DuncanCotterill
LAWYERS

Environmental Law News

Move to hasten consent processing

Councils around New Zealand have not had a good track record when it comes to processing resource consent applications on time. The statistics* show that in June 2009 only 69% of resource consent applications were processed within the statutory timeframes, the lowest result for the past decade.

This type of downwards trend was part of the motivation behind the Resource Management (Simplifying and Streamlining) Amendment Act 2009, enacted in September 2009. This inserted a new section, 36AA, into the Resource Management Act 1991, which requires the development of regulations governing discounts on administrative fees where the council fails to process an application within the time required.

It is proposed that a discount would apply where the responsibility for that failure rests on the council. Previously, there was no real incentive on council to process applications on time and legislative options to require compliance were limited. Meanwhile, any delay can have a significant impact on an applicant, for example, loss of potential profits. The new policy recognises that time is money.

Although the new s36AA outlines the requirement for the development of a policy relating to discounting charges, it does not specify the detail. Originally, the Bill proposed that a discount policy be set by each local authority, but many submissions say the policy should be set at a national level. As a result the Bill was amended so as to propose a default discount policy that is to be introduced as regulations. Compliance is to be mandatory, unless the council has its own policy (which must provide for a more generous discount). This means that some councils which already offer a 100% discount where there is a failure to process a consent on time may continue to do so.

The Minister for the Environment must recommend to the Governor-General that regulations be made by 1 July 2010. As part of this process an issues and options paper was released addressing several matters, including the method of calculating a discount, the value of discount, how local authority fault was to be determined and the timeframes after which a discount would apply.

The Government has now approved the policy for discount regulations. These regulations will mean that when the processing of an application exceeds the timeframes, a sliding scale discount will apply and a Council must apply a discount of 1% per working day, up to a maximum of 50%.

The value of the discount was reduced from that proposed in the issues and options paper (5% per day for the first five working days then 5% per week, capping at 80%). This change was in response to feedback from local authorities which said 5-30% of processing costs were core administrative costs that should be borne by the applicant.

The discount will apply automatically to all applications, for both non notified and notified resource consents. It will be based on the sum of all timeframes giving the consent authority the ability to 'make good' a timeframe they may have missed if overall the consent is processed within time.

The proposal is that local authorities would only be liable to provide a discount where the responsibility for the failure to meet statutory timeframes rests with it. The issues and options paper originally proposed that the regulations could provide an explanation for what constitutes 'fault' for a delay. However, the policy that has been approved says that the regulations will simply define some circumstances where a discount will not apply. Specifically, this refers to an unforeseen circumstance which has resulted in a change to the statutory timeframe, such as the late withdrawal of a submission meaning a hearing is no longer needed. It will also not apply where the delay occurs because the applicant does not pay a fixed fee required.

The regulations are currently being drafted and these are expected to be in force by the end of July 2010.

Overall, it is hoped that the new regulations will make Councils more accountable for their consent processing times. We will continue to monitor this issue with interest.

* *Resource Management Act: 2 yearly survey of local authorities 2007/2008.*

RECENT PROJECTS

NELSON

- Representing applicants at judicial review proceedings.
- Successfully obtaining air discharge and land use consents to operate a brewery in Nelson.
- Advising clients in relation to forestry rights.
- Acting for client in matter relating to coolstore consents at Council hearing and before the Environment Court.
- Acting on appeals filed with the Environment Court on Change 1 to the Canterbury Regional Policy Statement and Change 10 to the Tasman Resource Management Plan (Richmond West Variations).
- Successfully obtaining a variation to a resource consent to allow the expansion of a day care centre.
- Advising client on submissions to Plan Change 13 to the Nelson Resource Manage-ment Plan (Marsden Valley rezoning).
- Representing Applicant for a hydro scheme on an appeal of the Council's decision to grant consent.
- Advising "noisy" industry; including frost control fan distributors/users and rifle range operators.
- Successfully opposing an application for consent for a function centre and crematorium.

CHRISTCHURCH

- Successful prosecution of West Coast dairy effluent discharge resulting in $120,000 fine.
- Successfully obtaining air discharge consent for a national animal by-product processor and exporter.
- Acting in RMA proceedings in the roles of both prosecution and defence.
- Successfully obtaining resource consents for a milk processing plant in Waimate.
- Acting on submissions to the Environment Court on an application for a water conservation order on the Hurunui River.
- Acting for client in relation to a proposed augmentation scheme.
- Acting for client on proposed rezoning of land for residential purposes.
- Acting for Regional Council in appeal on variation to regional land and riverbed plan.
- Acting for Regional Council on appeals of Arnold Valley hydro scheme consents.
- Obtaining consent for erosion protection works (council hearing).
- Acting for MacKenzie farmers in relation to irrigation consents.
- Assessing implications for cubicle farming.
- Acting for Applicant in successful mediated resolution of appeal against duration, cow number and effluent volume caps on MacKenzie Basin dairy effluent consent.

$120,000 effluent fine - lessons for farmers

It's with good reason that the recent $120,000 fine received by Whataroa Dairy Company for effluent discharges has caught the national attention. As the firm that acted for the prosecuting council, we have some insights that may interest, in particular, those in the dairy industry.

The bottomline is:

- The fine could have been a lot higher;
- It could have been avoided;
- Dairy farmers need to take some key steps to avoid similar or even higher fines.

Although there were a total of eight charges spread over three farms, the Court treated them as a single big offence from one large farm, to reflect the overall criminality. Had it not done so, the total fines would have been $154,000 - still less than 1/6th of the $1,020,000 maximum possible fine that resulted from the continuous offending over the three farms.

This offending was before the trebling of the maximum fines under the amendments to the 2009 Resource Management Act. The same offending would attract a maximum possible fine of $1,820,000 if it took place today.

The West Coast Regional Council had given serious warnings in the form of abatement notices for each farm. Dairy NZ and the Council had made available to all dairy farmers a guide to effluent disposal. Despite this, offending was noted as late as five months after receipt of the first abatement notice. At the time of sentencing, the defendant could not guarantee that no further breaches were occurring.

The abatement notices were the clear warning that should have been heeded. They should have shocked the defendant into engaging an expert to stop the illegal discharges, rather than waiting for a conviction and a fine.

The Court was unconvinced by the defendant's initial attempts to focus attention on the sharemilkers. It emphasised that it was up to the company to make sure its systems were good enough and that its sharemilkers were coping.

It found that the defendant could and should have avoided the offending by:

- Making sure at the outset, and certainly once abatement notices were received, that the effluent systems could comply in all weather conditions. This meant having enough storage not to have to irrigate onto wet ground, having an irrigator that could put effluent on thinly enough to avoid ponding or runoff and having a contingency plan for breakdowns.
- Keeping a closer eye on sharemilkers when it saw that things were going wrong, and making sure they have all the training and equipment they needed in order to comply.

In order to avoid learning a similarly painful (or worse) lesson, don't wait till you get an abatement notice and certainly don't wait till charges are laid. Rather, before starting any milking, make sure that all effluent disposal systems have enough storage, correct irrigators and necessary breakdown contingency plans. Once up and running, do everything you reasonably can to make sure your sharemilkers are able to (and actually do) keep all application within the Council's rules or permit conditions.

Spotlight on ECan changes

Water management is a longstanding and vexacious issue in Canterbury - as many Canterbury farmers will attest who are attempting to run viable farms in the face of extreme climatic conditions.

They've been subjected to time-consuming and costly consenting procedures, in many cases exceeding hundreds of thousands of dollars to gain rights to take surface or groundwater to run their farms. Delays have been horrific for some, with applications for water permits being lodged up to nine years ago.

The Government has finally taken the initiative to question ECan's management of fresh water in Canterbury by replacing the Council with Commissioners, who are: Dame Margaret Bazley (Chair), Hon. David Caygill (Deputy Chair), David Bedford, Donald Couch, Tom Lambie, Professor Peter Skelton, and Rex Williams. The Commissioners will remain until all issues are addressed or when local body elections are scheduled for 2013, whichever is the earliest.

The three key aspects of the Act giving additional functions and powers to the Commissioners are:

- Power to impose moratoria to suspend resource consenting processing in catchments that are considered to be fully allocated. This is something that ECan has been requesting from the Government for years. What it means is that the Commissioners (subject to the approval from the Minister of the Environment) have the ability to refuse further consents and put existing applications on hold for fresh water resources in at risk catchments.
- Sidestepping applications for new national water conservation orders or variation/revocation of existing orders under the Resource Management Act. Water Conservation Order Applications for water bodies in Canterbury are now within the jurisdictional powers of the Commissioners rather than a special tribunal. The Commissioners are to make their recommendation against an amended decision-making framework that places more emphasis on sustainable management. The former regime strongly favoured preservation and protection of the water body. There are now no appeals to the Environment Court available on the merits of any recommendation. Any appeal will be to the High Court on points of law.
- Finally, the Bill alters aspects of the process for approving regional policy statements and plans, essentially fast-tracking regional plans. The Commissioners have been given the task of addressing issues, particularly freshwater management 'as rapidly as possible'. To achieve this, there will be no provision for appeals on the merit of any of the decisions of the Commissioners to the Environment Court - any appeals such as the Water Conservation Order process must be directed to the High Court on points of law. The Commissioners are required to consider the visions of the Canterbury Water Management Strategy. The Bill has effectively given the strategy legislative status, and more power.

There may be light at the end of the tunnel for the exploration of development such as storage options and irrigation development in Canterbury. The Government may have removed two impediments to development occurring, being elected councillors and the revised water conservation order regime. However, simply removing the council will not alter the challenges presented by the many competing interests for water.

Official information legislation under spotlight

How do you get a copy of a government report into contaminated sites, or find out how often your local Council has dug up your street?

If you cannot find the information in the public domain, you may be able to get it by making a request to the government department or Council under the Official Information Act 1982, or its local equivalent, the Local Government Official Information and Meetings Act 1987.

The Law Commission is currently reviewing both the Official Information Act 1982 and Parts 1 - 6 of the Local Government Official Information and Meetings Act 1987 (relating to official information). The project focus is the effective operation of the legislation for members of the public, officials, journalists, researchers and politicians. The review is broad in scope, and includes matters such as the general effectiveness and accessibility of the legislation, the grounds for withholding information and the role of the ombudsman (who decides disputes in respect of decisions under both Acts). The Commission will also look at how well the Acts respond to the ways in which we now use and store information, which have changed markedly since these Acts were conceived in the 1980s. The different "political landscape" is another prompt for the review, according to Commission President, Sir Geoffrey Palmer.

The Law Commission has completed the initial stage of its review, which involved a survey being sent out to agencies covered by either of these Acts and other stakeholders. Responses included complaints about the lack of any process enabling discussion, resulting in difficulty identifying which government or local entity held the information sought, frustrations with agencies waiting the full 20 days before responding "no," with no process for engaging with the applicant to refine the search. In relation to local government, there was a perceived overuse of "Public Excluded", and concern about the impact of large requests on local authorities' resources. One response even suggested that large requests are used tactically by trade competitors to overwhelm Councils who are undertaking commercial activities. The Commission is currently analysing the responses and doing further research with a view to releasing an issues paper towards the middle of 2010. This document will also be put out for public comment.

More NES in the pipeline

Regulating the rules that govern resource consent decisions, National Environmental Standards apply to every regional, city or district council across New Zealand by creating minimum standards to be maintained and enforced.

There are currently four NES: air quality, sources of human drinking water, telecommunications facilities, and electricity transmission. Another five National Environmental Standards are in development: contaminants in soil, ecological flows and water levels, future sea-level rise, measurement of water takes and on-site wastewater systems.

We profile the National Environmental Standards for electricity transmission, which have recently come into effect and also look at the proposed National Environmental Standard for assessing and managing contaminants in soil.

NES for electricity transmission

Designed to ensure greater "robustness", the NES provides a national framework of permissions and consent requirements for activity on the existing high voltage electricity transmission line commonly referred to as "National Grid" (owned and operated by Transpower New Zealand Ltd).

The NES does not affect existing access provisions allowing Transpower the right to enter private property but it aims to reduce supply interruptions and grid constraints. While it is difficult at present to accurately quantify the effects of the NES, benefits across the country are expected.

The term 'transmission line' includes underground cables, telecommunication cables, and any facilities or structures used or associated with transmission, but excluding substations. The NES is restricted to transmission lines which were operating or able to be operated at 14 January, 2010 when it came into effect. So the NES does not apply to Transpower's Upper North Island Upgrade Project.

The NES establishes national standards Transpower must meet to obtain consent for construction activity, use of land or occupation of the coastal marine area, activities relating to an access track to an existing transmission line, and undergrounding an existing transmission line.

Proposed NES for contaminants in soil

The proposed NES for assessing and managing contaminants in soil was publicly notified in February 2010.

Removing previous uncertainty, the proposed NES is intended to create a framework "to ensure that land affected by contaminants in soil is appropriately identified and assessed at the time of being developed and if necessary remediated, or the contaminants contained, to make the land safe for human use" (original emphasis).

The proposed NES standard will impact on only new decisions and resource consents. Under the NES an activity will be classified as permitted in circumstances where there is no evidence of soil contamination and where contaminants are acceptable for the intended land use as defined by the relevant soil guideline. Alternatively, activities will be classified as restricted discretionary where there is either a risk to human health or there is insufficient information to confirm whether the risk is acceptable or not. A restricted discretionary activity will require resource consent.

Assessment will be limited to the actual or potential

adverse effects of contamination to human health from subsurface investigations and the use, development and subdivision of land. It does not include on-site and off-site ecology, surface water, groundwater (including human drinking-water sources) or amenity values. The proposed NES does not, however, remove the ability of consent authorities to assess other impacts under the RMA.

With potentially far-reaching impacts for property owners, developers and investors the proposed NES is being viewed with a degree of caution. Just what the burden will be - in terms of costs for investigating land as well as the possible restrictions placed on land use and subsequent effects on the property market - is yet to be seen.

For more information on how either of these NESs or any of the other standards listed above may affect your interests, please contact us.

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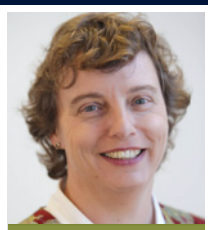

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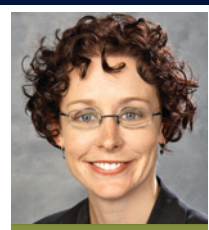

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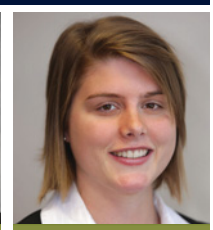

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