

Improving resource consent conditions

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Introduction

The management of New Zealand's water, stormwater and wastewater infrastructure is critical to our wellbeing. Many millions of dollars have been invested in the policy and planning framework for this infrastructure under the Resource Management Act and the Local Government Act but comparatively limited attention has been paid to its implementation via the development and implementation of resource consent conditions.

When a resource consent is granted, the consent conditions are essentially the only active resource management mechanism. Do these provide the community, the consent holder and the consent authority with certainty about environmental outcomes? Are they absolutely clear about the consent holder's obligations? Do they give the consent holder an appropriate level of certainty? Are they enforceable should the need arise? Are they the most efficient and effective methods to achieve the desired objectives?

The current practice of formulating resource consent conditions is patchy across New Zealand. There are many examples of excellence. However, there are a significant number of published examples of poor practice and the lack of application of some potentially useful resource consent condition mechanisms. There is scope to learn from current best practice and improve.

The purpose of this brief overview article is to raise awareness in the water, stormwater and wastewater sector about resource consent condition issues and how they can be resolved to improve outcomes for all parties with an interest in the resource consent process. The focus of this article is on publicly notified discharge permits and water permits but the issues generally apply to other, non-notified resource consents and to other sectors involved in the resource consent process. There may be some other resource consent issues that are not addressed here that may be more particularly relevant to land use consents, for example, issues relating to financial contribution conditions.

Consent conditions - what are the current issues?

Obtaining resource consents for major infrastructure developments usually requires a significant investment of human and financial resources. For contentious, notified resource consent applications, millions of dollars can be spent on consultation, investigations, environmental modelling, policy analysis, reporting, attendance at hearings and legal representation. Experts frequently spend weeks preparing and presenting reports and evidence on complex technical and policy issues. However, the same level of investment and expertise is not always applied to the process of formulating resource consent conditions.

There are some important implications of water and wastewater infrastructure resource consent conditions not meeting best practice. They include:

- uncertainty about compliance requirements,
- poorly targeted compliance and reporting requirements,
- disagreements about what is required to obtain a resource consent secondary approval from a council officer,

- unnecessary repetition of the resource consent process as a consequence of inappropriately short-term resource consents,
- poorly targeted conditions that address an indirect potential consequence of an activity,
- unnecessary expenditure on unnecessary or poorly targeted monitoring and reporting, and
- compromised ability of the consent authority to take enforcement action in the event of significant non-compliance because of either poor condition wording or because of a condition that inadvertently limits enforcement options.

Critical issues

This article summarises and develops the Quality Planning guidance on resource consent conditions¹. The most common critical issues are summarised in the following table:

Issue	Explanation	Alternative
The use of secondary approvals, e.g., “... plan shall be submitted for approval by ...”, “... to the satisfaction of the Manager...”, “... unless as otherwise agreed in writing by the Manager...”, etc.	Conditions that provide explicitly or implicitly for a subsequent approval will generally be invalid and unenforceable ² . A resource consent should provide the authority to do something that is complete in itself.	Significant issues should be resolved prior to a decision being made. Secondary approvals can be replaced by reference to a specific technical plan or design/performance standard that can be independently certified ³ . However, if such a condition is volunteered by the consent holder and accepted by the consent authority, under the ‘Augier principle ⁴ ’ it is enforceable.
Reliance on unenforceable and/or vague guidelines, ‘standards’ or “best practicable measures”.	A resource consent must be absolutely certain about what must be done to achieve compliance and should as far as practicable be self-contained. Standards referenced from a conditions should not provide for a secondary approval.	Care should be taken to ensure that any specific guidelines or standards are certain and enforceable. Standards should be incorporated directly or by reference in the conditions. Reference to a whole document is often inappropriate because it may contain irrelevant or uncertain provisions. A “standard” requires clear mandatory wording, e.g.,

¹ <http://www.qualityplanning.org.nz/consents/conditions-res-con.php>

² NZ Environmental Education Charitable Trust v Manawatu-Wanganui RC, W057/02, 8 NZED 260.

³ The courts have highlighted the distinction between an ‘arbitrator’ and a ‘certifier’. Pine Tree Park v North Shore CC, HC 26/96.

⁴ The Augier Principle provides that if otherwise *ultra vires* conditions are volunteered by a resource consent applicant, and if that resource consent is granted with those conditions, they are enforceable.

Issue	Explanation	Alternative
		<p>“shall” or “must”.</p> <p>“Best practicable measures” conditions should only be used to address relatively insignificant effects, and should provide a list of specific example measures that must be undertaken.</p>
<p>Reliance on a future management plan to resolve a significant issue.</p>	<p>This would generally offend the principle of transparency and the public’s right to have input to the resolution of significant issues during a public consent process.</p> <p>A decision maker needs to be satisfied that all significant issues are resolved or readily able to be resolved and not abdicate their responsibility by transferring a significant matter to a plan or person who does not have authority to make a resource consent decision.</p>	<p>Management plans are most appropriately used as mechanisms to provide an assurance that systems and procedures are in place to ensure that other conditions can and will be complied with⁵. Where some matters are left to management plans, the objectives and contents of the intended management plan need to be incorporated into the consent conditions and must be sufficiently clear and certain to be enforceable.</p>
<p>Reliance on references to technical plans that are not adequately defined e.g., no unique reference number or date.</p>	<p>Lack of specificity can lead to uncertainty and debates about what specific plan must be complied with.</p>	<p>Plan and design specification references need to be quite specific for example, about exactly what version must be complied with, and if necessary, what specific parts.</p>
<p>Reliance on shortened consent duration as the principal mechanism to address a significant adverse effect.</p>	<p>Consent duration is “a blunt instrument”⁶ to address adverse effects.</p> <p>There are two basis circumstances where a shortened consent duration is appropriate: where the sensitivity of the receiving environment is likely to increase over time or where adverse effects are only acceptable for a short period.</p> <p>A replacement application</p>	<p>There are usually better ‘sharper’ tools that can provide greater environmental certainty.</p> <p>Alternatives to shortened duration consents include combinations of conditions for: feedback control, targeted monitoring programmes, mitigation measures, requirements to undertake treatment investigations, and condition review clauses.</p>

⁵ Wood v West Coast Regional Council and Buller District Council, C127/99.

⁶ Genesis Power Limited v Manawatu-Wanganui Regional Council [2006] CIV-2004-485-1139 (HC)

Issue	Explanation	Alternative
	must be given additional consideration i.e., regard must be given to that investment ⁷ .	
Monitoring requirements not directly linked to a specific information need arising from the exercise of the resource consent.	Monitoring must be reasonably related to the effects of the activity - it is not an opportunity for wider research. Its scale and extent must also be reasonable i.e. commensurate with the scale of potential effects.	Monitoring requirements need to be clearly justifiable e.g., to check the extent of a specific adverse effect relative to a specific environmental outcome/standard or to gather specific information related to a specific adverse effect.
Inadequate technical specifications about how environmental effects information must be collected, analysed and/or reported.	Occasionally too many technical specifications are inadequately defined and potentially at the discretion of a consent holder. This could result in inappropriate methods being chosen e.g., out-dated or with inappropriate detection levels. In addition, there could be legal debate about monitoring requirements.	Important technical issues such as the methodology for sampling, preservation and reporting need to be specified by reference to a published methodology or at least to “...methods generally accepted by the scientific community...”. For example, it would normally be essential to specify that laboratories undertaking analyses need to be IANZ accredited or provide some equivalent assurance. It would also usually be appropriate to specify chemical analysis detection levels.
Reliance on terms such as “suitably qualified” for individuals undertaking critical certification.	This terminology is fundamentally uncertain and has the potential to result in debate about what is “suitable”. The greater the potential adverse effects the greater the need for an assurance that a qualified person has undertaken the certification that will provide assurance that those potential adverse effects will not occur.	For any significant issue it is preferable to specify a professional qualification e.g., CPEng, CEnvP, MNZILA, RPSurv, etc., or a tertiary qualification plus a specific level of experience. These conditions need to be complemented by a requirement to provide evidence of the relevant qualification.
Over-reliance on general (adverse	A review condition should not be relied on as the	It is preferable to have targeted reviews and/or other

⁷ Section 104(2A) “...the consent authority must have regard to the value of the investment of the existing consent holder.”

Issue	Explanation	Alternative
effects) review conditions.	primary mechanism to address unanticipated adverse effects. An adverse effects review should generally be limited to unforeseen adverse effects.	mechanisms to deal with anticipated effects by way of feedback control. However, a review clause is usually essential.

Specific resource consent condition mechanisms

There are some infrequently used innovative resource consent condition mechanisms, that in many situations have the potential to provide the community, the consent holder and the consent authority with greater certainty and significantly improve the efficiency and effectiveness of the resource consent process. The following are brief summaries of some key resource consent condition mechanisms.

Feedback control and trigger response

In its simplest form, feedback control has been used as a resource management tool in New Zealand since the 1970s, for example, limiting the abstraction of water if/when a river flow or groundwater level drops to a predetermined threshold.

A more advanced feedback control system can involve a variable response requirement based on the state of a specific resource, for example, modelled groundwater recharge, groundwater levels or river flows. These have been referred to as a form of ‘adaptive management’. However, it is probably more accurate to consider the approach as “variable or conditional feedback control”, i.e., allowing for a change in resource use or allocation depending on resource availability. This concept has historically been applied to some point source discharges to rivers where the allowable discharge increases or reduces as the river flow increases or reduces (this requires a specific environmental quality standard to be maintained at all times). Another example is the use of a water permit where the amount of water that can be abstracted varies in response to water flows or levels.

The concept has also been applied to the annual allocation of groundwater when the total available resource (above an environmental ‘bottom line’) can vary significantly from one year to the next. This would require robust environmental monitoring and modelling and resource consent conditions that specify individual ‘entitlements’ for a given period depending on the estimate of the total resource available before the start of, for example, an irrigation season. The method used to estimate resource availability would have to be detailed in advance in a resource consent condition. A trigger standard would be specified in a resource consent condition and ongoing monitoring undertaken to determine whether the trigger would apply. Clearly water permit holders want a high level of certainty about water availability before operational decisions are made.

Such mechanisms can provide certainty about environmental outcomes and provide annual certainty for water permit holders about their annual allocation.

For some situations, particularly those that involve essential services such as discharges from sewage treatment plants a “trigger response” mechanism may be more appropriate than an “absolute standard” condition. For example, instead of a condition that requires

the concentration or mass loading of a contaminant to be less than a specified quantity, a condition can specify what the response must be if an environmental or other threshold is exceeded. This can serve to highlight the need for the consent holder to control systems to ensure compliance with the predetermined threshold within an established timeframe. A focus on a trigger response can also recognise that it is generally not practicable for example, to stop a sewage discharge, but it is clearly prudent to have a mechanism that reinforces the fundamental requirement to achieve the specific environmental outcome that the resource consent decision is designed to achieve.

It is important to appreciate that reliance on a trigger response condition instead of an absolute standard may limit the enforcement options to actions required to achieve the required environmental outcome. However, in situations involving essential services the ultimate enforcement response would be a requirement to control the activity to ensure that the required environmental outcome is achieved.

Certification and assurance

The use of certification mechanisms has the potential to replace the current level of reliance on generally invalid secondary approvals. The key requirement is to have clear and certain technical specifications for an independent and qualified expert⁸ to assess compliance against. Basic guidance on certification conditions are outlined in the Quality Planning guidance on resource consent conditions⁹. It is important to have a clear understanding that certification involves an expert assessing whether or not well-defined technical standards or other clearly stated requirements have been achieved, i.e., the expert is a ‘certifier’ not an ‘arbitrator’.

Certification conditions can provide a powerful mechanism that can address potentially significant adverse effects. For example, for a highly critical certification where the consequences of an error or omission could be major, the consent authority and the community can obtain a high level of assurance if, for example, the certification is carried out jointly by a consent holder’s appointee and a consent authority’s nominee¹⁰. Two experts have the potential to provide a very comprehensive and rigorous certification process. An advantage of one of them being the consent authority’s nominee (they would not be *appointed* by the consent authority) is that that person is likely to be perceived as particularly independent.

Appropriate certification conditions can be particularly useful for some infrastructure developments where flexibility may be needed because a final design may not be determined until fairly late in the process. Provided that the performance specifications will achieve the desired environmental outcome, are adequately defined in resource consent conditions, and the consent authority has confidence that the specifications can be complied with, the detailed design does not need to be specified in advance.

In situations where the potential adverse effects are relatively insignificant, the relevant technology or systems are well established and other conditions can provide acceptable controls, there would generally not be a need for certification conditions.

⁸ The critical requirement is that the expert has the required qualifications. Some councils prefer to have a council officer undertake such certification. While this may provide some additional assurance, it also relieves the consent holder of some responsibility and transfers it to the consent authority.

⁹ <http://www.qualityplanning.org.nz/consents/conditions-res-con.php>

¹⁰ This does involve the consent authority taking on some responsibility, but may be appropriate to provide an additional level of assurance.

Examples of performance standards that are based on environmental effects for a stormwater discharge would be a total suspended solids reduction of 75% (used frequently in Auckland) or 25 mm first flush capture and treatment (used frequently in Christchurch). An eventual design would need to be certified by one or more specifically qualified person(s) as capable of meeting the specified performance standard. Additional conditions would also be required to ensure that the certified design is installed, maintained and operated correctly. The net result would be flexibility for the consent holder while at the same time providing certainty about the level of adverse effects.

Expert determinations

In some situations it may be appropriate to rely on expert assessment of an event. For example, if a feedback control condition requires a reduction in water take or amount of contaminant discharged in response to a breach of a specified environmental threshold e.g. a water quality standard, it is possible that an event could occur that results in a breach of that standard that is unrelated to the consented activity. If such a situation occurred it would be possible to provide for example, for two experts, one appointed by the consent holder and one nominated by the consent authority to both certify in their professional opinion on the balance of probabilities that the event was caused by events beyond the control of the consent holder. For example, if a condition provided for a trigger response controlling a discharge of treated sewage to land or water if the concentration of a specific contaminant in the receiving water exceeded a specific standard, there would need to be a provision that could take account of a breach being caused by an activity unrelated to the consented activity and beyond the control of the consent holder. If such a joint certification is provided the feedback control would not apply. In the absence of joint certification, the feedback control would apply.

Uncertainty, adverse effects and resource consent conditions

Clearly not all situations warrant the application of all possible resource consent condition mechanisms. All the available mechanisms need to be carefully considered in the context of the potential adverse effects, the nature of the activity and level of uncertainty. This is illustrated in the following simplified diagram.

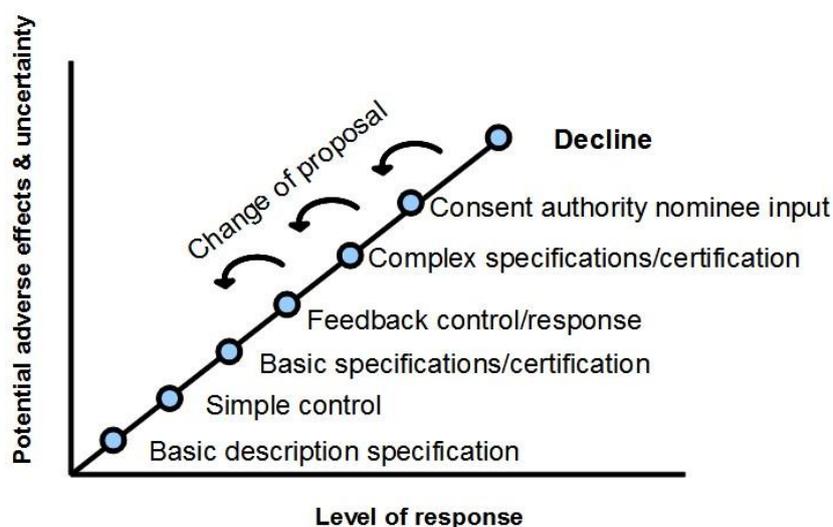


Figure 1 A simplified relationship between the adverse effects/uncertainty and the level of resource consent condition response

As the level of potential adverse effects and/or uncertainty increase, the level of resource consent condition response should similarly increase, up to a point where the potential adverse effects are not acceptable. In addition, a resource consent applicant sometimes reduces the scale or nature of a proposal in response to feedback about potential conditions which in turn then reduces the scale of the likely condition response, i.e., reduced potential adverse effects equals less demanding conditions.

Conclusions

The development and application of resource consent conditions in New Zealand is variable, with relatively frequent use of conditions that are invalid, unenforceable, ineffective and/or inefficient. There is scope for increased awareness of both the limitations of some types of conditions and the potential applicability of other conditions.

Greater use should also be made of available innovative resource consent condition mechanisms to improve the efficiency and effectiveness of the consent process, provide flexibility for the consent applicant/holder, and provide greater certainty that intended environmental outcomes will be achieved.

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