased costs, time, and uncertainty regarding resource consents, the discussion document proposes the following:

1. A new 10 working day time limit for straightforward, non-notified consents. This could include non-notified controlled and restricted discretionary activities which have very few rule breaches. Certain quality criteria would need to be met (for example, complete applications, with no further information required and all necessary written approvals provided) before being considered for the 10 day process;

2. A new process to allow for an "approved exemption" for technical or minor rule breaches. Essentially, the activity would be "deemed permitted" by giving councils a small degree of tolerance to decide on a case by case basis that a full resource consent is not required. This would be for very minor and technical rule breaches, where neighbours are unaffected and the environment is affected to a very minor degree;

3. Specifying that some applications should be processed on a non-notified basis. This would allow for non-notification on the basis of regulations. Those regulations could direct non-notification as a nationwide standard for some activity types. This could include those subject to the 10 day resource consent process;


4. Limiting the scope of conditions that can be put on consents. It is proposed to limit the scope of consent conditions by requiring them to be directly connected to the reason for which a consent is required. For example, that a condition only be imposed where it directly relates to the provision of the plan which has been breached;

5. Limiting the scope of participation in consent submissions and in appeals. It is proposed to limit the scope of submissions and third party appeals to only the reasons the application was notified and the effects related to those reasons. That would require the council to clearly identify why the application is being notified and to identify specific effects that meet the notification test in the Act;

6. Changing consent appeals from de novo to appeals by way of re-hearing. This proposal would mean that appeals would not be treated as a new hearing but the Court would have some ability to choose to re-hear certain evidence. Consideration is being given to the development of a lower cost tribunal style resolution process for minor matters;

7. Improving the transparency around consent processing fees. It is proposed to introduce a new requirement for Councils to set their own fixed charges for certain types of resource consents. That would guarantee the full and final processing costs associated with resource consent applications fall under those criteria. The cap will not apply to all activities, and Councils would retain the ability to fix charges in accordance with the Act. Where fixed charges are not required, Councils would be required to estimate the additional charges to the applicant in advance of the application being processed;

8. Memorandum accounts for resource consent activities. Memorandum accounts are a way of disclosing the accumulated balance of revenue and expenses incurred in the provision of certain outputs or services over a period. The proposal would introduce a new requirement for Councils to publish memorandum accounts specifically for their consenting activities. It is anticipated that this would increase transparency around charging and provide Councils themselves with a greater understanding of how consent processing costs measure up against charges;

9. Allowing a specified Crown established body to process some types of consent. It is proposed that either the call-in provisions be expanded, or new legislation be developed to enable the Minister to designate nationally important issues (eg, availability of land for housing) to be eligible for an alternative consenting process in specified areas or circumstances. A dedicated Board of Inquiry or Crown body would process the consent applications within 3 to 4 month time frames;

10. Providing consenting authorities tools to prevent land banking. It is proposed to allow consenting authorities to set conditions when approving section 223 survey plans to require construction work be completed in a time less than the current default 3 years, or else the survey plan will lapse. This is intended to encourage earlier development of subdivisions in high demand areas and to prevent land banking (where subdivision consent is obtained but the developer awaits increased demand for sections); and

11. Reducing the cost of the EPA nationally significant proposals process. It is proposed to make the EPA process more user-friendly and more useful to the public. Cost effectiveness is also an objective.
Better Natural Hazard Management

Greater national consistency and guidance to improve the way that natural hazards are planned for and managed are also proposed, especially in light of the Canterbury Earthquakes. Provisions would be made to ensure the risks of all natural hazards can be appropriately considered in resource consent decisions.

Proposal to Achieve This

It is proposed that natural hazards be added as a matter in the principles of the RMA and that Section 106 of the RMA is amended to ensure all natural hazards can be appropriately considered in both subdivision and other land use consent decisions. It is also proposed that the full risk of natural hazards – both likelihood and the magnitude of the impacts – be taken into account in these decisions.

Effective and Meaningful Iwi/Maori Participation

It is proposed to clarify the role of Iwi/Maori in plan making processes and to enable more effective Iwi/Maori participation in the resource management system generally. It is hoped to encourage pro-active local solutions early in resource management processes to reduce time and costs.

Proposal to Achieve This

Councils will be required to establish an arrangement that gives the opportunity for Iwi/Maori to directly provide comprehensive advice during the development of plans. That arrangement would allow iwi to provide advice on proposed policy ahead of council decisions on submissions with that advice having statutory weight under the RMA. Existing tools in the RMA would also be improved.

Working With Councils to Improve Practice

The proposals would provide more effective guidance on the development of best practice and would require councils to publicly report on their service performance in relation to resource management accountabilities.

Proposal to Achieve This

Central Government would provide local authorities with greater clarity on what they are expected to achieve, how performance would be measured and what they are expected to report on.

CONCLUSION

As this is a discussion document, I have not outlined the significance for transportation engineers in the practical sense. Until the proposals are included a Bill and then into legislation, we cannot be sure of the full extent of the proposals. It is clear, however, that the resource management framework is expected to change significantly.

If changes are made to Sections 6 and 7, it will change the focus of applications and reports that are made to councils on resource consent applications. Streamlined processes and truncated timeframes will mean that additional work will need to be done prior to the lodging of applications. If all changes proceed, there will be limited opportunity for others to have a say in the very minor applications that are made. For larger projects, consents will still be required and it is likely that a fairly similar approach will be required.