The ECan Act: Understanding the New Provisions for Planners
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The Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (the ECan Act) has provided some interesting new planning provisions that will exercise the minds of planners, lawyers and, I suspect, the Courts over coming months if not years. The ECan Act was introduced and passed under urgency on 30 March 2010 without going through a Select Committee process. Here I address aspects of provisions for Canterbury Water Conservation Orders and moratoria.

Canterbury Water Conservation Orders

The unexpected inclusion of Subpart 3 – Water conservation orders in the ECan Act has received significant media attention, but much less detailed analysis. Section 46 of the ECan Act specifically states that, with specific exceptions (e.g. section217 of the Resource Management Act (RMA)), the subpart applies instead of Part 9 of the RMA to every application for a Canterbury Water Conservation Order (CWCO). It is retrospective, applying to applications for WCOs made prior to the enactment of the ECan Act (see Joseph (2010) for an analysis of the constitutional implications of this and other aspects of the passage of the Act). Schedule 2 also removes the Hurunui WCO, which was reported on by a special tribunal under section 208 of the RMA on 14 August 2009, from the jurisdiction of the Environment Court and places it under Environment Canterbury (ECan – formally, the Canterbury Regional Council).

New applications for WCOs in the Canterbury region continue to be made to the Minister for the Environment, who may request further information or make any inquiries he considers necessary, and then must reject the application or submit it to ECan to hear and report on. ECan can recommend that the Minister reject the application or that he recommend the Governor General make the order. There are therefore two significant changes, as noted by the media: first, ECan has replaced the special tribunal which is provided for in the RMA to consider WCO applications; second, the only appeals of an ECan decision are on points of law and to the High Court. The Environment Court has been removed from the play.

In making an application and in its consideration of a CWCO, an applicant and ECan respectively must have regard to the matters set out in section 207(a) to (c) of the RMA: namely, the application and submissions; the needs of primary and secondary industry, and of the community; and the relevant provisions of every national policy statement, the Canterbury regional policy statement and regional plan(s), and district plan and any proposed plan. Significantly, the ECan Act also *changes the purpose* of a WCO in Canterbury. The purpose of WCOs under the RMA is to give particular regard to the recognition and sustenance of the outstanding amenity and intrinsic values afforded by the waters subject to the application. Under the ECan Act a new set of criteria are added: having particular regard to the vision and principles of the Canterbury Water Management Strategy (CWMS). These are reproduced in Schedule 1 of the ECan Act.

The CWMS was not produced through a statutory process. That and the truncated, rapid process by which the ECan Act proceeded through Parliament means that the vision and principles have not been subject to the same rigorous process one would expect of legislation generally or RMA policies/plans with this level of effect. There is no case law specifically on the CWMS as to its interpretation. Guidance from wider case law will no doubt be drawn on to aid interpretation.

The CWMS vision "to enable present and future generations to gain the greatest social, economic, recreational and cultural benefits from our water resources within an environmentally sustainable framework" has the potential to revitalise debates that were had in the 1990s over the interpretation of section 5 of the RMA. It is also focused on a regional scale. Whether "outstanding" is to be considered in a national or a Canterbury sense will also be debated, and may result in a number of applications for CWCO for water bodies that might not have been considered nationally outstanding, but are outstanding in a regional sense.

Moratoria

Provisions have existed for the Minister of Conservation to put moratoria in place for the coastal marine areas since the RMA was first enacted, but not for any other area or allowed to any other authority. The ECan Act provides ECan with the ability to impose a moratorium on "specified applications" for water permits or discharge permits (to land or water; discharges to air are not included). This is a power that ECan has sought since the early 2000s; it is interesting that it has now been provided, but only in Canterbury, and only after the removal of the elected regional councillors and their replacement with appointed commissioners. Notification of a moratorium must include its expiry date, which can be no later than the day after the day on which the next councillors are elected.

The moratorium can only be put in place with the prior permission of the Minister for the Environment. The process of putting in place a moratorium requires ECan to "have regard to" the vision and principles of the CWMS; the extent to which the freshwater of the area covered by the moratorium is subject to high or increasing demand or to diminishing quality; the extent to which the freshwater of that area is fully allocated, nearing full allocation, or over-allocated; and any other relevant matter.

There are two points of interest here: the wide discretion given to impose a moratorium, and the spatial component. Notably, ECan is not required to demonstrate that any of these criteria are met, but only to have regard to them when reaching its conclusion that it wishes to impose a moratorium. It has discretion over whether to impose a moratorium, fettered only by the Minister's prior approval. There are no criteria set out on which the Minister is required to grant that approval. It will be interesting to see if the Minister waits for ECan to request his approval of a proposal for a moratorium. Presumably, the Minister giving assent to a moratorium is sufficient for ECan to decide to impose one, whether or not it had intended to request one.

The ECan Act also specifies that the moratorium be imposed "on specified applications in relation to 1 or more areas of the Canterbury region" (section 34(1)). This will require ECan to carefully and unambiguously describe the area(s) to which it applies. It will be interesting to see if and how this will be applied to unconfined aquifers. The provisions also do not have to apply to complete catchments or river systems and when applied presumably the boundaries will have to be advised to the Minister to ensure that he has given prior approval to the area that is intended. A simple statement such as the Minister giving approval to the imposition of a moratorium on "the Hurunui River" will not be sufficient to cover the rivers and streams running into it or the areas of land that comprise the Hurunui River's entire catchment, especially given the definitions of the Hurunui River in Schedule 2 of the Act. Any prior approvals will therefore need to be carefully worded and considered. Notification of an area which has not previously been approved as specified by the Minister would be challengeable.

The new provisions create a separate process for considering applications for any of the specified activities covered by the moratorium (see figures 1 & 2).

Reference

Joseph, P. (2010) Environment Canterbury legislation *NZ Law Journal*, June 2010, 193-196.
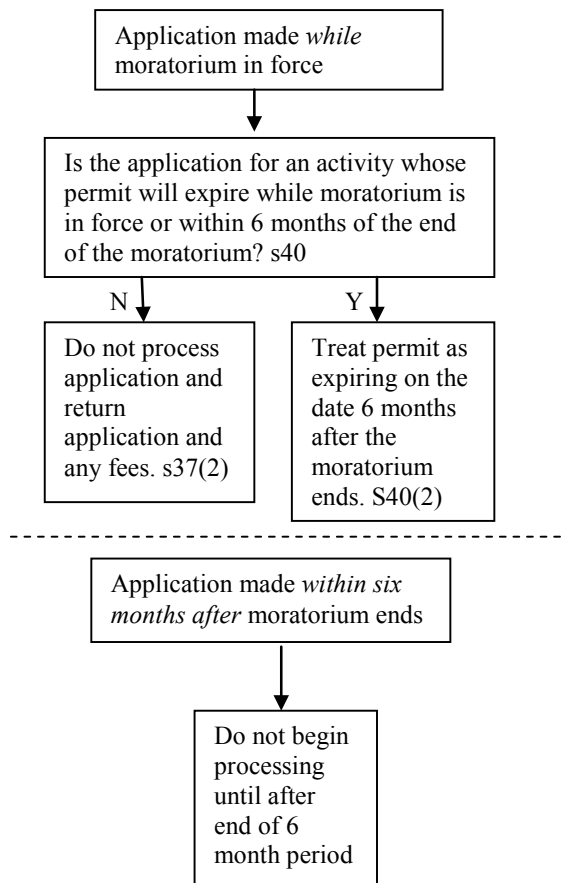
Figure 1. *The effect of ECan Act moratoria on resource consent applications to which a moratorium applies or has applied in the last 6 months (All references to sections are to the ECan Act unless otherwise specified)*
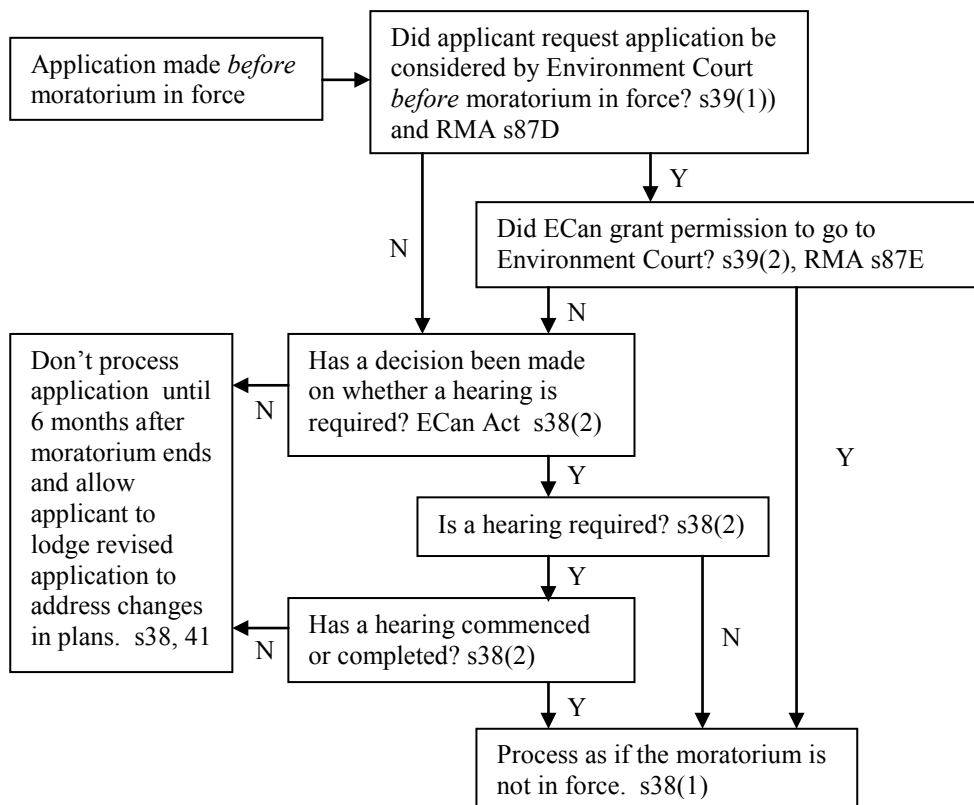

Figure 2. *The effect of ECan Act moratoria on resource consents applied for before a moratorium was put in place in the area and for the activity that the moratorium addresses. (All references to sections are to the ECan Act unless otherwise specified)*