

Practice Note:

Consenting under Proposed and Operative Plans

The following advice note outlines how proposed, operative and partially operative plan changes relate to the processing of applications already lodged or to be lodged with Otago Regional Council.

Plan changes

Plan changes have a bearing on how resource consent applications are assessed. The effect of plan changes on the assessment of resource consent applications varies depending on several factors which are prescribed under the Resource Management Act 1991 (RMA). This relates to the activity status of an application, or the weighting of proposed provisions against operative provisions. Objectives, policies and rules have “legal effect” at different points in time under the RMA. In addition, rules must be treated as operative at different points in time.

When do rules in plan changes apply?

Section 86B(3) of the RMA sets out that rules have immediate legal effect upon notification, if the rule:

- protects or relates to water, air, or soil (for soil conservation); or
- protects areas of significant indigenous vegetation; or
- protects areas of significant habitats of indigenous fauna; or
- protects historic heritage; or
- provides for or relates to aquaculture activities.

As the above relates to most activities carried out by a Regional Council, most rules in a proposed plan will apply and have legal effect from the date they are notified.

What rules apply – the Proposed Regional Plan or the operative regional plans?

Both. Until the proposed regional plan rules are operative, the rules in the proposed regional plan and an operative regional plan apply. If there was not a rule in a regional plan before the proposed plan was notified, then it is this new rule that applies.

What does ‘legal effect’ of rules mean?

It means that if you are applying for resource consent, for the next few years (until the proposed rules are beyond legal challenge and made operative by Council) you may need to apply under both the current operative regional plan(s) and the proposed regional plan. It also means that if you want to carry out a new activity that is a permitted activity, you need to comply with the permitted rules and their conditions in both (all) plans – both the operative plan(s) and the proposed regional plan.

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Practice Note:

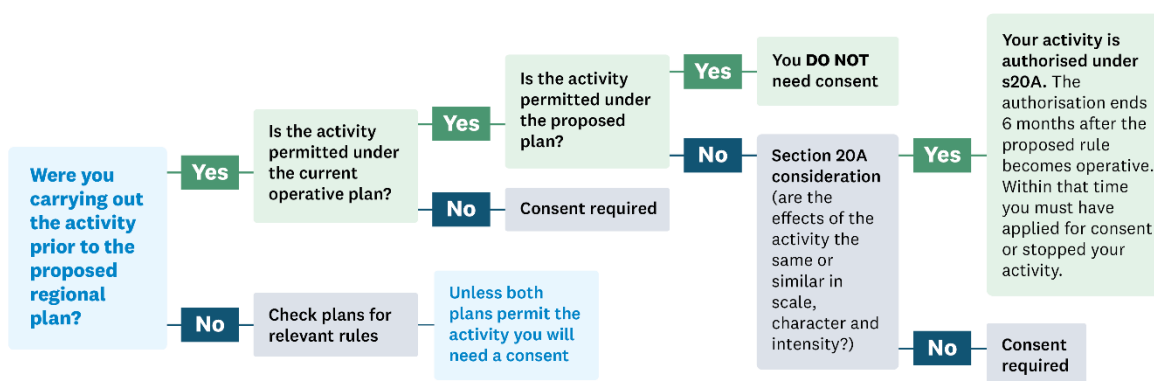
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What happens when the proposed rules are beyond challenge?

Once the rules are beyond challenge, they are treated as operative in accordance with section 86F RMA and any corresponding rules in the operative plans are treated as inoperative.

If I'm undertaking a permitted activity now, or there was never a rule about this activity until now, am I able to continue to do this now rules in the proposed regional plan have 'legal effect'?

Section 20A of the RMA allows for certain existing lawful activities to continue (even if the new plan says that you need a resource consent for your activity). If you are currently undertaking an activity that is a permitted activity in one of the operative regional plan(s), or there was previously no rule about this activity, as long as you don't change the way you go about doing it (i.e. the effects of the activity are the same or similar in character, intensity and scale) you can carry on doing it until the new rules are operative.



When do objectives and policies in plan changes apply?

Objectives and policies in a proposed plan change have legal effect immediately upon public notification of a plan change. The RMA does not distinguish between the weight that should be afforded to the objectives and policies of an operative plan as compared to those in a plan change. The requirements of s104 of the RMA of having regard to various matters relate to the exercise of discretion. Rather than having a general rule about the cases where the objectives and policies of a proposed plan change are to prevail over inconsistent provisions of an operative plan, or vice versa, the planner and decision maker consider the matter on a case-by-case basis according to the circumstances. Relevant factors to the exercise of discretion include:

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Practice Note:

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- the extent to which the proposed measure has been exposed to independent decision-making
- possible injustice to the applicant
- the extent to which a new measure may represent a significant policy shift when compared to the provisions of the operative plan, or implement a coherent pattern of objectives and policies in a plan.
- Where there has been a significant shift in Council policy, and any new provisions accord with Part II of the RMA (e.g. an identified resource management issue that previous plan provisions failed to address in achieving sustainable management) or the requirements of a national policy statement – then the objectives and policies in the proposed plan change may potentially be given more weight.

What is the activity status?

The activity status of an application is crystallised at the date of lodgement. It is based on the activity proposed and applicable planning provisions (rules) at lodgement date. The activity status can be controlled, restricted discretionary, discretionary or non-complying¹.

For applications lodged **prior to** the notification of a proposed plan change, the activity status is as provided by the operative plan rules, although the objectives and policies of both the operative and proposed plan are relevant when considering the application.

For applications lodged **from the notification date of a proposed plan until the decision on a proposed plan** (once the plan is amended or adopted by the Council as directed by the Court) both the operative and proposed (notified version) rules apply and the relevant activity status is the most restrictive activity status, in accordance with the usual principles of bundling applications.

For applications lodged once the rules in the proposed plan are beyond legal challenge or when the plan change is operative, only the rules in that plan change apply.

¹ Permitted activities do not require consent and consent cannot be applied for prohibited activities. S87A and s104A-s104D of the RMA outline the key differences of each activity status.

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