Where the Wild Things Are: Examining the intersection between the RMA 1991 and the Wildlife Act 1953

Pip Wallace *LLB Auck LLM (Hons) Waikato, Lecturer, Department of Geography, Tourism and Environmental Planning, University of Waikato.*

THE RESOURCE MANAGEMENT ACT 1991 & THE WILDLIFE ACT 1953

Recent case law has drawn attention to the impact of the Wildlife Act 1953 (WA) and its intersection with the Resource Management Act 1991 (RMA). Some of the decisions have been summarised in previous RMLA publications and it is the intention of this article to examine more closely aspects of those cases. A particular focus is the use of review conditions related to wildlife in resource consents and the role of an Assessment of Environmental Effects (AEE).

The effect of the WA is to provide for the protection of wildlife and to regulate the hunting of game. The Act deems wild animals to be absolutely protected unless scheduled as game, partially protected, or not protected animals. Wildlife sanctuaries and reserves can also be created under the Act. Where the absolutely or partially protected status applies, permission must be obtained from the Department of Conservation, in order to hunt or kill the animal pursuant to s53. To fail to do so, constitutes an offence pursuant to s63(1). The restrictions are wide ranging and those listed in s63(1)(c) include disturbing, destroying or possessing a nest of protected wildlife or game. The definition of *hunt or kill* includes *taking, as* a result of which any method of taking, catching or pursuing is also captured by the provision.

Potentially included in these definitions is the concept of incidental take, where wild animals are killed or taken, or their nests interfered with during a development activity or vegetation removal operation. Fortunately the average mynah, rat or opossum and many other common introduced animals are excluded from protection by way of Schedules to the WA. If however, the intention is to destroy habitat or disturb the nest of fauna such as kokako, tui or gecko, a WA permit will need to be obtained from the Department of Conservation. In practice such permits are generally obtained in large-scale operations such as forestry applications, where the habitat of an iconic species is known to be affected. When the resource consent to fell is lodged with the council, a copy is usually provided to the Department of Conservation which can make recommendations as to procedures to follow.

THE CASE OF THE MOKO SKINK

A recent example of the discovery of the moko skink, during development of the Whangamata marina is a cautionary tale. The decision in *Gunson v Waikato Regional Council* unreported, Environment Court, 4 December 2008, A134/2208, Bollard J., records the facts. Over a period of a more than a decade, the Whangamata Marina Society sought and obtained a range of resource consents to develop an extensive marina at Whangamata, Coromandel Peninsula. The consents contained extensive conditions regulating development activities in order to avoid, remedy or mitigate adverse effects. In terms of fauna, there were particular concerns relating to birds such as the banded rail and the dotterel. As a condition of one of the coastal permits for reclamation, a fauna management plan was required to be completed.

Pursuant to the consent, the fauna management plan was to be completed prior to construction work commencing. When this plan was prepared it recommended surveying a particular area for reptiles and the decision records that the presence of moko skink became known to the Marina Society in March 2007. The presence of the skink at the site had not been alluded to in evidence of ecologists before the Court, in the previous marina appeal brought by iwi bodies representing tangata whenua interests. No clear finding was made in *Gunson* as to when the moko skink occupied the particular site. The possibility of migration to the salt marsh site post consent was raised.

Although works were not to have commenced on the site prior to completion of the fauna management plan, through miscommunication, kikuyu grass and pampas vegetation associated with the skink's habitat needs, had been sprayed with herbicide in various locations within the site.

In this situation, the Department of Conservation responded to require permits under the WA to be obtained, in order to put into place immediate measures to protect the species. Subsequently, the applicant sought interim enforcement proceedings in the Environment Court, to the effect that the Marina Society obtain resource consents to damage/destroy the habitat of the species and that the Regional Council require this. The application was unsuccessful. The Environment Court considered the chain of events, the actions taken and the WA permits obtained and determined that the likely effects on the environment would not be adverse to the point that would justify intervention of the Court.

A pragmatic decision such as this may provide welcome relief to the conscientious developer caught unawares by the presence of a secretive species. Yet it treads a path that may not be completely beneficial to absolutely protected species. The moko skink case clearly highlights the things that can go wrong. Set out below are a series of issues that require further thought in terms of managing these processes. The issues are not all necessarily in reference to the *Gunson* decision, which had its own particular set of circumstances.

The case highlights the importance of a rigorous AEE, with careful ecological assessment, in terms of protecting the environment and providing for smooth process for the applicant. Had the skink been detected from the outset, its position could have been protected by conditions of consent, together with conditions attached to a WA permit. To be fair to the applicant in this case, there is an inference in the decision that the skink may not have been present to find in the area, at the time of the original assessment and should that be the case, then such problems are inevitable. In this instance the safeguard of a condition requiring the preparation of a fauna management plan proved invaluable to the survival of the skink in this habitat. A more rigorous approach would require the preparation of a fauna management plan as part of an AEE, and when there is to be a lengthy delay between consent and construction, a requirement for resurvey of the area in terms of protected species. It is accepted that such an approach may add to cost and delay, but it can be argued that the cost, delay, disruption and damage to species of not taking this action, outweighs the initial expense of resurvey.

Is a fauna survey/management plan required as a condition of consent necessarily the best method to approach this problem? A condition to be given effect to prior to the start of development works, carries less risk than an ongoing adaptive management condition requiring review when unforeseen or undue adverse effects are encountered, as a result of the operation of the consent. Judge Bollard in *Gunson* accepted the Society's submission that it was not possible in relation to a development project such as Whangamata Marina to predict all fauna that might be on-site, particularly where there is a significant time lapse between applying for the consent and the commencement of works. He viewed the essential purpose of having fauna management plans, to be to ensure that any fauna on sites when resource consents come to be exercised are identified and appropriately managed. It is accepted that such plans can provide a pragmatic solution, where an adaptive management approach can be applied, without undue risk. However in terms of species for which on site protection or translocation is not a viable proposition, this approach may carry the risk of causing irreversible effects. It would be unfortunate if the use of adaptive management type conditions supplanted the role of a rigorous AEE.

Once consent is granted and not appealed, it confers a right upon the owner to carry out the consented activities. Interfering with this right is to be treated with caution. Under

the RMA the opportunity to prevent the operation of the consent is limited. Pursuant to ss126 and 132(4) RMA, consent may be cancelled if not exercised, or upon review, where it is found that inaccurate material influenced the grant of consent. (*Director-General of Conservation v Marlborough DC,* unreported Environment Court C113/04).

As a safeguard, when adaptive management-type conditions are employed, review conditions are attached to the consent pursuant to s128 RMA. The use of these conditions is central to the employment of an adaptive management approach, as they enable the conditions to be recalibrated to manage the impacts, as they are established. Where specified in the original consent, review conditions enable the consent authority, to review conditions of consent to deal with any adverse effect on the environment, which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage. Although a useful mechanism to reshape conditions at a later date, s128 and the related s132, do not enable termination of the consent. (*Minister of Conservation v Tasman DC*, unreported, High Court, Nelson CIV-2003-485-1072, 9 December 2003, Ronald Young J, 73-74). Furthermore, when making a decision upon the review of conditions, the consent authority is directed by s131(2)(b) to have regard to the matters in s104 and to whether the activity allowed by the consent will continue to be viable after the change. This direction may limit the impact of review. It is a further reason for supporting the provision of full and effective AEEs. The implications of this situation will be discussed further in a later section of this article.

Although power exists under the RMA to take enforcement action reliant upon s17 RMA, the general duty to avoid adverse effects, it is not a section commonly used to restrain existing activity and certainly not to reverse a constructed development. Once a development is consented, or construction has commenced, the investment and legitimate expectation surrounding the development is a powerful force to reckon with. Furthermore the law is unsettled as to whether the remedies available pursuant to s314 RMA, in the absence of inaccurate information supplied with consent, would extend to cancellation of the consent (*Director General of Conservation v Marlborough District Council* [2004] 3 NZLR 127). This is again, a further reason to support a rigorous AEE at the outset.

Finally, relying upon ecological planning and surveying post-consent, but pre-start of construction can render fragile ecosystems more vulnerable to human error. The herbicide spraying of potential habitat of moko skink is a case in point. Although it could happen at any time, it is more likely to occur post-consent, as operators ready for development. Robust project management and vigorous monitoring is vital to effective protection of any kind.

It is a requirement of s88(2)(b) RMA that the detail of an AEE, correspond with the size and scale of the effects that the activity will have on the environment. For a large scale project, there is usually a lengthy period of lead-in time which enables the preparation of a detailed AEE. It makes excellent sense for an applicant to conscientiously document the environmental effects in order to be fully prepared for all eventualities and this is the practice of many major utility companies. Dealing with ecological surveys post consent may deliver unwanted uncertainty for the applicant and may result in costly proceedings and delays.

A final issue is the burden that a less than adequate AEE can place on the general public and government agencies such as the Department of Conservation. In an environment where an order security for costs may deter legitimate opposition to applications, a rigorous AEE may constitute the last line of defence for threatened species.

The moko skink case is a useful example of problems that may arise when development activity intersects with wildlife habitat. It appears in this situation that the actions of the parties involved, have mitigated any irreversible impact on the skink in this area and that translocation will be successful. It must be recorded however, that tangata whenua have significant concerns relating to the entire proceedings and have particular concerns relating to activities that disturb/and or translocate species regarded as taonga.

THE CASE OF THE POWELLIPHANTA SNAILS

A second example is the litigation stemming from the west coast of the South Island, relating to the impact of open cast mining and *Powelliphanta* land snails.The decision, *Royal Forest and Bird Protection Society v Minister of Conservation* [2006] NZAR at paras 21-22, established that habitat

destruction resulting in incidental killing may equate to a breach of the WA, as constituting hunting or killing as defined by s2 of the Act. In a related 2008 decision, *Solid Energy New Zealand Ltd v The Minister of Energy and Ors* unreported, High Court, Wellington CIV-2007-485-1381, Mallon J, 10 December 2008, the intersection between the RMA and the WA was examined further. The decision records that Solids Energy carries out mining pursuant to land use consent issued under the RMA and pursuant to licences granted under the Coal Mines Act 1979 (CMA). As the land on which the operations are carried out may contain wildlife, the permits granted contained conditions to protect wildlife, including detailed conditions requiring the preparation of fauna management plans to facilitate, amongst other things, the catching and translocation of the snails. The decision refers to the reasoning of the Environment Court when imposing the conditions where the Court stated:

> "[132] we acknowledge that there is a risk of failure, and thus we accept that the conditions require close monitoring and allow for a regular review of the conditions of consent. We use an analogy from the reasoning in the decision in *Jackson Bay Mussels Limited and Ors v West Coast Regional Council* in relation to Hector's dolphins. In the event that it is found that there is an adverse impact on the kiwi or the patrickensis snails beyond that contemplated in this decision, then that is a matter which may give rise to the review of the consent as a whole. The concern of the opponents is that by the time the adverse consequences of the plan are known, the excavation of the site will have already occurred and the loss of the patrickensis and their habitat will be a foregone conclusion. "

Given that a review of condition cannot lead to termination of the consent, the intent to "review the consent as a whole" does not seem particularly reassuring. Furthermore, as the "opponents" in this case appear to have identified, an adaptive management approach may allow for the activity or part of the activity to proceed, with the damage being assessed on an ongoing basis. For some species this may be appropriate, but for threatened species, particularly those with small, discrete populations, even limited impact could have significant effects on population levels. (See for example Drewitt, A.L. & Langston, R.H.W., "Assessing the impacts of wind farms on birds", In Wind, Fire and Water: Renewable Energy and Birds, (2006) Ibis 148 (Suppl. 1): 29-32).

Adaptive management is to some extent an ongoing experiment, with the stakes being particularly high for the vulnerable. Factor in human error and it could become a lethal cocktail. Although it is accepted that considerable financial resources and scientific expertise may be employed in order to limit adverse effects on species and achieve sound results, where undue risk to species is a possibility, the use of adaptive management techniques should be rigorously controlled. The better approach is for the applicant to provide a comprehensive AEE, accounting for detailed ecological planning, at the outset of the application.

An alternative, or even additional approach, is to enable termination of the consent upon review. Such an option is being promoted in relation to proposed legislation for the regulation of Environmental Effects in the Exclusive Economic Zone (EEZ). The Cabinet paper discussing the proposed legislation records in the Executive Summary:

> "17. A precautionary approach that allows for the application of adaptive management tools will be used to mitigate any lack of information about the marine environment and the environmental effects of individual activities. The provision for adaptive management will not restrict the ability of the consent authority to decline any application. For example, new types of activity, if approved, could have a staged work programme, with stringent monitoring requirements and the ability to revoke permission if the environmental effects exceed set levels. "

Amendment to s128 RMA could effect the adoption of a similar approach on land and in the coastal marine area. Although it is accepted that the EEZ is less extensively explored and researched than the territorial sea and land, aspects of scientific uncertainty are common to all areas. This uncertainty combined with a precautionary approach, supports an option to cancel consent upon review, where it is found that effects exceed set levels. The principles of non-derogation of grant and legitimate expectation may impact upon the ability to apply any such amendment

retrospectively. However in terms of property rights and future consents the purpose shared by the parties, when they entered the relationship, would be shaped by limitations of the RMA as amended, as would any subsequent consent. It should also be noted that the Cabinet Paper sounds a caution in terms of the use of an adaptive management approach and concludes that:

> "There are many circumstances, such as proposals for activities in unique or vulnerable areas, where adaptive management may not be appropriate due to the consequences of any irreversible effects."

The focus of the Solid Energy case was not upon this issue, but rather upon the question of whether, when Solid Energy takes steps to protect wildlife pursuant to conditions in RMA and CMA consents/licences, it is also required to obtain authorisation or consent under the WA. Solid Energy was of the view, that having obtained detailed permission under the RMA to deal with the wildlife and take steps to protect it by translocation, that further permits under the WA, should not be required. The Court was not convinced by this argument, particularly as the existing RMA consents required, as a condition, that any necessary WA permits be obtained. However, the court did leave open the possibility that in certain circumstances, RMA consent could constitute lawful authority for the purposes of the WA.

In relation to dual permitting the court stated, at para 122, "Whether this dual process serves any useful purpose when all relevant interests are taken into account by the consenting authority under the RMA process, or merely serves to add to the time and cost for the applicant for a consent, is a matter for Parliament." Sympathy can be felt for a conscientious applicant who has gone to great lengths to obtain a consent that provides for protection of a species via a detailed translocation procedure and then finds that additional permits under the WA are needed. In the current climate of recession and the drive for efficiency of procedure, this will no doubt be an area targeted by resource users for reform. Before adopting such a change there are several issues to contemplate.

Dual permitting under separate enactments is not uncommon, particularly where the mandates or foci of those Acts are different. Commonly these processes are complementary. Pursuant to s5, the purpose of the RMA is the sustainable management of natural and physical resources. Protection of the habitat of fauna is a matter of national importance pursuant to s6(c), however, it is but one matter of many to be considered, and is viewed as accessory to the primary purpose. (*NZ Rail Ltd v Marlborough District Council* (HC) [1994] NZRMA 70, 85, Greig J.). In this way, protection of fauna may "give way" to another matter of national importance or to enabling people to provide for their social, economic and cultural wellbeing, provided adverse effects are adequately avoided, remedied or mitigated.

The WA has a more defined focus relating to the protection and control of wild animals. It can be argued that this defined focus will better serve the interests of threatened species in ensuring their continued existence. The decision-maker on WA permits, exercises powers delegated by either the Director General of Conservation or the Minister of Conservation and is likely to be well versed in species management. Although the Department of Conservation has extensive input into reviewing and making submissions on resource consents, RMA land use consent procedure does not vest decision-making power in the Department. In a climate where biodiversity is under threat both globally and nationally, it would be prudent to ensure the presence of robust measures to protect threatened species, in the suite of regulatory tools. That is not to say that the law could not be improved, but rather that in a situation of risk, it is wise to have strong checks and balances. It can be argued that in terms of threatened species protection, it would be a retrograde move to enable RMA consent to constitute lawful authority for the purposes of the WA.

CONCLUSION

Successful negotiation of space shared with humans, is central to the continued existence of many species of wildlife. In the practice of resource management, finding workable solutions to the issues of shared space is an important challenge for all disciplines involved.