A More Than Minor Debate: The Correct Use of Effects Terminology

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Introduction

We should all be proud pedants when it comes to our choice of words. Words are the primary medium through which your ideas and opinions can be conveyed. Words mean what they say, and if you want to say what you mean, then you must choose your words with great care. With that in mind, how many times have you somewhat aimlessly written or thought "the effects will be no more than minor" or "the effects are de minimis"? Be honest. It happens. A lot. These phrases have become somewhat of a mantra, trotted out automatically without a great deal of thought being given to exactly what is meant in any particular situation, or any thought being given to whether it is appropriate to use this phraseology at all. As a result, the Court still finds it necessary to remind experts and lawyers that the "no more than minor" assessment is solely a threshold test for otherwise non-complying activities under a district or regional plan.

Experts frequently give evidence, with the endorsement of legal counsel, to confirm that controlled or discretionary activities, for example, will have effects on the environment that are "no more than minor", despite this test being relevant only to whether a non-complying activity might be allowed through the section 104D "gateway":

(Upland Landscape Protection Society v Clutha District Council EnvC Christchurch C85/08, 25 July 2008, Smith J at [93]):

- Generally we note that ... evidence reached conclusions as to whether effects were more or less than minor. This test appears to be derived from the threshold test under section 104D. However such a test is irrelevant to the substantive evaluation that must be undertaken under 104(1)(a) and under Part 2 of the Act.

Council decisions often reflect the same misuse of the threshold test, no doubt as presented to them in evidence or pre-hearing reports:

(McKinlay Family Trust v Tauranga City Council EnvC Auckland, A119/08, 29 October 2008, Smith J at [9]):

- We note that the Hearings Panel refer to effects more than minor as a ground for declining consent. Given than the applications are for discretionary activities, this test arising under section 104D is not relevant.

So why are we still getting it wrong? "No more than minor effects" is a phrase that has evidently found popularity with lawyers who are wary of over-emphasising adverse effects when advocating for a client's proposal to the Court, and experts who are cautious of speaking in absolute terms. The Court does not have the same admiration for the phrase and is more often seeking clarity as to what is really meant when an effect has been described in that way. When it is used as an evaluative measure, rather than as a simple threshold test, it appears to do little to assist the Court's understanding of the significance of a particular adverse effect. Simply put, outside of its proper context, it seems to lose its meaning altogether.

This article will examine what experts can do instead to introduce shades of meaning to their analysis, and will ask whether "no more than minor" has crept into our resource management vernacular in place of a proper evaluation of the impacts of an activity: namely, what are the actual and potential effects on the environment and does the activity, on balance, promote sustainable management?

The only other area in the RMA where the more than minor test is applied with real meaning is with respect to decisions regarding public or limited notification.

Section 95A provides a consent authority with the discretion to publicly notify a resource consent application if it considers that the activity will have or is likely to have adverse effects that are more than minor. Where public notification is not required, limited notification must be given to those individuals who are affected by the adverse effects of an activity in a minor or more than minor way (but not less than minor). These notification provisions have their own peculiarities, not least the inability for a consent authority to consider both positive and adverse effects when making a decision to notify. For that reason the "more than minor" notification test is beyond the scope of this particular article and will not be discussed further.

Section 104D: A threshold test

The "no more than minor" descriptor is derived from the threshold test for non-complying activities under section 104D of the Resource Management Act 1991. That section provides that a consent authority may only grant consent for a non-complying activity if it is satisfied that either the adverse effects on the environment will be minor, or that the activity is one that will be not be contrary to the objectives and policies of the relevant plan or plans.

For all applications (including those non-complying applications that have passed through the section 104D "gateway"), section 104 sets out that a consent authority must, subject to Part 2, have regard to any actual or potential effects on the environment, any relevant provisions of any relevant environmental standard, regulation, policy statement or plan, and any other matter deemed relevant by the consent authority. The "test" in section 104 is therefore simply whether the activity meets the singular purpose of the Act set out in Part 2 - does it achieve sustainable management? In considering whether the application meets that test, a consent

authority must consider each and every actual and potential effect, including positive effects, regardless of their scale or degree.

There is therefore no requirement for a consent authority determining an application, other than a non-complying application under section 104D, to first consider whether the adverse effects of allowing the activity will be minor. The test of "no more than minor" is simply not relevant to the consideration of other types of activities, unless it can be shown that particular evaluation of the level of adverse effect provides a useful clarification for the Court or consent authority during the balancing exercise required by section 104. So, does it?

Defining no more than minor - a helpful descriptor?

On the face of it, the "no more than minor" test should provide a helpful descriptor of the degree of relevant effects for a decision maker who is considering granting consent for an activity. But what does it actually mean?

While the RMA defines other terms important to the section 104 assessment, such as "effect" and "environment", there is no corresponding definition of the concept of minor. In King v Auckland City Council [2000] NZRMA 145 the Court stated that a minor effect will be "at the lower end of a scale including major, moderate and minor effects but must be something more than de minimis". Various other decisions have followed that interpretive theme.

Effects that are "no more than minor", then, will register somewhere on a scale. That might serve a purpose in the context of a threshold or gateway test, but is it useful when describing effects that are to be assessed in the round? A decision maker undertaking a broad section 104 assessment is not necessarily concerned with effects which register on a scale of de minimis to moderate, but whether the effects are indeed significant enough to be considered adverse in the context of a particular proposal and, if so, whether or not they are counter-balanced by a suite of conditions, mitigation measures and positive effects that will also flow from the application in question.

If the test of "no more than minor" effects is irrelevant to the assessment of anything but a non-complying activity, what is the relevant test? The RMA is not a "no effects" statute - in other words, it is not about preventing any or all effects on the environment or only allowing activities with a certain scale of effect. As section 104(1)(a) is concerned with all actual and potential effects, there can be no requirement to classify effects on a scale or more or less than minor. Whatever their magnitude, the effects should properly be considered by the Court or decision maker as part of their overall assessment.

There are very few applications that would not generate any effects or any adverse effects. It is obvious that whether or not an application would result in adverse effects is not the ultimate test. Applications for resource consent which would generate very significant effects can, and often are, granted by the Court.

The Environment Court has helpfully described the issue in this way:

(Upland Landscape Protection Society EnvC Christchurch C85/08 at [94])

- Case law clearly establishes that activities with very significant effects may be granted consents, while others without such particular effects may be refused consent. The scale of effect is clearly a matter which will go into the evaluation necessary under Part 2 of the Act but is not determinative of it.

So the scale or significance of effects will not necessary preclude a resource consent from being granted, but will simply factor in the overall evaluation and balancing of the application against Part 2 of the RMA. What the decision maker needs to know then is, on balance, how much weight should be given to the effects in question when undertaking the balancing exercise. Are the effects greater than de minimis? Are they significant or moderate? What are their impacts on the various affected parties/receptors/the environment?

It is clear then that outside of its section 104D context, an assessment of an adverse effect as more or less than minor is of little assistance to the Court. As a threshold test it has value, but as an evaluative tool it loses its meaning in the face of other, more balanced assessments.

So why is "no more than minor" so attractive?

As we have noted above, it is often said that the RMA is not a "no effects" statute. Why is it then that expert witnesses loathe to describe any proposal as having an adverse impact on the environment? Why do practitioners find comfort in the safety net of "no more than minor"? This ability to assess adverse effects in the round when undertaking a proper balancing exercise means that experts (and lawyers) should have confidence in acknowledging adverse effects when they are in fact likely to occur. But is there a perceived risk in doing so?

We suggest there are a number of reasons which, cumulatively, are responsible for the regular use of the "no more than minor" terminology in an improper context.

The first, and most obvious, is that the phrase has fallen into popular use. Experts and practitioners are used to saying it, used to hearing it, and feel like they are using "RMA language" when describing an effect in that way. This is understandable. On the odd occasion the use of the phrase appears to crop up when evidence has, from appearances, been worked up on the basis of a template document for a previous activity - one that was in fact non-complying. This is less excusable. Experts should be encouraged to always start from scratch when preparing evidence, and to give careful thought to how best to describe a particular effect.

The qualification as "no more than minor" must also have an inherent level of comfort for those giving an evaluative judgment. The effects have been acknowledged, there can be no question about that, but have been assessed as no more than minor, or nothing to worry about. This, then, is an assessment that covers all the bases. There is no element of controversy - for example by suggesting there are no effects or no adverse effects. (As any practitioner will know, an expert will seldom accept that there will be absolutely no effects - in science, that is an unlikely proposition, as even the smallest proposal is likely to create a measurable impact, if your degree of measurement is small enough!)

A further reason for the popularity of the description could be that it is used by experts who want to describe effects as being very minimal indeed. However that concept has been encapsulated by the description of effects as de minimis - a term that has been very strictly confined in case law:

(Rea v Wellington City Council [2007] NZRMA 449 at [10])

- The term de minimis has survived... since there is no equally convenient and pity English alternative. It is a shorthand way of expressing the full Latin maxim "de minimis non curat lex". This is usually translated as "the law is not concerned with trifles." In the present context, it means that an adverse effect ...is so trifling that the law should regard it as of no consequence. That is a much more stringent test than whether the adverse effect is minor.

If the de minimis definition is not available but the expert wants to acknowledge some level of adverse effect, albeit one that does not give cause for any alarm, then "no more than minor" might appear to fit the bill.

Another explanation may be that experts are nervous about how their message will ultimately be conveyed and understood by the decision maker. Experts could fear that the shades of meaning in their assessment may not be immediately apparent and, unless they are questioned in detail by the Court or by opposing counsel (giving rise to an opportunity to provide a detailed justification), their evidence might not be given the appropriate weighting by the Court when the time comes to undertake the balancing exercise.

Alternatively, experts may fear that the positive effects of any given proposal will not be given sufficient weight, so that any acknowledged adverse effect at all may be enough to tip the scales against the proposal seeking consent. If a proposed activity does not find sufficient favour with a decision maker (with respect to the enabling purpose of the Act), then a lesser degree of adverse effect may represent ample justification for declining consent.

The obvious solution here is for lawyers and experts alike to ensure that the positive effects of any given proposal are illustrated carefully for the benefit of the decision maker. Often applications are framed in such as way as to minimise or justify the adverse effects, and the positive effects of the activity are only added as an afterthought. These should be emphasised up front as they are a crucial aspect of the Part 2 balancing exercise. To undersell the positive effects of a proposal is to run the risk of the acknowledged adverse impacts assuming greater significance in the round.

Reminders for experts and lawyers

What then can, or should, be kept in mind when drafting (or reviewing) expert evidence? Should experts and lawyers ensure that the language used in expert evidence and submissions accurately matches the statutory tests for the particular activity? The answer is yes, to the extent possible. Although is the Court that has the final responsibility to assess the effects against the relevant statutory tests, both lawyers and expert witnesses have a duty to assist the Court as much as possible in undertaking this evaluation.

Ultimately it is for the expert witness to decide how to set out his analysis for the court and lawyers should be wary of suggesting changes which impact on the meaning that the expert is trying to convey. In saying that, it is the lawyer's job to remind themselves of the relevant statutory tests and, when reviewing expert evidence, ensure experts are aware of the correct terminology and/or are prepared to justify their conclusions to the Court in a way that will be easily understood.

What a decision maker really needs to hear from an expert witness is, on balance, what weight should be given to effects relevant to any given area of expertise when undertaking a holistic assessment of the resource consent application. Experts may like to consider employing language which still provides an adequate detail of scale but avoids importing an irrelevant statutory threshold. For example, expert witnesses could explain adverse effects that are nothing to worry about as "nominal", "insignificant" or "negligible". It is also important that, if an expert witness does consider that there are no relevant adverse effects arising from the activity, he or she does not feel precluded from saying so in the simplest possible terms. While this may be scary, an expert witness should be prepared to be tested by the Court and to explain how they arrived at that conclusion.

If adverse effects are more serious, but can be appropriately mitigated through conditions and other measure, it may be more accurate to describe them as "acceptable", all things considered. This is a term that has found favour with the Court in the past:

(McKinlay Family Trust EnvC Auckland, A119/08 at [55]):

- We would only alter the words of their decision more than minor to read unacceptable.

Although the use of "no more than minor" out of its proper context will not necessarily detract from the Court's final evaluation, it does put a decision maker to an unnecessary task. When selecting appropriate evaluative language to be used in evidence and in legal submissions, it is plain that lawyers and experts can greatly assist the Court by being accurate and precise.

Conclusion

Judicial comment on the use of section 104D language when assessing activities other than non-complying has sparked a more than minor debate. Although it is ultimately for the Court, and not experts and lawyers, to undertake the final evaluation of the activity under the RMA, practitioners and witnesses have a responsibility and a duty to appropriately employ the relevant statutory tests and RMA terminology. Whatever the language used in the final product, experts should be prepared to explain their conclusions and reasoning in such a way that will add value to a decision maker's overall assessment under Part 2.

Ultimately adverse effects will be considered in the round, weighed up against the positive effects of a proposal and any conditions or mitigation measures that lessen the impact of the proposal. Experts and lawyers alike should have confidence in this balancing exercise and adopt a brave and up-front approach where adverse effects are concerned, forgoing the safety blanket of "no more than minor" once and for all.