

RMA Rules: A Summary of Activity Classes

Activity Classes - 101

The rules within a regional plan determine the class (status) of any particular activity and whether a resource consent is required for that activity to be carried out. Each of the rules in the plan must specify whether a particular activity is:

- Permitted;
- Controlled;
- Restricted Discretionary
- Discretionary;
- Non-complying; or
- Prohibited.

These classes of activity are provided for in sections 77A and 87A Resource Management Act 1991(RMA) described below.

Permitted activity: No resource consent required

Activities specified as permitted activities within the rules of a regional plan can occur 'as of right' without the need to obtain a resource consent, provided they comply with the conditions stated in the rule. They are very useful for authorising activities that would otherwise require consents under the RMA, but have minor effect on the resource used or the environment affected. They should be considered in a plan to manage low impact 'minor' effects that are consistent and predictable (able to be anticipated), low risk and can be easily remedied or mitigated by landowners without further formal process by simple conditions that can be easily complied with - by anyone who can count to ten and tie their own shoelace. In some circumstances a permitted activity resource use will become the default 'permitted baseline' for an activity.

From an administrative point of view permitted activities must be pretty much 'set and forget' as there would be limited opportunity to register permitted activity users, monitor their compliance performance or charge for compliance monitoring. There is no mechanism to set s36 charges.

Caution must be applied where cumulative effects may arise if many resource users are operating under permitted activities in a confined location or catchment. An example is the discharge of effluent from septic tanks in a beach community where contamination from many systems accumulates to cause local health issues.

Controlled activity: Resource consent required but always granted

Activities specified as controlled activities within the rules of a regional plan are activities which require a resource consent from the Regional Council, but which will always be granted by the Council. The application for a resource consent will be assessed according to specified matters over which the Council will exercise its control. It is therefore very important that applications for controlled activity consent cover precisely those specified matters. Because council must grant consent, applications should be refused unless complete.

Controlled activity consents give certainty to users and if well designed should be relatively easy (less expensive) for council to administer. The plan rule making an activity controlled must state clearly what council (as consent authority) has reserved control over in relation to the activity. (s77B of RMA). The rule must specify any requirements, conditions (terms, standards, restrictions, and prohibitions), and permissions with which the activity must comply. Essentially, if the matters (aspects of the operation of the activity) council has

reserved control over are clear in the rule then the consent conditions (including any self-monitoring and reporting requirements) of controlled activity consents should be the same or similar. Council can set s36 charges to recover any costs of compliance or monitoring.

Discretionary activity: Resource consent required

Activities specified as discretionary activities within the rules of this Plan are activities which require a resource consent from the Regional Council, but which the Council has retained its discretion as to whether it will grant the resource consent. The Council will, in considering any application for a discretionary activity, be guided by the objectives and policies contained within the regional plan, the Regional Policy Statement (RPS), any National Policy Statement (NPS) and the requirements of the RMA. There are two types of discretionary activity, with the rules specifying which of these two discretionary activities applies in each case:

(a) Restricted discretionary activities

Restricted discretionary activities are those for which the Regional Council has restricted the exercise of its discretion. This means that the Council limits the range of matters it considers and only sets conditions (if the resource consent is granted) that are relevant to the matters to which it has restricted its discretion. The relevant rules of a regional plan must list these matters. Restricted discretionary rules are helpful where council wants to focus on the management of a specific form of activity that has a narrow set of cause/effect matters at issue.

The matters of discretion are those matters the council can consider when determining to either decline resource consent, or to grant consent and impose conditions. A council can consider RMA Part 2 matters in granting a restricted discretionary resource consent, but the rule should state this. Care needs to be taken in specifying the matters over which a council restricts its discretion. It is helpful to list these matters in relation to the activity being considered and the effect(s) to be managed, and give guidance (limits if necessary) on conditional requirements, quoting relevant policy parameters. If the restriction is too narrow then the council may not be able to set conditions on consents that avoid or mitigate significant adverse effects. Conversely, if the discretion is too wide the restriction on discretion becomes meaningless and a full discretionary activity rule should be considered.

Council can decide that a restricted discretionary activity application is for an activity that exceeds or is outside the matters over which the council has restricted its discretion in the rule and decline it. As with controlled activity applications, it is very important that applications for restricted discretionary activity consent cover precisely those matters to which council has restricted its discretion.

(b) Discretionary activities

Discretionary activities are those for which the council retains full discretion. The council may exercise its discretion in accordance with the relevant policies of a regional plan, regional policy statement, any relevant NES and the RMA in particular Part II matters. If the resource consent is granted the council may set any conditions that fall within the Council's powers under Section 108 of the RMA.

Discretionary activities are useful where (because of environmental or site constraints) the effects of the activity are so variable that it is not possible to prescribe standards to control them in advance. Many councils use discretionary activity rules as the 'default', where an activity cannot meet (any or all of) the standards for a permitted, controlled, or restricted discretionary activity.

Discretionary activity rules can be designed to cover 'composite' resource consents to authorise diverse activities for a project that has many different resource use and effect aspects, for example for a quarry.

Non-complying activities: Resource consent required

Activities specified as non-complying within the rules of a regional plan are activities which require resource consent from the Regional Council, but which the council may only grant if the consent application meets RMA threshold criteria and the objectives and policies of the regional plan. Applications for a non-complying activity need to be particularly robust to show that these criteria and requirements can be met.

RMA s104D places particular restrictions on the granting of non-complying activity applications; consent can only be granted if council is satisfied that either the adverse effects of the activity on the environment will be minor (s104D(1)(a)), or the application is for an activity that will not be contrary to the objectives and policies of the regional plan (or any proposed regional plan) in respect of the activity(s104D(1)(b)). In this context it is very important that the objectives and policies of the plan be carefully crafted with this in mind. Some regional plans have policies that specify criteria that must be considered when deciding on non-complying activity applications, this would be the ideal approach.

The non-complying activity class can be useful for situations where it is intended that consents only be granted in exceptional circumstances (for example in managing cumulative adverse effects on a resource that is at, or close to, capacity). However, using the non-complying activity class in this way requires clear, strong, objectives and policies to be included in plans. Without such clear, strong, objectives and policies, there is a risk that the threshold to meet the second test above (that of s104D(1)(b)) may be set too low, inadvertently allowing consents to be granted where it may not otherwise have been desirable to do so.

Section 87A(5)(b) RMA also requires the council to test that the non-complying activity can comply with any restrictions, conditions and permissions specified in the RMA, regulations or regional plan.

To avoid doubt, a rule providing for a non-notified activity should state;

- what activities are regarded as non-complying,
- what policies apply to the application,
- where in the district or region the non-complying activity class is to apply,
- any restrictions, conditions and permissions that need to be complied with and
- when an application for a non-complying activity will be notified.

Prohibited activity: No resource consent will be granted

Activities specified as prohibited activities within the rules of a regional plan may not occur and no resource consent can be granted for these activities. A prohibited activity rule needs to be stated in clear and precisely absolute terms, especially what the activity is and where (or when) it applies. Prohibiting any activity sends a strong message that council will not even consider the activity.

The prohibited activity class is the most restrictive of any activity class and therefore must be used with care. The decision to use it should be backed with strong evidence of its necessity, including justification through objectives and policies. Make sure that the activity or effect is easily identifiable and discrete (so as to avoid loopholes in interpretation or inadvertently including activities or effects that may otherwise be acceptable).

When setting up a prohibited activity rule, make sure that the activity is one that the council are determined should not occur in the region (or at a specified place in the region) and is an activity council has a function or duty to administer and manage under the RMA (s30 for regional councils). Also make sure that the activity is a significant issue, conflict or concern (s65(3)) for the region, with objectives and policies to provide clear direction to support and justify the prohibited status (if not, consider a less restrictive activity class).

Controlled vs Restricted Discretionary Rules

What is the difference between matters (aspects of the operation of the activity) council has reserved control over in a Controlled Activity rule and the matters over which the council has restricted its discretion to for a Restricted Discretionary rule?

In some regional plans the matters council has reserved control over and the matters council has restricted the exercise of its discretion over seem to be similar or the same. This is not helpful and potentially confusing.

The difference should be that:

- In a controlled activity rule the activity itself and the control over effects it causes including specific aspects of the operation of the activity should be precisely stated in the rule (or referenced to a policy where they are); even to the point of stating conditional requirements in the rule itself, similar to a permitted activity rule if that makes requirements clear. Some controlled activity rules include the standards and terms set out in a table related to specific catchments or locations. The requirements for application information, including any supporting AEE (or Farm Nutrient Plan) should similarly be tightly focussed on the rule requirements. Essentially the links between the rules conditional requirements and the application information must be concise and robust. Staff must confirm this before the application is accepted, otherwise trouble.
- In a restricted activity rule, the activity itself should also be precisely identified but the matters over which the council has restricted its discretion can be listed as those aspects of the activity that council has concerns about, will set limits on, and make a decision about, after considering plan policy, other relevant requirements and any relevant AEE or site constraints. It is also by default saying that it considers other aspects of the activity are not important or dealt with by other rules (e.g. permitted activity) or not a matter over which it has a duty (s30).