

Royal Forest & Bird Protection Society
PO Box 631
Wellington
3 April 2009

Local Government and Environment Select Committee
Parliament Buildings
Wellington

Submission on the Resource Management (Simplifying and Streamlining) Amendment Bill

Forest & Bird

The Royal Forest and Bird Protection Society of New Zealand Inc. (“Forest & Bird” or “the Society”) was founded in 1923 and is New Zealand’s leading private conservation organisation. The Society has over 40,000 members in over 50 branches throughout New Zealand and has a small number of professional staff.

Forest & Bird is involved in a wide range of activities, including managing reserves and lodges, restoration planting, pest control, native species re-introductions, threatened species management, environmental education, field trips and conservation advocacy (including under the Resource Management Act 1991).

The constitutional objective of Forest and Bird is to:

To preserve and protect the indigenous plants and animals and natural features of New Zealand for the benefit of the public, including future generations

The Society has long advocated for responsible environmental planning, including the promotion of Water and Soil Conservation legislation and the Town and Country Planning Act that was the precursor to the Resource Management Act. In the 1980’s Forest & Bird was also closely involved in the review of New Zealand’s planning laws that led to the Resource Management Act 1991 (RMA).

Forest & Bird appreciates the opportunity to present our views on the Resource Management (Simplifying and Streamlining) Amendment Bill (the Bill).

Summary

The RMA is the main way that ordinary New Zealanders can have a say in how our resources and environment are managed. One of the key principles behind the Act is that the best outcomes for sustainable management are achieved when the public has the ability to participate in decision-making processes.

While this amendment bill is meant to simplify and streamline the RMA, Forest & Bird's experience leads us to believe that many of the proposed changes are likely to have the opposite effect.

The Bill proposes to significantly restrict the public's ability to participate in decisions that affect them. Fewer resource consent applications will be notified. The Bill's proposal for a quicker - rather than thorough - planning process will lead to poor plans that are likely to lead to more - rather than less - court cases.

Fewer affected individuals or community groups will challenge unsustainable developments because developers will be able to go directly to the Environment Court, they may be subject to unscrupulous security of costs applications, and the costs of appealing council decisions to the Environment Court will rise 900%.

Introduction to the Resource Management Act

New Zealand's Resource Management Act 1991 (RMA) seeks to protect those qualities of our environment that we rely on and value, such as breathing clean air or swimming in a clean river or at an unpolluted beach. It also encourages the protection of areas of our natural environment that provide habitat for indigenous species.

The RMA integrates environmental management. In 1991 it replaced 50 different statutes that dealt with air quality, noise control, water and soil conservation, and town planning and coastal management, so that all the environmental effects of proposed activities could be considered at once.

The purpose of the RMA is to promote the sustainable management of natural and physical resources. It does this by requiring that the use, development and protection of resources are managed in a way, or at a rate, which enables people and communities to provide for their wellbeing, health and safety, the needs of future generations and the life-supporting capacity of air, water, soil, and ecosystems while avoiding, remedying, or mitigating any adverse effects of activities on the environment. The Act provides environmental principles for resource management planning and decision-making.

The RMA is administered by local authorities, that prepare regional policy statements and regional and district plans to ensure that the environment is sustainably managed. These policy statements and plans set out the environmental issues in the region or district, the environmental results that the council is seeking to achieve, as well as the objectives, policies, and methods it will use to achieve these results.

Applicants for resource consents must provide the council with an assessment of their proposal's potential effects on the environment. If the Council considers that a proposal's effects on the environment will be more than minor, the resource consent application should be 'publicly notified'. This allows members of the community to have a say. If the application is not notified, the public has no input.

The RMA is a citizens' Act. One of its underlying principles is that those affected by resource consent applications are best placed to identify the adverse effects on them, and should have the opportunity to put these before decision makers and to seek avoidance or mitigation of adverse effects.

The purpose and principles of the Act are put into practice at the local and regional level through decision-making processes for both planning and resource consent applications that have been made deliberately accessible and reasonably informal to enable those affected by decisions to participate. The Environment Court (formerly the Planning Tribunal) provides a more formal check on these processes and helps to ensure consistency in the interpretation and application of the Act. These processes, with their requirements for public involvement to ensure that decisions are well informed, fair, participatory, balanced and environmentally sustainable, are critical to the success of the Act.

This structure has clear advantages. Those affected by decisions are encouraged to participate. Central government can provide overall frameworks and direction within which, local and regional communities can plan and manage their sustainable development. A body of experienced judges and Environment Court commissioners bring specialist expertise on process and law to ensure fairness and consistency in the interpretation and application of the Act .

Forest & Bird's and the Resource Management Act

Forest & Bird's involvement in sustainable resource management

Forest & Bird is one of New Zealand's principle NGO practitioners in resource management law. The Society represents the public interest in the protection of the indigenous plants and animals and natural features of New Zealand, including the coastal environment and landscapes. In doing so, the Society is one of the main organisations seeking to ensure that the purpose and principles of the RMA are achieved and adhered to.

Forest & Bird advocates for matters of national importance

The Society seeks the protection of matters of national importance described in section 6 of the RMA. These matters include: the preservation of the natural character of the coastal environment, including the coastal marine area; the preservation of the natural character of rivers, lakes and wetlands; the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development; the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna; and the maintenance of public access to and along the coastal marine area, lakes and rivers.

The Society seeks to ensure that the adverse effects of activities on the environment are avoided, remedied and mitigated; consistent with section 5 of the Act.

Forest & Bird has a strong interest in effective resource management law and practice. The Resource Management Act is one of the most effective tools New Zealand has for achieving its conservation objectives, including those of New Zealand's Biodiversity Strategy. We are committed to ensuring that resource management law is sensible and fair.

Day to day resource management practice by Forest and Bird

Forest & Bird staff, branches and individual members are active participants in Resource Management. The Society employs a full time in-house solicitor who manages the Society's extensive involvement in resource management hearings at Councils and in the Environment Court. Some lawyers in private practise also provide assistance to Forest & Bird at reduced rates in recognition of the significant public interest role the Society plays.

Examples of Forest & Bird's work include:

Northland: Forest & Bird staff and the Aquaculture industry have successfully identified sites for Aquaculture Management Areas (AMAs) in Northland that were then adopted by the Northland Regional Council. The Minister of Fisheries is now developing a process to implement aquaculture at these sites.

- **Central North Island:** Forest & Bird has worked with Federated Farmers and Horticulture NZ in Environment Court mediation on the Otorohanga, Rodney, South Taranaki and Gisborne District Plans, to improve native vegetation clearance policies and rules.
- **South Taranaki:** Forest & Bird successfully took part in an Environment Court mediation on the South Taranaki District Plan. Agreement was reached with Federated Farmers for an improved rule in the district plan to control clearance of native vegetation. These clearance rules have resulted in significant areas of forest being protected, and strong rules relating to sustainable forest management which have benefited the logging industry and enabled them to get sustainable forest accreditation.
- **Canterbury:** Forest & Bird has successfully negotiated improved protection for waterways through the creation of riparian set backs.
- **Southland and Otago:** Through submissions to district plans and appeals to the Environment Court, Forest & Bird has gained rules controlling the planting of trees with high risk of wildling spread.

- **Fiordland:** Forest & Bird has successfully protected Fiordland wilderness from the risks of oils spills and other damage arising from excessive tour boat access. The applicant for a surface water tourism venture agreed to restrict access to parts of Preservation and Chalky Inlet, and George Sound, and to undertake no trips into Bligh or Sutherland Sounds, or Supper Cove in Dusky Sound.
- The fact that the large majority of district plans (72 out of 77 according to the MfE 2003 survey) have rules protecting significant indigenous biodiversity is in fair part the result of involvement of Forest & Bird and its branches throughout New Zealand.

Over the last 3 years the Society has managed approximately 20 plan appeals and 14 major resource consent appeals before the Environment Court. It has also been involved in a High Court declaratory judgement relating to the RMA, has taken a High Court judicial review and a successful appeal to the Court of Appeal. It would be fair to say that there is unlikely to be a regional or district plan in the country that has not had input from local Forest & Bird branches and staff.

Forest & Bird has a cautious approach to litigation. Most Environment Court appeals relate to district or regional plans and the majority of cases are settled by agreement achieved through mediation.

Forest and Bird has gained a significant body of experience in resource management law and has achieved important public interest conservation gains as a result. Where Environment Court cases on plans or resource consents taken by the Society have gone to a hearing, important Environment Court precedents have often been established.

Forest and Bird seeks to improve resource management practice

With Ministry for the Environment assistance Forest and Bird has produced a guide to the Act and undertaken community based seminars aimed at increasing the quality of public involvement in resource management matters. Another round of workshops is currently underway.

Forest and Bird also produced the “Environmental Law Handbook”, a detailed publication providing advice to the public and to practitioners on resource management and environmental law in New Zealand. It is now in its second edition.

Background to the Bill

The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 has nine objectives:

1. reduce costs and delays from frivolous, vexatious or anti-competitive submissions and appeals
2. streamline processes for applications of national significance
3. establish an Environmental Protection Authority (*EPA*) to administer applications of national significance
4. improve (by reducing time and costs to participate in) planning processes
5. improve (by reducing time and costs to participate in) resource consent processes
6. increase the effectiveness of national instruments
7. strengthen the enforcement provisions
8. improve decision making processes
9. enhance the workability of the Act

Resource Management Act supposedly holding back the economy

Prior to the recent world economic downturn New Zealand experienced the most sustained period of growth for many decades. Despite this some of the RMA's detractors say it has been holding back the economy. Not surprisingly these detractors have been unable to provide much evidence to back their case. This opposition to the RMA can be criticised as showing a focus on cost cutting at the expense of adding value to the economy.

Figures from the latest available Ministry for the Environment's RMA Two-Yearly Survey Of Local Authorities shows that of the **51,768** resource consents were processed through to a decision over the 2005/2006 year just **357** (0.69%) were declined.

There have also been strong suggestions that the RMA is responsible for significant delays in major infrastructure projects. In 2003 the Ministry for the Environment commissioned the Young-Cooper report "Streamlining RMA Approvals for Land Transport Projects". The report's Executive Summary (p6) says:

"... the RMA approvals process generally takes around five years,"

and the 'international comparison' box in the Introduction (p10) says:

"RMA processes take about 5 years where designation and resource consent processes are separated."

These comments have been regularly repeated, however, when you look at the 4 projects that the paper studies (see table 1 p 12 for the summary information) it is clear that the RMA consent processes (as separate from the notice of requirement processes) took :

ALPURT B2:	20 months (including appeal)
Grafton Gully	3 months
Project PJK	11 months (including appeal)
Inner City Bypass	15mths (7 months- then appeal on Requirement - then 8mths including appeal)

So the latest study we have – commissioned by MfE - shows that the resource consent processes for major roading infrastructure projects with significant community and environmental impacts take on average just 12 months, including appeals to the Environment Court. Even taking into account the separate time frames around getting Requiring Authority approval the average doesn't get above 2 years

Central Government tools available to simplify and streamline RMA processes

In spite of poor performance by central government agencies, there are a range of mechanisms under the Resource Management Act that enable central government to provide direction to local government. It is a lack of will and resourcing, rather than a lack of opportunities that has prevented successive governments from providing direction.

Mechanisms under the Act that enable central government to influence local government performance include;

- ***Making submissions on regional policies, plans and resource consent applications.*** DoC has been active in this area, and the Ministry for the Environment was active until the mid to late 1999s. However since then the Ministry has generally failed to provide the kind of input into planning process that has been needed.
- ***National Policy Statements.*** The New Zealand Coastal Policy Statement, was mandatory under the principal Act and was completed by DoC in 1994 and is currently under review. For over a decade this first National Policy Statement was the only National Policy Statement.
- ***National Environmental Standards.*** National standards are now being produced. The process has proved reasonably fast, taking 6 months from the release of drafts to the completion of the standards.
- ***Enforcement action.*** Sections 314, 315 and 316 of the Act enable enforcement action to be taken in the Environment Court when any person (including a local authority) fails to meet their obligations under the Act.
- ***Water Conservation Orders*** – These orders enable the protection of water quality and quantity, acting a little like a resource consent to keep water where it is, rather than take it out, and to set water quality standards. No government agency has applied for a Water Conservation Order since the

establishment of the principal Act. Instead this has largely been left to Fish and Game councils.

- **Call-ins** – the powers have only been used twice for the Stratford Combined Cycle Power Station and for consent on the Waitaki around Project Aqua.

Many of the perceived problems with the Resource Management Act would not have occurred had the Government in general, and the Ministry for the Environment in particular, made better use of these tools.

The tools outlined above are adequate to address the national interest in such matters as water quality, biodiversity protection, landscape protection and sensible infrastructure development.

Improving local government performance

An ongoing concern has been the inconsistent and at times poor implementation of the Resource Management Act by local authorities. This has occurred through an unwillingness by central government to use the tools available to it, compounded by inadequate resourcing of local authorities.

Forest & Bird has experienced four major areas of poor performance by local authorities, only one of which is partially addressed in this Bill.

- **Biodiversity protection:** Inadequate rules to protect biodiversity in Northland mean that more than 1500 hectares of kiwi habitat has been destroyed in the region since 1994.
In Rodney District has half of the rural area of the Auckland region and since 1984 it loses 2% of indigenous vegetation per annum. This hasn't changed with the advent of the RMA and is not much different to when there were Government vegetation clearance subsidies. Rodney has good policies and rules for protecting significant vegetation, but it does no monitoring and the factual base for planning bears only minimal relationship to the biodiversity on the ground.
- **Retrospective consents:** Many councils grant retrospective resource consents to environmentally damaging activities rather than enforcing their rules. In one example, the Tasman District Council granted a retrospective resource consent to a farmer who had illegally destroyed most of the largest remaining lowland wetland in the Nelson region.
- **Enforcement and monitoring:** Many councils fail to properly monitor and enforce their resource consents so that the conditions on the resource consents become meaningless.
- **Inadequate notification of resource consents:** Councils routinely fail to publicly notify resource consents in breach of their legal responsibilities. Non notified resource consents have included proposals to clear forest, grow invasive seaweed, wetland drainage

and other environmentally damaging activities. In Ruapehu District, the council granted a non-notified consent that would affect the endangered blue duck in the Mangonui o te Ao River (which has a National Water Conservation Order) neither DOC, the Regional Council, Iwi or neighbours were notified.

Forest & Bird and many other NGOs consider the following proposals would significantly improve local government performance and increase consistency across councils:

- Ensure that local authorities are regularly monitored and reviewed on the performance of their RMA functions.
- Establish a contestable fund to ensure that councils can fund their RMA obligations. Some local authorities are struggling to develop and administer their resource management plans because they lack the rating resources.
- Compulsory accreditation of all RMA decision-makers at council level (councillors and commissioners).
- Increased use of National Policy Statements and National Environmental Standards (including the use of these tools together).
- Greater funding for the Ministry for the Environment's best practice work such as the Quality Planning website to provide greater consistency across councils and help struggling councils to lift their performance.
- One to one assistance for councils that are struggling and would benefit from advice and expertise from councils that are performing well.
- Increased use of pre-hearing meetings to sort out issues of fact etc.

Analysis of the Bill's key clauses

Participatory democracy is central to decision making under the RMA. Limiting public participation would be a fundamental shift in the Act's philosophy.

Third party participation ensures that a decision maker has good information before it. Although there is an obligation on applicants to provide an Assessment of Environmental Effects (*AEE*), the applicant cannot be expected, nor relied upon, to advocate in the public interest, particularly when it may run counter to their objectives.

While there is no public agency that is mandated to provide a comprehensive and reliable overview of the environmental effects of a proposed activity, third party participation provides an important check to test the rigour of the information that has been provided by the applicant. This participation becomes even more important if consent authorities rely more heavily in their reporting and decision making on the AEE provided by an applicant, as provided for in the Bill (clause 30).

Plans

The Bill proposes many changes to the process of developing district and regional plans with the intention that they will lead to the quicker production of those plans. While there is no question that the first generation of RMA planning has taken longer than all parties would have wanted, it is nevertheless likely that the second generation of plans will be much faster.

The second generation plans will be based on the plans already in place and only those bits which need adjusting need be dealt with. Central government is now also taking a more active role in producing National Policy Statements and National Standards, which often deal with contentious issues that regional and district councils have had to deal with individually during the first generation planning process.

The Bill's proposed changes may actually slow the process as affected parties go to the Courts to establish standing and to argue that questions of merit rather than just questions of law need to be considered.

Quick, but poorly formulated plans, are likely to create confusion and greater opportunities for litigation.

1. Removing the requirement that planning documents be reviewed every 10 years (clause 56).

The Bill proposes to remove the requirement that planning documents be reviewed every 10 years, although the Minister is given a new power to direct a review of a plan, in whole or in part. This change is motivated by a concern about the length of time it took to complete first generation plans; however, we can assume that second generation plans will be an opportunity to address problems with the existing plan, rather than starting from scratch, and will take substantially less time.

In the absence of a plan review requirement, improving and updating plans will become reliant on private plan changes, which are ad hoc, expensive and likely to be driven by those with a financial and development interest. This proposed change to the RMA is therefore likely to create greater complexity rather than simplification and remove opportunities for councils to consistently keep pace with changing information and public opinion on matters of planning importance.

Outcome sought:

Delete clause 56

2. Removing the ability to lodge further submissions in the planning process (clause 148)

The Bill proposes to remove the further submissions stage in the planning process. This stage enables comment on submissions that have been lodged on a plan or policy. Without further submissions, there is no opportunity to respond to anything new that has been sought by other submitters, which may significantly change or even reverse the provisions in the plan. Further submissions are an important step in the process, because they give the public a chance to have a say on issues that have only become apparent through the first submissions process.

Instead of further submissions, the Bill allows local authorities to seek the views of anyone that it considers might be adversely affected by matters raised in a submission. While those views must be taken into account in the decision, there is no right to appear at the hearing or lodge an appeal on that part of the policy statement or plan. This means that under the Bill a submitter could request that rules be removed or altered to allow for more intensive development (for example a reduction in minimum lot sizes in the rural zone) and there would be no opportunity to oppose that relief or participate in the process (except, to a limited extent, at the discretion of the local authority).

Allowing Councils to identify affected persons without any requirement that this identification be comprehensive creates a very open ended discretion. This is very likely to lead to disputes and court cases as those affected - but not identified by the council - seek to have their say. This proposed change provides opportunities for Councils to establish “favourites”, and is likely to create different classes people involved in RMA planning processes with different levels of rights:

- those affected by planning decisions that are known to be so affected by the council and are invited to submit on the changes
- those affected by planning decisions that are known to be so affected by the council but are not invited to submit on the changes
- those affected by planning decisions but are not known to be so affected by the council and are therefore not invited to submit on the changes

The further submissions process means that issues are fully considered, and results in better quality plans. Again, it is better to have a good plan than to rush through a poorly drafted plan, that will inevitably involve more litigation and poor outcomes for the community, businesses, and the environment.

This proposed change will result in weaker plans and more litigation in the High Court, as people resort to judicially reviewing the decision of the local authority. Rather than streamlining and simplifying the planning process it will help to make it more complex and difficult.

Outcome sought:

Delete clause 148.

Retain the ability to make further submissions as further submissions allow issues to be fully considered, resulting in better quality plans. This process also flushes out issues that otherwise would be dealt with by costly and lengthy litigation.

3. Providing that rules will generally have no effect until decisions on the rule have been notified (clauses 16, 59)

The Bill proposes that a rule in a plan does not have legal effect until decisions are notified unless: there is no opposition to the rule; or the local authority passes a resolution that the rule will take effect earlier; or the rule protects water, air, soil, significant indigenous vegetation, significant habitats of indigenous fauna or historic heritage; or the rule provides for an aquaculture management area. The proposed changes mean that generally rules will not take effect until decisions on submissions are notified, which will increase the lead-in time for new rules and may encourage parties to rush through applications to avoid new regulation; for example if a proposed plan reduces the maximum building height, developers could build up to the higher limit set under the old rule until decisions are made on the more restrictive rule, without any regard for the new rule or the policy reasons behind it.

Outcome sought:

Delete clauses 16 and 59.

Retain current provisions around the effect of proposed rules, to avoid the ‘gold rush’ effect where parties apply for consent based on the old rules, disregarding the policy reasons for changing the rule.

Consider setting timeframes for local authorities to complete rule change processes.

4. Limiting appeals on policy statements and plans to questions of law (except with the leave of the Environment Court) (clauses 132,136 and 148)

The Bill proposes to reduce appeals on planning decisions to points of law (except with the leave of the Environment Court to appeal questions of merit). Often a planning decision requires an evaluative judgement based on facts, such as whether or not an area of indigenous vegetation is significant under s6(c) of the Act. This amendment will make it more difficult to contest a council’s determination about these kinds of questions of fact.

Forest and Bird’s experience is that most errors in plans are not on matters of law, but on matters of fact and interpretation of planning issues. This is generally exacerbated by the lack of RMA monitoring by councils. They usually carry out no monitoring of;

- the state of Section 6 matters in their district,
- the affects of exceptions to the plan policies, and
- the cumulative effects on the plan of permitted and exceptional activities.

This is borne out by the only two significant pieces of research on this matter; the Waikato University’s Planning Under a Cooperative Mandate (PUCM) research team and Dr Mark Bellingham’s PhD thesis in the Auckland Region.

As a consequence of minimal monitoring, the factual base of most regional and district plans is weak, resulting in most of the errors in plans and therefore the appeals to the Environment Court. Some councils are minimising these problems through more thorough consultation.

It is a considerable burden on participants to have to seek the leave of the Court to appeal questions of merit. Having to apply for leave to appeal questions of merit is another example of the Bill's potential to create more, not less cost and complexity to the process. It could see the Environment Court bogged down with applications of this sort. It could also result in more litigation on resource consent applications because plans contain inconsistencies or ambiguities, which would have otherwise been resolved through the planning process.

Reducing appeal rights will also reduce the accountability of local authorities, particularly when coupled with the proposal to remove the obligation on councils to review their planning documents every ten years.

The majority of planning appeals are resolved without the need for a hearing. Mediation at this stage enables parties to work through issues that will ultimately improve the quality of the plan and increase community buy-in. In fact, it is not uncommon for a council to appeal its own plan, or to support the appeal of another party, where they recognise there is a mistake or an unintended consequence in the plan.

It is very important that these plans are accurate and well thought out. The public's ability to appeal on issues of fact and policy is the main way to ensure that local authorities are giving effect to sustainable management principles. There is greater community support for planning documents where the issues have been properly and adequately considered. Removing the opportunity for parties to appeal on merit will ultimately reduce the quality of plans and create greater uncertainty and opportunities for litigation.

In addition, this change could substantially reduce the Environment Court's specialist environmental jurisdiction.

The Minister of Justice has commented that it is a basic requirement of the NZ Justice System that there is a first right of appeal with leave required only for subsequent appeals. It is not consistent that the leave of the Environment Court to appeal plans and policies on anything other than questions of law should be required to lodge a first appeal.

To summarise:

- Having to apply to the Environment Court for leave to appeal will add further complexity and cost.
- Removing the ability to appeal will reduce the quality of plans.
- It is a basic right of the New Zealand justice system that there is a first right of appeal.

Outcome sought:

Delete clauses 132, 136 and 148.

Retain the current right to appeal policy statements and plans to the Environment Court:

Consider making greater use of precedents and national planning instruments to make the planning process more efficient.

5. Deleting non-complying activities (within a three year transitional period) (clauses 147 and 152)

The Bill removes the non-complying activity status (these activities are deemed to be discretionary if the Council has not changed or varied their plans to reclassify them within three years of enactment).

The removal of non-complying activity status may undermine the policy and objectives in the plan, if a non-complying activity is deemed to be discretionary.

There is a presumption in the RMA that non-complying activities are not granted consent unless the effects of the activity will be minor or it will not be contrary to the objectives and policies of the relevant plans (the threshold test in s104D). The threshold test is very broad and it is almost always met; however, the non-complying activity status sends a signal to consent authorities and applicants that the activity is less appropriate than discretionary activities and falls on the more restrictive end of the spectrum. The removal of the non-complying activity status is likely to weaken environmental protection currently afforded by these rules. The opportunity should be taken to tighten the non-complying test in s104D by, for example, amending s104D so that an application must satisfy **both** limbs of the test before consent is granted.

Outcome sought:

Delete clauses 147 and 152.

Replace them with a new clause that amends s104D so that an application must satisfy **both** limbs of the test before consent is granted

Resource consents

6. Removing the presumption in favour of notifying resource consent applications and changing the criteria for public notification (clause 68)

The Bill proposes to remove the presumption in s94 that resource consent applications will be notified. The Government claims this change will bring the law into line with what is the practice; however, this is likely to further reduce

levels of notification and limit opportunities for public participation because the onus will shift back to the community to argue in favour of notification.

The Bill also proposes to make it harder for a decision to be made in favour of public notification by changing the test to ‘adverse effect of the activity *beyond the immediate environment* will be more than minor’ (s94AA). Forest & Bird considers that the vague term “*beyond the immediate environment*” will prove to be unworkable and will lead to considerable litigation. Forest & Bird and the Department of Conservation may have a legitimate interest in the *immediate environment*, where there may be significant indigenous vegetation, or the habitat of threatened species, etc.

Through its members’ work throughout the country, Forest & Bird has been recognised as an affected person and is often consulted early in the consent process where a consent application adversely affects indigenous vegetation or habitats of indigenous fauna. Under the Bill, groups such as Forest & Bird are unlikely to be given this status.

The Bill also proposes to remove the ability to review notification decisions through declaratory proceedings in the Environment Court rather than the High Court (although these are not currently in force they were included in the RMA to balance the introduction of limited notification). Taking reviews of notification to the Environment court would be cheaper and simpler for all parties. Forest & Bird has had a recent experience of this where we had to go as far as the Court of Appeal in order to successfully challenge a situation where we were not notified of a resource consent that directly affected the Society.

Outcome sought:

Delete clause 68,

Retain the current notification provisions.

Consider a clause that allows appeals on Council decisions about notification should go to the Environment Court (rather than the High Court, as they do now).

7. Allowing applicants, with the agreement of the council, to have their application heard by the Environment Court in the first instance (direct referral) (clause 60)

The Bill proposes that provided the local authority agrees, an applicant can have their application determined by the Environment Court in the first instance (direct referral). This will mean that individuals and community groups who want to have their say at the informal, relatively cheap, local Council hearing will be denied that chance and instead will have to voice their concerns in the formal and generally more expensive Environment Court setting. Council hearings also often give the community a chance to become fully informed on an issue, giving them the background to fully participate at a later stage if

necessary. Fast-tracking will remove this important participatory function of Council hearings.

Direct referral may not only discourage public participation, it may also clog up the Environment Court with consent applications that will be heard *de novo*, with little chance of any effective mediation which can often “weed out” the less important issues. Direct referral may also be used by councils seeking to avoid making difficult or unpopular decisions.

Outcome sought:

Delete clause 60.

Retain the current local authority hearing provisions that allow for effective public participation that acts as an essential check and balance on resource consent decisions. This will also avoid ‘clogging-up’ the Environment Court.

Costs of going to the Environment Court

8. Allowing the Environment Court to require security for costs (clause 133)

The Cabinet paper for this Bill suggests that security for costs will reduce anti-competitive behaviour. Unfortunately, security for costs is likely to significantly reduce all third party participation (a case of throwing the baby out with the bathwater); in particular:

- In the majority of cases, security for costs is unlikely to prevent anti-competitive appeals (where there is a clear financial interest and greater available resources); it will however reduce the participation of those with legitimate cases but little money (the cabinet paper notes that a similar comment was made by the Ministry of Justice officials).
- There is no evidence that security for costs deters frivolous, vexatious and/or anti-competitive appeals; security for costs is therefore unlikely to create a barrier to those with lots of money.
- Despite security for costs being used sparingly under the previous provisions (1996-2003), defending a spurious or weak application for security for costs would drain a third party’s resources, significantly limiting the ability of that group or individual to participate in the substantive hearing. This was occasionally used as a device by unscrupulous parties with substantial funds.
- Security for costs is intended to ensure that a party is able to pay costs where an order has been made against them; however this may be able to be addressed in other ways, such as greater support and guidance for participants to ensure that do not proceed with a case that lacks merit and that any case that is taken is efficiently managed.

Outcome sought:

Delete clause 133 of the Bill, as this will significantly restrict vital public participation in resource management decision making, particularly for environmentally-focussed community groups who have limited funds.

9. Removing the ability to join an appeal under s274 when ‘representing a relevant aspect of the public interest’ (clause 131)

The Bill proposes that a party can only join under s274 if they were an original submitter or are directly affected (ie with an interest greater than the public generally). Community groups and individuals will no longer be able to join in appeals on either consents or plan changes on the basis that they represent a “relevant aspect of the public interest”. This would mean, for example, that a local environmental group would not be able to join an appeal against a subdivision that involved clearing native bush (unless they submitted at the beginning of the consent process, which given the low levels of notification, will be less likely).

The Bill proposes to remove the opportunity to become a party where a group or individual represents a relevant aspect of the public interest (unless you are the Attorney General).

If an individual or group can convince the Environment Court that they do represent an “aspect” of the public interest that is “relevant” to the case, it is surely in the public interest that they be allowed to participate.

The Bill also proposes to reduce the period for lodging a s274 notice from 30 working days to 15 working days. This is another example of a change which will operate against the involvement of public interest organisations that will now have even less time to consider a decision and then seek the agreement of their membership to take an appeal.

Outcome sought:

Delete clause 131.

Retain the current provisions relating to s274 appeals.

10. Removing the Minister of Conservation’s decision making role in respect restricted coastal activities (clauses 20, 82 and 83)

The proposal to remove the Minister of Conservation’s decision making role in respect of restricted coastal activities is intended to remove a perceived conflict

of interest where the Minister of Conservation sets the policy, submits on the consent application and then makes the decision. The amendment is intended to bring the Minister of Conservation's role more closely in line with the Minister for the Environment's role.

The Minister of Conservation's consenting role recognises the values associated with the coastal environment and only applies in respect of restricted coastal activities. It also recognises the position of the Minister as "landowner" on behalf of the people of New Zealand. The Minister, as landowner, should be afforded the opportunity to refuse access to the coastal environment (and to collect rents where access is granted).

Concern has been expressed that an applicant can go through a very long process only to have the Minister of Conservation say no. This issue might be better dealt with by making a change where an applicant would have to seek the Minister's agreement before making a consent application for a restricted coastal activity.

This issue may be better considered in phase two of the RMA reform.

Outcome sought:

Delete clauses 20, 82 and 83

The important opportunity of the Minister of Conservation as the "landowner" to approve or decline a restricted coastal activity should not be lost.

Other ways to simplify the process of dealing with applications for restricted coastal activities could be better considered in phase two of the RMA reform.

Other issues

11. Expanding the existing call in powers for proposals of national significance (Clauses 35, 91-106)

The Cabinet Paper suggests that roading, electricity and other large scale infrastructure projects are often delayed as a result of numerous council requests for further information (s92), duplication of the Council hearing process in the Environment Court (with the potential for some parties to withhold experts until the Environment Court stage) and procedural delays such as appointment of commissioners and setting the hearing time.

It is Forest & Bird's experience that the applicants for many large infrastructure projects fail to engage in adequate public consultation. Their projects then experience delays because the application does not provide adequate or meaningful information and important issues are often missed.

The Bill establishes an Environmental Protection Authority (initially within Ministry for the Environment) responsible for the administration of applications

for proposals of national significance. This includes applications for resource consent, notices of requirement and private plan changes.

The EPA will make recommendations to the Minister about whether an application should be called in. The Bill provides that the Minister will be able to call in a private plan change application, even after the local authority has declined it.

The EPA will have the power to grant certificates of compliance for permitted activities (clause 90).

There is an indication that the role of the EPA may broaden significantly in the second phase of RMA reform and the EPA could have a decision making function on national planning instruments and, potentially, applications that have been called in. The significant new powers and functions of the EPA should not be subject to political interference. It is particularly important that the EPA not be subject to political direction in relation to call-ins and that it not be bound by any “Whole of Government” approach in relation to a development proposal which it is considering.

An application that has been called in can be considered by a board of inquiry or the Environment Court (at the discretion of the Minister). A board of inquiry can request information or commission reports. The board of inquiry releases a draft decision for comment before making a final decision. Comments on the draft decision are limited to conditions and minor or technical issues (not whether or not a consent should be granted).

A call in may be at the request of the Minister or the applicant. This is intended to prevent situations where a Minister is reluctant to call in an application because of its political nature. The Minister can process minor applications related to another application that has already been called in on a non-notified basis. A decision on a called in application must be made within 9 months of the application being notified unless an extension has been sought (up to a maximum of 18 months).

Decisions on applications that have been called in can only be appealed to the High Court on questions of law. Originally it was proposed that call in decisions could only be appealed to the Court of Appeal. While this has been changed, any appeal from the High Court is to Supreme Court (rather than the Court of Appeal) and only if the Supreme Court finds that there are exceptional circumstances to hear the matter.

In the call in process, the decision maker (board of inquiry or Environment Court) must have regard to the Minister’s reason for calling the matter in. One concern that has been raised is the possibility that the Minister’s reasons for calling in an application may be given greater weight than the matters in Part II. It is essential that the call in process does not become a mechanism for avoiding the purpose and principles that underpin the RMA. In order to achieve this, the Bill should be amended so that the decision on a called in application is

expressly ‘subject to Part II’. This should also avoid further litigation on this point.

Given that the call in process relates to applications of ‘national significance’ that often cross many local authority boundaries, it should have at least the same procedural safeguards as a local authority consent decision – s32 reporting and public participation. The benefit of a call in is to provide a comprehensive ‘one stop shop’ for applications of this kind, not to short cut the checks and balances in the process.

Outcomes sought:

Amend the Bill so that the decision on a called in application is expressly ‘subject to Part II’.

Amend the Bill so that the EPA can not be subject to political interference (including a “Whole of Government” approach) when considering whether to recommend a call-in.

Other notable changes introduced by the Bill include:

Restricting opportunities for trade competitors to object to applications and participate in proceedings (clause 139, and cross references throughout).

The Bill requires disclosure of third parties’ interests with regard to trade competitors. The Bill introduces indemnity costs (ie full costs) where a trade competitor is behind an appeal (either being brought or continued). Forest & Bird can imagine situations where this proposed change could affect sponsorship, membership or contributions legitimately made to an organisation for its ordinary fundraising.

Outcomes sought:

Clause 139 needs clarification

Removing the ability to use general tree protection rules (clauses 52 and 151).

This section restricts the use of rules that protect trees or groups of trees – this could overlap with rules designed to protect significant indigenous vegetation under s6(c). The Government is concerned with the costs associated with general tree protection rules in urban areas such as North Shore City.

General tree protection rules should be drafted so their application is limited to trees of high value: for example:

- over a certain height;
- historically significant;

- located in a reserve or adjacent to a reserve;
 - a significant landscape feature;
 - rare or ecologically significant
- (these criteria would be further defined).

The requirement to schedule particular trees puts a considerable administrative burden on the Council and is also open to error. Further a requirement to schedule notable trees, rather than providing for tree protection in a general rule, sets a precedent regarding the use of general rules as opposed to schedules in other areas, for example rules that protect significant indigenous vegetation or landscapes. The Bill provides that general tree protection rules will be revoked on enactment.

Outcomes sought:

Delete clauses 52 and 151

Removing the opportunity to appeal an entire policy statement or plan (clause 148).

This requires appeals to be more detailed at the outset. The proposal would have the ridiculous outcome that someone would not be able to fully oppose a private plan change designed to enable a particular development in a particular area. If an objector is opposed to the whole proposed plan change they should be allowed to oppose it in its entirety.

Outcomes sought:

Delete clause 148

Increasing cost of appealing to the Environment Court

It has been announced that the fee for taking an appeal to the Environment Court will increase 900% from \$55 to \$500. The Government has said that this increase (which is many times more than the inflation rate since the fee was last set) is to deter frivolous and vexatious appeals. However it will most likely act as a disincentive for parties with limited resources such as community groups or individuals, and it is unlikely to affect the participation of parties motivated by trade competition.

Outcomes sought:

The select Committee should recommend against such a significant increase in the cost of lodging an appeal to the Environment Court – or if it is to be increased that this increase be indexed to the CPI rise since it was last set.

Amending the statutory timeframe for processing consents so that it will only be suspended for the first further information request under s92.

This proposal has broader implications than simply speeding up the processing time for applications, as there must be a certain amount of information that is required by a consent authority before it is able to make a reasonable decision. The Bill also removes the ability for consent authorities to decline an application due to insufficient information (**clauses 65 and 67**).

Outcomes sought:

Delete clauses 65 and 67

Removing consideration of Part II matters for controlled and restricted discretionary applications except where they are relevant to the council's control/discretion.

Section 6 relates to matters of national importance – should we allow councils, through the plan process, to limit or prevent the consideration of these matters?

Outcomes sought:

Ensure that Part II matters continue to be considered for controlled and restricted activities.

Proposals supported by Forest & Bird

Increasing the maximum fine from \$200,000 to \$300,000 for individuals or \$600,000 for corporations (**clause 141**).

The Environment Court's ability to review a resource consent where the consent holder is repeatedly in breach of the consent conditions (**clause 141**).

The Environment Court will now have the power to require new conditions as well as fines when dealing with breaches of consent conditions (**clause 141**).

Removing Crown immunity from prosecution to increase public accountability.

Clarifying that public notice can be provided through the internet and service by email.

Reducing councils' reporting requirements so that plan and policy decisions can be made in relation to each issue, rather than each submission. Forest & Bird consider this a sensible change so long as all relevant submissions are cross referenced to each issue.

Removing the role of requiring authorities to make decision on their own notices of requirement (**clauses 110 and 120**). This is consistent with the principles of natural justice: an applicant should not be the decision maker on their own application.

Conclusion

While this amendment bill is meant to simplify and streamline the RMA, Forest & Bird's experience leads us to believe that many of the proposed changes are likely to have the opposite effect.

The Bill proposes to significantly restrict the public's ability to participate in decisions that affect them. Fewer resource consent applications will be notified. The Bill's proposal for a quicker - rather than thorough - planning process will lead to poor plans that are likely to lead to more - rather than less - court cases.

Fewer affected individuals or community groups will challenge unsustainable developments because developers will be able go directly to the Environment Court, they may be subject to unscrupulous security of costs applications, and the costs of appealing council decisions to the Environment Court will rise 900%.

Forest & Bird would like the opportunity to make an oral presentation in support of this submission.

Yours sincerely

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