

# PROTECTING NEW ZEALAND'S ENVIRONMENT

## *AN ANALYSIS OF THE GOVERNMENT'S PROPOSED FRESHWATER MANAGEMENT AND RESOURCE MANAGEMENT ACT 1991 REFORMS*



Sir Geoffrey Palmer QC

September 2013



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## EXECUTIVE SUMMARY

This report has been prepared at the request of the New Zealand Fish and Game Council in response to the Government's announced proposals to amend the Resource Management Act 1991 and reform freshwater management. It analyses the nature, extent and implications of those proposals for the protection of New Zealand's natural environment and its recreational enjoyment by all New Zealanders.

I have concluded that the environmental protection offered by the Act will be weakened by the passage of the Government's proposed changes. No amount of assertion or assurances given can alter that analytical fact. Further, the journey to finding out the precise consequences of the changes will be long, expensive and uncertain.

The Resource Management Act represented a deliberate shift on the part of New Zealanders away from economic advancement at any cost towards long-term economic and environmental sustainability. It expressly acknowledged that the state of the natural environment and New Zealand's economic development were inextricably linked. It was enacted with broad political support after years of public consultation. The Government's proposals fundamentally erode that commitment to sustainability.

The Government's proposals will rewrite the principles at the very heart of the Act. Sections 6 and 7 set out the signposts by which decision-makers can achieve the Act's purpose of "sustainable management". The Government's proposals will replace those provisions with a single list of competing considerations, under which principles protecting the natural environment and its recreational enjoyment will be consistently weakened, and principles promoting development will be consistently strengthened. Two decades of case-law built up in relation to the interpretation of the Act will be rendered redundant.

Those changes will reduce the level of legal protection for the natural environment and recreational opportunities by:

- Reducing the relative importance placed on environmental protection principles and increasing the relative importance placed on development principles.
- Limiting the outstanding natural landscapes that receive protection under the Act.
- Significantly reducing the level of protection given to the habitats of trout and salmon.
- Deleting any reference to the "ethics of stewardship", "amenity values", the "quality of the environment", and the "intrinsic value of ecosystems".

- Emphasising the benefits to be gained from the “use and development” of resources (without considering associated costs).
- Emphasising the benefits of urban development and infrastructure.
- Prioritising the rights of land-owners over the rights of the public to enjoy a clean natural environment.

These changes have been justified by reference to assumptions and perceptions that are not supported by empirical evidence or analysis. They are unnecessary and will inevitably lead to uncertainty and increased costs. They were objected to by 99% of public submitters. It is simply not enough to dismiss those concerns – from experts, councils, iwi, individuals, and environmental organisations – as “howls of outrage from some of those that have made a nice industry from the very complexity we are seeking to address”, as the Government has done.

These changes will be accompanied by a series of process changes. Many of these will be helpful and cut through the increasing complexities of the planning and resource consent system. Others, however, have the potential to significantly restrict the ability of ordinary New Zealanders to have their say about the environmental and recreational impact of development in their country and their communities.

The Government’s related freshwater reforms signal much needed action to address the system of freshwater management in New Zealand. There is no question that the current state of our freshwater falls below the expectations of New Zealanders and that change is needed. But the Government’s proposals contain no commitment that the existing state of New Zealand’s rivers, lakes and streams will not be allowed to decline further. The emphasis on “minimum bottom lines” and “overall water quality” leaves it open for some water bodies to be further polluted in the future as a calculated cost of doing business. Much of the detail of these proposals remains to be developed. Without careful attention there is a real risk that they will deliver a framework that will see worse – not better – outcomes for New Zealand’s lakes, rivers and streams.

New Zealand’s natural environment is at the core of our national identity. It is intertwined with our social, cultural and economic prospects – and those of future generations. The risks involved to the integrity of New Zealand’s natural environment, already under serious pressure, are palpable.

The protections for the New Zealand environment offered by the Resource Management Act have been progressively whittled away over time. The Government’s latest proposals erode those protections further – most seriously by amending the decision-making principles at the very heart of the Act itself. They are a major step backwards for environmental protection in New Zealand, and for the continued recreational enjoyment of the environment by all New Zealanders.



It is my recommendation that the New Zealand Fish and Game Council urge the Government to make no changes to the decision making principles in sections 6 and 7, except for an addition to recognise the importance of the management of significant risks from natural hazards. Such a step would, I consider, address the most serious weakness in the Government's proposals and help to reduce the level of concern that they have raised.

## THE ORIGINS OF THE RMA

Environment and development are not separate challenges; they are inexorably linked.<sup>1</sup>

1. The Resource Management Act 1991 did not develop in a vacuum. It was a response to a series of forces, both in New Zealand and overseas. Those forces aligned to demonstrate the need for a comprehensive integrated approach to decision-making with respect to the impact of human activities on the environment. They were:

- First, the fragmented, complicated and inefficient state of New Zealand's resource management law prior to 1991.
- Second, the concern on the part of many New Zealanders at the environmental costs of the so-called "Think Big" projects of the late 1970's and early 1980's.
- Third, the growing international consensus around the notion of "sustainable development".

2. The RMA was unashamedly intended to reform New Zealand's law.<sup>2</sup> It was intended to bring greater coherence, to provide for better decision making and opportunities for public participation, and to "promote the sustainable management of natural and physical resources".<sup>3</sup>

### Resource Management Law in New Zealand before the RMA

3. Before the Resource Management Act, resource management law was known as "planning law". Ironically, that law, rather than being elegantly planned, was an unplanned hodgepodge. Over 59 statutes and 19 regulations were repealed when the RMA was enacted.<sup>4</sup> More than 55 other statutes and regulations had to be amended.<sup>5</sup>

4. Under the law before the Resource Management Act, activities were managed on a sectoral approach. There were different laws to manage different types of activities and types of effects. A single proposed activity could potentially involve rules under the Town and Country Planning Act

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<sup>1</sup> World Commission on Environment and Development *Our Common Future: From One Earth to One World* A/42/427 (Annex) (1987) ("*Brundtland Report*") at p. 248.

<sup>2</sup> For a detailed discussion of the reform proposals behind the Resource Management Act 1991 see G Palmer "The Making of the Resource Management Act" in *Environment: The International Challenge* (Victoria University Press, Wellington, 1995).

<sup>3</sup> Resource Management Act, section 5(1); see also the Explanatory Note to the Resource Management Bill 1989 (224-1).

<sup>4</sup> Resource Management Act, Schedules 6 & 7.

<sup>5</sup> Resource Management Act, Schedule 8.

1977, the Water and Soil Conservation Act 1967, the Clean Air Act 1972, and the Noise Control Act 1982 to name but a few.

5. Rules were structured around the designation of activities. Aspects of an activity were thereby considered in isolation. This made it difficult to manage all of the environmental effects of a proposed activity. It also imposed a significant regulatory cost, requiring proposers of a complex activity to go through multiple different consent processes.

6. Emphasis was placed on planning in the sense of “direction and control of development”.<sup>6</sup> The rules were overly prescriptive with limited flexibility to consider end results:

The current law allows – indeed encourages almost limitless intervention for a host of environmental and socio-economic reasons. This has resulted in a plethora of rules and other *ad hoc* interventions that are intended to achieve multiple and often conflicting objectives. In many instances they achieve few clear objectives, but they impose enormous costs on developments of any kind. In addition there was a multiplicity of Acts and control authorities relevant to any proposal. The duplications, overlaps, delays and costs resulted in the call for an integrated streamlined statute with a clear purpose and focus.<sup>7</sup>

7. The Resource Management Act addressed this problem. It brought “the law relating to the use of land, air and water”<sup>8</sup> together into one place providing “a more liberal regime for developers”<sup>9</sup>. At the same time “activities [would] have to be compatible with hard environmental standards”.<sup>10</sup> It deliberately moved from an activities-based system to focus on the management of effects on the environment.

8. Given the complexity of that task it is no surprise that the RMA is long and that some of its procedures can be elaborate and time consuming. It is also no surprise that many of those procedures can probably be simplified and improved. But the key advancement of the RMA in establishing a single integrated set of legal rules should not be forgotten.<sup>11</sup>

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<sup>6</sup> See, for example, the described purpose of regional, district and maritime planning in section 4(1) of the Town and Country Planning Act 1977.

<sup>7</sup> Hon Simon Upton (4 July 1991) 516 NZPD 3018. See also the Explanatory Note to the Resource Management Bill 1989 (224-1) for a summary of the problems in the law as it existed at the time of its introduction.

<sup>8</sup> Resource Management Act, long title.

<sup>9</sup> Hon Simon Upton, above n 7, at 3019.

<sup>10</sup> *Ibid.*

<sup>11</sup> For a discussion of the role of the RMA as part of deregulatory free market reforms, see Buhrs & Bartlett *Environmental Policy in New Zealand* (Oxford University Press, Auckland, 1993), chs 4 and 5.

## The Rejection of Economic Advancement at Any Cost

9. The environment has always played a major role in New Zealanders' lives. It provides a source of food, of livelihood and of resources; a place to live, work and play; and a basis of spiritual and cultural values and pride. "New Zealand's social, cultural and economic prospects are entwined with the health and sustenance of New Zealand's natural resources. Wild features and landscapes also define New Zealand's national identity."<sup>12</sup> Quality of life and the quality of the environment consistently rate as higher priorities for individual New Zealanders than economic considerations.<sup>13</sup>

10. As in many countries, the 1970s and 1980s were marked by a growing environmental awareness on the part of New Zealanders.<sup>14</sup> Decades of inappropriate land and resource use were starting to take their toll through erosion, pollution, the reduction in the extent and quality of native habitat, and decline in native species. Many New Zealanders had taken for granted that they would always have clean water and air, the ability to hear native bird song, fish in a river, or walk in the bush – and those basic assumptions about the quality of New Zealand's natural environment were increasingly under threat.

11. At the same time, the Government was conscious of the need for economic development, to grow New Zealand's economy in the wake of the decline of New Zealand's traditional export markets and other external market forces. Several Government proposals for the development of major infrastructure under this policy acted as a touchstone, transforming growing environmental concern into public action.<sup>15</sup>

12. In 1970, almost 10% of New Zealand's population signed the "Save Manapouri" petition – protesting against the Government's proposal to raise the levels of lakes Manapouri and Te Anau as part of the Manapouri Power Project to provide electricity for the aluminium smelter at Tiwai Point. In 1974, the "Save Aramoana" campaign was launched to protest against the proposal to build a second aluminium smelter at the tiny settlement of Aramoana, at the mouth of the Otago Harbour.

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<sup>12</sup> Ministry for the Environment *Improving our Resource Management System* (Ministry for the Environment, Wellington, 2013) ("RMA Discussion Document") at 10-11.

<sup>13</sup> Hughey et al *A Decade of Public Perceptions of the New Zealand Environment: A Focus on Water and its Management* (2011) <[http://nzae.org.nz/wp-content/uploads/2011/08/Hughey\\_et\\_al\\_A\\_Decade\\_of\\_Public\\_Perceptions.pdf](http://nzae.org.nz/wp-content/uploads/2011/08/Hughey_et_al_A_Decade_of_Public_Perceptions.pdf)>.

<sup>14</sup> A brief summary of these events and their political and economic context can be found in the chapter "Land Under Pressure" in Michael King *The Penguin History of New Zealand* (Penguin, Auckland, 2003). See also the more detailed discussion in Pawson & Brooking ed *Environmental Histories of New Zealand* (Oxford University Press, Melbourne, 2002).

<sup>15</sup> See, for example, Simon Nathan 'Conservation – a history - Environmental activism, 1966–1987' *Te Ara - the Encyclopedia of New Zealand* (13 July 2012) <<http://www.TeAra.govt.nz/en/conservation-a-history/page-8>>.

Public interest groups fought the Government in the Courts, and won. Thousands also joined in related protests against the associated proposals to build a hydro-electric dam on the upper stretches of the Clutha River, at Clyde. Concern about the lack of proper legal protection for New Zealand's wild and scenic rivers led to the creation of a system of "Water Conservation Orders" to "recognise and sustain the amenity afforded by waters in their natural state".<sup>16</sup>

13. Victory, however, was short-lived. The response of the Government of the time, led by Prime Minister Sir Robert Muldoon, was to legislate to give greater power to central government to pursue its economic development agenda. In 1979 the Government enacted the National Development Act, with the express purpose to streamline the planning process for "works of national importance".<sup>17</sup> The Government was given power to designate such works and to refer them directly to the Planning Tribunal for its review and recommendations.<sup>18</sup> The final decision on whether such works would proceed was retained by the Government.<sup>19</sup> Significant constraints were placed around the ability of affected persons to challenge or review those decisions.<sup>20</sup>

14. In 1982, the Government went one step further. It enacted the Clutha Development (Clyde Dam) Empowering Act 1982 to "grant water rights to the Crown in respect of the operation of the Clyde Dam on the Clutha River"<sup>21</sup> – "notwithstanding anything in the Water and Soil Conservation Act 1967 or in any other enactment"<sup>22</sup> or the decisions that had already been made by the High Court and the Planning Tribunal to decline the Crown's application for such a consent.<sup>23</sup>

15. Those actions did not sit well with New Zealanders' fundamental sense of fair play.<sup>24</sup> In 1984 an election was held and the Government was defeated.

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<sup>16</sup> Water and Soil Conservation Amendment Act 1981, section 2. For a discussion of the development of Water Conservation Orders see, for example: Nolan ed *Environmental and Resource Management Law* (4<sup>th</sup> ed, LexisNexis, Wellington 2011) at [8.60]-[8.62]; and McDowall, R. M. *Gamekeepers for the Nation: the Story of New Zealand's Acclimatisation Societies, 1861–1990* (Canterbury University Press, Christchurch, 1994).

<sup>17</sup> National Development Act 1979, long title: "An Act to provide for the prompt consideration of proposed works of national importance by the direct referral of the proposals to the Planning Tribunal for an inquiry and report and by providing for such works to receive the necessary consents".

<sup>18</sup> National Development Act, sections 3 and 4.

<sup>19</sup> National Development Act, section 11.

<sup>20</sup> National Development Act, section 17.

<sup>21</sup> Clutha Development (Clyde Dam) Empowering Act 1982, long title.

<sup>22</sup> Clutha Development (Clyde Dam) Empowering Act, section 3(1).

<sup>23</sup> *Annan v National Water and Soil Conservation Authority and Minister of Energy* (1982) 8 NZTPA 369; *Gilmore v National Water and Soil Conservation Authority and Minister of Energy* (1982) 8 NZTPA 298 (HC).

<sup>24</sup> See, for example: Michael King, above n 14, at 444-445; Brookfield "High Courts, High Dam, High Policy" [1983] Recent Law 62.

## The Shift to Sustainable Development

16. What was happening in New Zealand in the 1970s and 1980s reflected broader international developments. In the wake of decolonisation, international discussions moved to the need for “development” to bring the previously colonised third world out of poverty. At the same time, the environmental impact of industrial development in first world countries was becoming all too clear.

17. A series of international conferences and agreements were concluded in these decades to grapple with these issues. Central among them was the World Commission on Environmental and Development, chaired by Norwegian Prime Minister Gro Harlem Brundtland.<sup>25</sup> The Commission’s report, issued in 1987, introduced the concept of “sustainable development” into the international mainstream.<sup>26</sup>

18. As defined in the Brundtland Report, “sustainable development” is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.<sup>27</sup> It contains two key concepts: the concept of needs; and the idea of limitations.<sup>28</sup> Rather than viewing “development” and “environment” as competing values, one to be sacrificed to the other, the Brundtland Report approached the two as inseparable – needs could only be met within the limitations of the environment:

Failures to manage the environment and to sustain development threaten to overwhelm all countries. Environment and development are not separate challenges; they are inexorably linked. Development cannot subsist upon a deteriorating environmental resource base; the environment cannot be protected when growth leaves out of account the costs of environmental destruction. These problems cannot be treated separately by fragmented institutions and policies. They are linked in a complex system of cause and effect.<sup>29</sup>

It thus provided a framework within which to promote economic and social advancement in ways that would avoid environmental degradation and over-exploitation.

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<sup>25</sup> Established by the United Nations Secretary-General in 1983 in accordance with *Process of Preparation for the Environmental Perspective to the year 2000 and Beyond* GA Res 38/161, A/Res/38/161 (1983).

<sup>26</sup> *Brundtland Report*, above n 1 at 248. For a discussion of the origins and impacts of the Brundtland Report see Drexhage & Murphy *Sustainable Development: From Brundtland to Rio 2012* (United Nations, 2010).

<sup>27</sup> *Brundtland Report*, above n 1, at Chapter 2, paragraph 1.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, at Chapter 1, paragraph 40.

19. The Brundtland Report formed the foundation for the ground-breaking “Earth Summit” held in Rio de Janeiro in 1992.<sup>30</sup> Principle 4 of the Rio Declaration declared that “[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”.<sup>31</sup>

20. 25 years on the concept of sustainable development remains a central paradigm of development.<sup>32</sup> Its importance has been repeatedly reaffirmed by the members of the United Nations, including New Zealand – most recently at the “Rio + 20” conference held in Rio in 2012.<sup>33</sup> Although its precise definition varies, it retains at its heart the key concept of development within the capacity of the environment.<sup>34</sup>

21. That concept, under the label “sustainable management”, forms the central principle behind the Resource Management Act.<sup>35</sup> The conceptual basis for the approach to management adopted in the Resource Management Act was the Brundtland Report.<sup>36</sup> Although the RMA went through considerable redrafting and review prior to its enactment, that foundation principle of “sustainable management” remained intact.<sup>37</sup>

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<sup>30</sup> United Nations Conference on Environment and Development, held at Rio de Janeiro, 3-14 June 1992.

<sup>31</sup> U.N. Conference on Environment and Development (UNCED) *Rio Declaration on Environment and Development* A/CONF.151/26 (vol I) (1992); reprinted in 31 ILM 874 (1992).

<sup>32</sup> Drexhage & Murphy, above n 26, at 11.

<sup>33</sup> United Nations Conference on Sustainable Development *The Future We Want* GA Res 66/288, A/Res/66/288 (2012).

<sup>34</sup> See, for example, the Royal Society of New Zealand publications *The Sustainable Carrying Capacity of New Zealand* (March 2013) and *Constraints to New Zealand's Sustainable Well-being* (March 2013) <<http://www.royalsociety.org.nz/expert-advice/information-papers/>> and the references therein. See, also, the discussion of varying definitions of the sustainability principle in *Environmental and Resource Management Law Online* (online loose-leaf ed, LexisNexis) (“*LexisNexis Resource Management Law Online*”) at [3.8].

<sup>35</sup> Resource Management Act, section 5(1): “The purpose of this Act is to promote the sustainable management of natural and physical resources”. Note that the term “sustainable management” rather than “sustainable development” was deliberately chosen because the broad meaning of the latter term had been used to include matters such as social inequality and wealth distribution: *Report of the Review Group on the Resource Management Bill*, 11 February 1991 at [3.3].

<sup>36</sup> See, for example, the discussion of the “Genesis of the RMA” in *LexisNexis Resource Management Law Online*, above n 34, at [3.2-3.3].

<sup>37</sup> For a useful summary of the development of this part of the Resource Management Act see Hon S D Upton “Purpose and Principle in the Resource Management Act” (1995) 3 Wai L Rev 17.

## SUSTAINABLE MANAGEMENT – THE LODESTAR OF THE RMA

The purpose of this Act is to promote  
the sustainable management of natural and physical resources.<sup>38</sup>

22. The system of management established in the Resource Management Act is founded in the purpose and principles of Part 2, which sets out the “framework against which all the functions, powers and duties of the Act are to be exercised for the purpose of giving effect to the Act”.<sup>39</sup> Part 2 has accordingly been described as the “engine room” of the RMA.<sup>40</sup> It guides the functions of councils in their planning and policy decisions and guides decisions as to whether to grant or refuse consent applications.

23. Part 2 consists of four provisions – sections 5 to 8. “Section 5 sets out the purpose of the Act. Sections 6, 7 and 8 are principles of varying importance intended to give guidance to the way in which the purpose is to be achieved.”<sup>41</sup> These sections were prepared through a lengthy process of analysis, public consultation and Parliamentary debate.<sup>42</sup>

24. The structure and drafting of Part 2 was the subject of intricate academic analysis and discussion following its adoption.<sup>43</sup> However, the Courts have noted the “deliberate openness of the language” of Part 2 and the importance of taking a broad “purposive approach” to its interpretation in light of its role in the Act.<sup>44</sup>

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<sup>38</sup> Resource Management Act Section 5(1).

<sup>39</sup> *Brookers Resource Management* (Looseleaf ed, Thomson Reuters) (“*Brookers Resource Management*”) at [A5.02(1)].

<sup>40</sup> *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 at [47].

<sup>41</sup> Peter Salmon *Environmental Law - Resource Management Act 1991* (Looseleaf ed., Brookers) (“*Salmon’s Resource Management Act*”) at [RMPt2.01].

<sup>42</sup> See, for example, the comment that “[t]he government made unprecedented efforts to involve the community in the [RMA] law reform exercise” (BV Harris “Sustainable Management as an Express Purpose of Environmental Legislation: the New Zealand Attempt” (1993) 8 Otago LR 51). For a summary of the process for the development of the Act see, for example, *LexisNexis Resource Management Online*, above n 34, at [3.2]-[3.3] and J McLean “New Zealand’s Resource Management Act 1991: Process with Purpose?” (1992) Otago LR 538 at 538-539. Note that sections 6 and 7 have been further amended over time.

<sup>43</sup> See, for example, the competing analyses in: DE Fisher “The Resource Management Legislation of 1991: a Juridical Analysis of Its Objectives” in *Resource Management* (Brooker and Friend Ltd, Wellington, 1991) Vol. 1A, at 1–30; BV Harris, above n 42; B Pardy “Sustainability: An Ecological Definition for the Resource Management Act 1991” (1993) 15 NZULR 351; J McLean, above n 42; IH Williams “The Resource Management Act 1991: Well Meant But Hardly Done” (2000) 9 Otago LR 673.

<sup>44</sup> See, for example: *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 at 19 (CA); *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC); *North Shore City Council v Auckland Regional Council* (1996) ELRNZ 305.



## Section 5 – the Purpose of “Sustainable Management”

25. Section 5 is the most critical part of the legislation which governs both its operation and interpretation. It states:

- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

This is the "paramount" purpose of the RMA<sup>45</sup> - the “lodestar” of the Act<sup>46</sup> - to which all the other RMA considerations refer.

26. “Sustainable management” is defined in the second paragraph of section 5:

- (2) In this Act, sustainable management means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while –
  - (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
  - (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
  - (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

27. Management is defined to mean “use, development and protection”, incorporating all three elements – not as alternatives but as a cumulative whole. The choice therefore is not between development at the expense of protection, or vice versa. “Neither use and development on the one hand nor protection on the other is necessarily to prevail. Resources may be used but only in a sustainable way”.<sup>47</sup> In the words of the Minister for the Environment at the time of the Act’s adoption:

Only sustainable outcomes were to be acceptable – in other words, whatever the trade-offs in the circumstances of the case, a highest level trade-off in favour of sustainability had already been made in the legislation in advance.<sup>48</sup>

28. The purpose of the Act therefore incorporates both the elements of “needs” and “limitations”. It acknowledges the need for “people and communities to provide for their social, economic, and cultural well-being and for their health and safety”. At the same time, it acknowledges the environmental constraints within which those needs must be met, as defined in

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<sup>45</sup> *Falkner v Gisborne District Council* [1995] 3 NZLR 622 at 632; [1995] NZRMA 462 at 477

<sup>46</sup> *Lee v Auckland City Council* [1995] NZRMA 241 (PT) at 242.

<sup>47</sup> *LexisNexis Resource Management Online*, above n 34, at [3.23].

<sup>48</sup> Upton, above n 37, at 21.

the three elements set out in section 5(2) subparagraphs (a), (b), and (c). Development is to be promoted – but only where it is *sustainable*.

29. Section 5(2)(a) to (c) “most clearly emphasise the [RMA’s] shift from direction and control of resources to the consideration of effects of activities. They are a mixture of ecocentric [ecosystem-centred] and anthropocentric [people-centred] considerations.”<sup>49</sup> Social and economic considerations are relevant within the definition of ‘sustainable management’ but are limited in their scope and are subject to ecological considerations.<sup>50</sup>

30. Sub-paragraph (a) incorporates the notion of “intergenerational equity”. It focuses primarily on the ability of the environment to provide resources to meet people’s needs – a people-centred concern. It expects that renewable resources will be managed in such a way that harvest does not exceed regeneration, with an aim of substituting renewable for non-renewable resources.<sup>51</sup>

31. Sub-paragraph (b) contains an express recognition of the importance of ecosystems to the maintenance of life. It recognises the intrinsic value of the natural world and acknowledges “the need for humans to avoid interference with nature’s order and balance”.<sup>52</sup>

32. Sub-paragraph (c) manifests an implicit conservation ethic, requiring that adverse effects must be “avoided, remedied or mitigated”. The inclusion of the notions of remedy and mitigation implies an acceptance that the environment may have to sustain some adverse effects but that these cannot be left untreated.

33. The definition of sustainable management in section 5(2) is to be taken as a whole and not broken into separate principles.<sup>53</sup> The elements of the definition are cumulative.<sup>54</sup> The Courts have accordingly adopted an “overall broad judgment approach” to assessing whether the sustainable management purpose of section 5 has been met:

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<sup>49</sup> G Smith “*The Resource Management Act 1991: ‘A Biophysical Bottom Line’ vs ‘A More Liberal Regime’: A Dichotomy?*” (1997) 6 *Canta LR* 499 at 508. For a brief explanation of the concepts of ecocentrism and anthropocentrism see *LexisNexis Resource Management Online*, above n 34, at [3.8].

<sup>50</sup> *LexisNexis Resource Management Online*, above n 34, at [3.10].

<sup>51</sup> BV Harris, above n 42, at 59. Note that minerals are expressly excluded from section 5(2)(a). This exclusion recognises the non-renewable nature of mineral resources. Allocation decisions with respect to minerals are governed by the Crown Minerals Act 1991, while the RMA regulates the environmental effects of prospecting, exploring and mining of minerals.

<sup>52</sup> *Ibid* at 63.

<sup>53</sup> *Salmon’s Resource Management Act*, above n 41, at [RM5.01(1)]; *Brookers Resource Management*, above n 39, at [A5.04(1)(a)].

<sup>54</sup> *Brookers Resource Management*, above n 39, at [A5.05(2)].

Under Part 2 we are required to make an overall broad judgment whether the proposal promotes the sustainable management of natural and physical resources. That recognises that the Act has a single purpose. Such a judgment allows for comparison of conflicting considerations, the scale and degree of them and their relative significance in the final outcome - *North Shore City Council v Auckland Regional Council*. This means where, on some issues, a proposal is found to promote one or more of the aspects of sustainable management, but on others it is found not to attain, or to attain fully, one or more of the aspects described in subsections 5(a), (b) or (c) it would be wrong to conclude that the latter overrides the former with no judgment of scale or proportion [*Genesis Power Ltd & anor v Franklin District Council* A148/2005 at [51]].<sup>55</sup>

34. The principle of “sustainable management” under the RMA is thus not about “economic development” at the expense of “environment”. But nor is it about “nature” at the expense of “people” – there is no dichotomy between the natural environment and people’s well-being under the RMA.<sup>56</sup> It embraces the concept of the “environment” as the place “where people live”.<sup>57</sup> This is evident from the definition of “environment” in section 2 of the Act, which includes:

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) all natural and physical resources; and
- (c) amenity values; and
- (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

35. The “environment” is thus not confined to “natural wilderness” – it encompasses urban, coastal, rural and wilderness landscapes; ecosystems and biodiversity; resources, including built resources; and the natural and physical characteristics that contribute to people’s appreciation and enjoyment of an area. The recreational value of the environment to all New Zealanders is thus at the very centre of the Act.

### **Sections 6 and 7 – Signposts to Sustainability**

36. Sections 6 and 7 are also important as these inform and assist the purpose of the RMA.<sup>58</sup> “The constraints found in ss5(2)(a), 5(2)(b) and 5(2)(c) are refined and given further meaning by ss 6, 7 and 8”.<sup>59</sup>

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<sup>55</sup> *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 at [53]. See also *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC); *Trio Holdings v Marlborough District Council* (1996) 2 ELRNZ 353; *Genesis Power Ltd v anor v Franklin District Council* A148/2005 [2005] NZEnvC 341, (2006) 12 ELRNZ 71, [2005] NZRMA 541 (7 September 2005).

<sup>56</sup> *Long Bay-Okura Great Park Soc. Inc, v North Shore City Council* EnvC A078/08.

<sup>57</sup> *Brundtland Report*, above n 1, at “Chairman’s Foreword”.

<sup>58</sup> *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 at [51]

<sup>59</sup> *Salmon’s Resource Management Act 1991*, above n 41, at [RM5.01(1)].

37. Section 6 sets out a series of “matters of national importance” that decision makers under the act “shall recognise and provide for” in “achieving the purpose of this Act”. That language clearly indicates that the matters identified have significant priority, and are not merely an equal part of a general balancing exercise.<sup>60</sup> At the same time, however they are not ends in themselves but accessories to the general principle, and remain subordinate to the sustainable management purpose in section 5.<sup>61</sup> There is no internal hierarchy of factors within section 6; all matters are given equal importance to each other.<sup>62</sup> In reality conflicts between section 6 matters rarely arise in practice.<sup>63</sup>

38. The matters identified in section 6 were the subject of intense parliamentary scrutiny, public consultation, and debate.<sup>64</sup> Section 6 contains important imperatives of “preservation” and “protection” in relation to the environment. Those imperatives reflect both a people-centred and ecosystem-centred approach to the environment. They emphasise the value of the environment to people as well as its value in its own right. They recognise the close link between people and the environment through concepts such as public access to the coast and water bodies, the relationship of Maori to their lands and taonga, historic heritage, and protected customary rights. At the same time section 6 also emphasises the value of the “natural character” of New Zealand’s coasts, wetlands, lakes and rivers; the importance of “natural features and landscapes”; and of “areas of significant indigenous vegetation and significant habitats of indigenous fauna”.

39. Those matters thus ensure that these environmental values are given the consideration they deserve in order to ensure that use or development is “sustainable”. They are not absolute protections and, in several cases, explicitly recognise the value of “appropriate” use and development.<sup>65</sup> The matters in section 6 do not “create a veto over an application being considered

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<sup>60</sup> *Brookers Resource Management*, above n 39, at A6.02; *Lexis Nexis Resource Management Online*, above n 34, at [3.34.]

<sup>61</sup> See, for example, *NZ Rail Ltd v Marlborough District Council* [1993] 2 NZLR 641, [1994] NZRMA 70 (HC), *Auckland Volcanic Cones Society Inc v Transit New Zealand* [2003] NZRMA 316, para [38].

<sup>62</sup> *Brookers Resource Management*, above n 39, at [A6.03(1)].

<sup>63</sup> *Report of the Environmental Defence Society Technical Advisory Group on the Review of Sections 6 and 7 of the Resource Management Act 1991* (Environmental Defence Society, Submission, April 2012) <[http://www.eds.org.nz/eresources/submissions.cfm?content\\_id=118534](http://www.eds.org.nz/eresources/submissions.cfm?content_id=118534)> at 13.

<sup>64</sup> Note that the matters in section 6 have been amended over time: section 6(f) was inserted by the Resource Management Amendment Act 2003; section 6(g) was inserted by the Resource Management (Foreshore and Seabed) Amendment Act 2004 and subsequently amended by the Marine and Coastal Area (Takutai Moana) Act 2011.

<sup>65</sup> Sections 6(a), (b) and (f).

under s 5, but merely inform the essential decision-making process required under s 5”.<sup>66</sup> They were not intended to act, and have not acted, as an absolute bar to development.<sup>67</sup> But they ensure that development, where it is appropriate, is environmentally “sustainable”. They serve as important signposts to elaborate on the central principle of “sustainable management” in section 5 – showing decision makers what sustainability looks like.

40. Section 7 in turn sets out “other matters” to which decision makers “shall have particular regard”. That language makes clear that the matters in section 7 were intended to be “important to the particular decision and therefore are to be considered and carefully weighed in coming to a conclusion”.<sup>68</sup>

41. The matters in section 7 were again selected through the course of the four years of analysis, consultation and debate that led to the adoption of the Act.<sup>69</sup> They elaborate specific dimensions of sustainable management, drawing on the key concepts of:

- the responsibility of human guardianship – expressed as kaitiakitanga and the “ethic of stewardship”;<sup>70</sup>
- the efficient and sustainable use of resources over time;<sup>71</sup> and
- the avoidance of environmental degradation – to amenity values, the intrinsic values of ecosystems, the quality of the environment, and particular habitats.<sup>72</sup>

42. The specification of the matters in sections 6 and 7 is not a question of “double counting” the value of the environment. The Courts have recognised that both sections 6 and 7 could be seen to raise similar issues, but that they do so from different perspectives and in different forms. The distinction between “matters of national importance” in section 6 and “other matters” in section 7 provides an indication of priority to assist decision makers in giving effect to the purpose of the Act. In the end all aspects go into the evaluation as to whether any issue being considered achieves the

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<sup>66</sup> *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* (Env Court, Christchurch C 179/03, 17 June 2003), para [47].

<sup>67</sup> *LexisNexis Resource Management Online*, above n 34, at [3.34].

<sup>68</sup> *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 & 336 (PT); see also, for example, *Takamore Trustees v Kapiti Coast District Council* [2003] NZRMA 443 (HC) at 455: the duty to have particular regard creates “not just an obligation to hear and understand what is said, but also to bring what is said into the mix of decision making”.

<sup>69</sup> Note that the matters in section 7 have been amended over time: Section 7(aa) was inserted in 1997 by the Resource Management Amendment Act 1997; Sections 7(ba), (i) and (j) were inserted in 2004 by the Resource Management (Energy and Climate Change) Amendment Act 2004; Section 7(e) was deleted in 2003 by the Resource Management Amendment Act 2003.

<sup>70</sup> Sections 7(a) and (aa).

<sup>71</sup> Sections 7(b), (ba), (g), (j).

<sup>72</sup> Sections 7(c), (d), (f), (h).

“sustainable management” purpose of the Act.<sup>73</sup> In short, the matters in sections 6 and 7 are not separate from the well-being of communities – they form part of that well-being.<sup>74</sup>

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<sup>73</sup> See, for example, *Wakatipu Environmental Society Inc v Queensland Lakes District Council* [2000] NZRMA 59 and *Kuku Mara Partnership (Forsyth Bay) v Marlborough District Council* EnvC W025/02.

<sup>74</sup> See, for example, *Long Bay-Okura Great Park Soc. Inc. v North Shore City Council* EnvC A078/08.

## TILTING THE FRAMEWORK BACK IN FAVOUR OF NATIONAL DEVELOPMENT

43. Part 2 of the Resource Management Act is supported by a detailed framework of measures, systems and procedures to realise its central purpose of sustainable management. A number of changes have been made to this framework over time – subtly tilting the framework away from sustainability and back in favour of national development, even as environmental pressures continue to grow.

### **The Framework for Sustainable Management under the Act**

44. The RMA provides for a hierarchy of policy statements and plans. At a national level, the central government may adopt national environmental standards and national policy statements.<sup>75</sup> At a regional level, planning is achieved through regional policy statements,<sup>76</sup> which may also be supported by regional plans.<sup>77</sup> District plans are adopted by each city or district council.<sup>78</sup>

45. City and district councils are generally responsible for making decisions about: the effects of land use; the effects of activities on the surface of rivers and lakes; noise; and subdivision.<sup>79</sup> Regional councils are generally responsible for making decisions about: discharges of contaminants to land, air or water; water quality and quantity; the coastal marine area; soil conservation; and land use to avoid natural hazards.<sup>80</sup>

46. This hierarchy represents a deliberate decision to place decision making closest to the community which will be affected by an activity – in order to achieve the RMA’s purpose of enabling “people and communities to provide for their social, economic, and cultural wellbeing”.<sup>81</sup> It also reflects the distinction between the use of land and the use of other resources under the Act. The use of land is generally permitted under the RMA unless national environmental standards or rules

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<sup>75</sup> Sections 43-44A.

<sup>76</sup> Sections 59-62.

<sup>77</sup> Sections 63-70.

<sup>78</sup> Sections 72-77.

<sup>79</sup> Section 31. Note that some areas operate under unitary authorities, which exercise the functions of both city or district councils and regional councils.

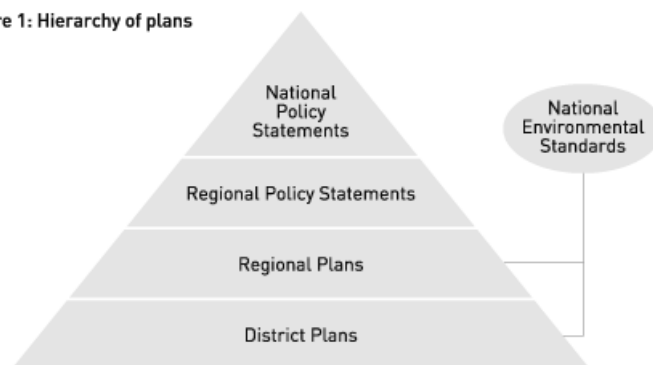
<sup>80</sup> Section 30.

<sup>81</sup> See, for example: Explanatory Note to the Resource Management Bill 1989 (224-1) at iii; *Report of the Review Group on the Resource Management Bill* (February 1991) at 102-103.

in plans specify otherwise.<sup>82</sup> In the case of other resources (water, air, or the coastal marine area) the presumption is reversed – so that most activities are prohibited unless expressly allowed.<sup>83</sup>

47. In order to ensure consistency and integration district plans are generally required to be 'not inconsistent' with regional plans, district and regional plans are required to 'give effect to' regional policy statements, and all these documents are in turn required to 'give effect to' national policy statements (see Figure 1).<sup>84</sup> Special provision is also given for Water Conservation Orders<sup>85</sup> and heritage protection orders.<sup>86</sup>

Figure 1: Hierarchy of plans



48. In adopting those rules, decision makers must assess whether “having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives”.<sup>87</sup> “The purpose of section 32 is provide a check on the necessity for including policies and rules in a plan, to ensure that over-regulation does not occur, costs and benefits are considered, and that the controls are justified.”<sup>88</sup>

49. Where an activity is not permitted as of right, a resource consent must be obtained under Part 6 of the Act.<sup>89</sup> Each resource consent application must include an assessment of effects of the proposal on the environment.<sup>90</sup> When considering applications for resource consents, the focus is

<sup>82</sup> Section 9.

<sup>83</sup> Sections 12, 13, 15 and 15A-15C.

<sup>84</sup> Environmental Defence Society *Resource Management Act for the Community* <<http://www.rmaguide.org.nz/rma/introduction/overview.cfm>>.

<sup>85</sup> See *infra* [86]-[90].

<sup>86</sup> Section 193.

<sup>87</sup> Section 32.

<sup>88</sup> Nolan, above n 16, at [3.91].

<sup>89</sup> Sections 87 & 87A.

<sup>90</sup> Section 88(2) and Schedule 4.



on evaluating the “actual and potential effects on the environment of allowing the activity”.<sup>91</sup> Consenting authorities must monitor the effects of activities which resource consent has been granted and take enforcement action where appropriate.<sup>92</sup>

50. A specialist judicial tribunal, called the Environment Court, hears appeals in respect of policy statements and plans, requirements, and resource consents.<sup>93</sup> It also has wide jurisdiction to make enforcement orders to secure compliance with the Act.<sup>94</sup> Appeals are on a “de novo” basis, meaning that the Environment Court can hear evidence and reach its own decisions on the merits of the case. Decisions may not always turn on legal issues, but often on the evaluation of sustainable management outcomes depending on an assessment of facts and expert evidence.<sup>95</sup> The membership of the Court reflects this role – it comprises a legally qualified Environment Judge, sitting usually with two Environment Commissioners each with professional resource management expertise.<sup>96</sup> Any further appeals are limited to points of law.<sup>97</sup> During the Environment Court appeal process considerable emphasis is placed on mediation and the majority of appeals are resolved without the need for a full appeal hearing.<sup>98</sup>

51. Public participation is an important feature of the processes under the RMA and was a foundation principle in its development.<sup>99</sup> Central government and local authorities are under an obligation to consult widely when developing policies and plans under the Act.<sup>100</sup> Anyone may take part in these processes – there are no technical rules of “standing” and anyone may make a submission.<sup>101</sup> Similarly, any person may make a submission about an application for a notified resource consent,<sup>102</sup> and any submitter may appeal the consenting authority’s decision.<sup>103</sup>

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<sup>91</sup> Section 104.

<sup>92</sup> Section 35(2)(d).

<sup>93</sup> Part 11.

<sup>94</sup> Part 12.

<sup>95</sup> Nolan, above n 16, at [2.20].

<sup>96</sup> Sections 247-268.

<sup>97</sup> Section 299.

<sup>98</sup> Section 299. For information on the number of appeals resolved by mediation see *Report of the Registrar of the Environment Court (for the 12 months ended 30 June 2012)* (Presented to the House of Representatives Pursuant to s264(1) of the Resource Management Act) E.49 (2012) at 12. For a summary of the mediation process see, for example, Ministry of the Environment *You Mediation and the Environment Court* <<http://www.mfe.govt.nz/publications/rma/everyday/court-mediation/>>.

<sup>99</sup> See, for example, Explanatory Note to the Resource Management Bill 1989 (224-1) at iii; *Report of the Review Group on the Resource Management Bill* (February 1991) 102-103; and the comments by Elias CJ in *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597, [2005] NZSC 17 at [10].

<sup>100</sup> Sections 44, 46 & 46A and Schedule 1.

<sup>101</sup> Schedule 1, clause 6. Note that in the case of trade competitors, subclause 4 confines the right to make submissions to situations where the competitor is “directly affected by an effect of the proposed policy

52. These key elements give effect to the central philosophy behind the Act to move away from a system of centralised activity-based planning to one driven by the effects of activities, with the assessment of those effects to be made at the local level.

### Changes over Time

53. These mechanisms and procedures have been the focus of a series of changes over the two decades since the RMA was adopted. The RMA has received steady criticism from some quarters for the complexity of its procedures, and the compliance costs they are perceived to impose on businesses.<sup>104</sup> However, such criticisms are not unique. Similar complaints are routinely directed at other regulatory regimes designed to achieve public policy outcomes – including tax, employment and ACC.<sup>105</sup> In the most recent Compliance Cost Survey conducted by Business NZ, the RMA was in fact identified as a compliance cost priority by less than 10% of business respondents.<sup>106</sup> That relatively low level of concern is consistent with international assessments of the RMA's efficiency.<sup>107</sup>

54. There is no doubt, however, that processes can be improved with experience. Many of the changes have assisted in rationalising processes with a view to reducing costs and increasing efficiency. For example, significant changes were made in 2009 to prevent businesses from using the RMA as way to stifle trade competition.<sup>108</sup> However, other changes have, in the words of the

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statement or plan that— (a) adversely affects the environment; and (b) does not relate to trade competition or the effects of trade competition.”

<sup>102</sup> Section 96. Note that in the case of trade competitors, sections 308A and B confine the right to make a submission to situations where the competitor is “directly affected by an effect of the activity to which the application relates, that—(a) adversely affects the environment; and (b) does not relate to trade competition or the effects of trade competition.”

<sup>103</sup> Section 120.

<sup>104</sup> For an analysis of the basis and validity of those concerns see, for example: Jarvis & Wilkinson *Survey of Compliance Costs of NZ Farmers: A Study of Costs and an Exploration of Issues* (MAF Policy Information Paper No 24, November 1998) <<http://maxa.maf.govt.nz/mafnet/rural-nz/profitability-and-economics/compliance-costs/compliance-costs/compliancecost.pdf>>; Burrell et al *Impacts on the Business Environment of the RMA* (LECG, 12 May 2006) <<http://www.med.govt.nz/sectors-industries/energy/pdf-docs-library/energy-and-the-environment/the-role-of-the-rma/rma-impacts-legc-report.pdf>>; NZIER *Off-Farm Agribusiness Compliance Cost: Report to the Ministry of Agriculture and Forestry* (NZIER, Wellington, May 2007).

<sup>105</sup> See, for example, Business NZ and KPMG *Summary Report of the Business NZ-KPMG Compliance Cost Survey* (October 2008) <<http://www.businessnz.org.nz/surveys/504>>.

<sup>106</sup> *Ibid* at p. 8.

<sup>107</sup> See, for example, World Bank *Doing Business: Measuring Business Regulations* (2013) <[www.doingbusiness.org](http://www.doingbusiness.org)>. New Zealand was rated third overall and sixth in relation to “dealing with construction permits”.

<sup>108</sup> Part 11, inserted by section 135 of the Resource Management (Simplifying and Streamlining) Act 2009.

New Zealand Law Society, increased delays and costs “without necessarily improving the quality of decisions or the meeting of environmental objectives”.<sup>109</sup>

55. Under the rhetoric of efficiency key aspects of the RMA framework have been significantly eroded over time – for example, by increasing the ability of central government to intervene in decision making, reducing opportunities for public participation in decision making processes, and limiting the capacity for judicial supervision by the Environment Court. The incremental effect has been to subtly tilt the framework of the RMA towards the facilitation of national development in order to meet Government economic policy. Thus, there has been a gradual creep away from sustainability and back towards the centralised planning that the Act was originally introduced to replace.

56. The Act has always contemplated a role for central Government in providing guidance to local authorities in relation to cross-cutting national issues. The key tools provided for central Government are National Policy Statements<sup>110</sup> and National Environmental Standards<sup>111</sup>. National Policy Statements can be issued on a range of matters, in order “to help local government decide how competing national benefits and local costs should be balanced”.<sup>112</sup> National Environmental Standards may specify “technical standards, methods or requirements” on issues such as water or air quality.<sup>113</sup>

57. Successive Governments have in large part failed to develop this guidance. To date, only four National Policy Statements have been issued (including a NZ Coastal Policy Statement, which must be in place at all times),<sup>114</sup> while only five sets of National Environmental Standards have been developed.<sup>115</sup> Although slow to develop national guidance through these mechanisms, successive

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<sup>109</sup> New Zealand Law Society *Submission on the Resource Management (Simplifying and Streamlining) Bill* (8 April 2009).

<sup>110</sup> Section 45(i).

<sup>111</sup> Section 43.

<sup>112</sup> Ministry for the Environment *National Policy Statements* <[www.mfe.govt.nz/rma/central/nps](http://www.mfe.govt.nz/rma/central/nps)>

<sup>113</sup> Section 43(1).

<sup>114</sup> “New Zealand Coastal Policy Statement 2010” (4 Nov 2010) 148 *New Zealand Gazette* 3679 at 3710; “National Policy Statement on Electricity Transmission 2008” (13 Mar 2008) 58 *New Zealand Gazette* 1603 at 1631; “National Policy Statement for Freshwater Management 2011” (12 May 2011) 64 *New Zealand Gazette* 1455 at 1482; “National Policy Statement for Renewable Electricity Generation 2011” (14 April 2011) 51 *New Zealand Gazette* 1101 at 1180. Two other National Policy Statements are in various stages of development: one on urban design and one on indigenous biodiversity (see Ministry for the Environment *National Policy Statements* <[www.mfe.govt.nz/rma/central/nps](http://www.mfe.govt.nz/rma/central/nps)>).

<sup>115</sup> NES for Air Quality (“Resource Management (National Environmental Standards for Air Quality) Regulations 2004”); NES for Sources of Human Drinking Water (“Resource Management (National Environmental

Governments have been quick to expand the ability of the central government to achieve its desired development objectives through the Act.

### *Directed Plan Changes*

58. For example, reforms in 2005 expanded the functions of the Minister for the Environment, creating a new power for the Minister to direct plan changes.<sup>116</sup> That change was made as part of a bundle of reforms, described by Parliament's Local Government and Environment Committee as: "propos[ing] radical surgery to council and appeal processes for consents and plans. This was almost universally opposed by all sectors, be they councils, developers, environmental groups, business groups, and interest groups such as the Law Society."<sup>117</sup> The Minister's direction power was itself extended in 2009 to include a power to direct councils to review their plans.<sup>118</sup>

59. In 2009 the Government used legislation to mandate changes to the protections for trees in all district plans nationwide – preventing councils from making general rules to protect trees or groups of trees in an urban environment.<sup>119</sup> Prior to 2009, many urban councils had relied on general rules to protect trees because of their ecosystem, biodiversity and amenity values – particularly in built-up urban areas.<sup>120</sup> As a result of the reforms, councils wishing to protect trees

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Standards for Sources of Human Drinking Water) Regulations 2007"); NES for Telecommunication Facilities ("Resource Management (National Environmental Standards for Telecommunication Facilities" Regulations 2008"); NES for Electricity Transmission Activities ("Resource Management (National Environmental Standards for Electricity Transmission Activities) Regulations 2009"); and NES for Assessing and Managing contaminants in Soil to Protect Human Health ("Resource Management (National Environmental Standards for Assessing and Managing contaminants in Soil to Protect Human Health) Regulations 2011). Note that several other National Environmental Standards have been initiated but, for various reasons, have not been completed (see Ministry for the Environment *National Environmental Standards* <<http://www.mfe.govt.nz/laws/standards/>>)

<sup>116</sup> Resource Management Amendment Act 2005, section 8 – inserting new section 25A into the Act.

<sup>117</sup> Resource Management and Electricity Legislation Amendment Bill 2004 (237-2) (Select Committee Report) at 1.

<sup>118</sup> Resource Management Act (Simplifying and Streamlining) Amendment Act 2009, section 24 – inserting new section 25B into the Act.

<sup>119</sup> Resource Management (Simplifying and Streamlining) Amendment Act 2009, sections 59(1) – inserting new sections 76(4A) and (4B) into the Act.

<sup>120</sup> See, for example: the Parliamentary Commissioner for the Environment *The Cities and their People: New Zealand's Urban Environment* (Parliamentary Commissioner for the Environment, Wellington, 1997) at sections 4.5 and 5.3.5; New Zealand Freshwater Sciences Society *Submission on the Resource Management Reform Bill 2012* (February 2013) <<http://freshwater.science.org.nz/index.php/news/submission-on-the-resource-management-reform-bill-2012/>> at [5]-[11]

are required to describe and specify the precise location of trees be protected – a costly and unwieldy exercise.<sup>121</sup>

60. Similarly, changes in 2011 gave the Minister the specific power to amend coastal plans for the purpose of managing aquaculture development “in accordance with the Government’s policy objectives”.<sup>122</sup> Changes to two existing regional coastal plans were mandated by the legislation in order to expand the potential for aquaculture development in the Tasman and Waikato regions.<sup>123</sup> The express justification for these interventions lay in the Government’s identification of aquaculture as a central plank of its Business Growth Agenda.<sup>124</sup>

#### *Expansion of the Minister’s “Call-In” Powers*

61. Similarly, the Minister’s powers to directly intervene in applications for resource consents or plan changes were significantly expanded in 2009.<sup>125</sup> Commonly referred to as the “call in” procedure, section 140 of the Act allows the Minister to short-circuit the usual decision-making processes by referring “proposals of national significance” for decision to a Board of Inquiry appointed by the Minister or to the Environment Court. Decisions made under the “call-in” procedure are only subject to limited appeal rights on points of law.<sup>126</sup> The “call-in” procedure seems to reflect the assumption that “a Board of Inquiry would attribute different values in the balance between preservation of environmental attributes and enabling economic activities, than would be applied by a local authority”<sup>127</sup> – in direct contrast to the principle of local decision-making at the heart of the Act.

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<sup>121</sup> Note that sections 76(4A)&(4B) were further amended by section 12 of the Resource Management Amendment Act 2013. These changes will still prevent Councils from adopting general rules and will require trees to be described and their location specifically identified.

<sup>122</sup> Resource Management Amendment Act (No 2) 2011, section 49 – inserting new section 165K into the Act.

<sup>123</sup> Resource Management Amendment Act (No 2) 2011, sections 62 and 63.

<sup>124</sup> See, for example, the comments made by the Minister of Fisheries and Aquaculture in Parliament on the first reading of the Bill: “The Government is committed, as part of its economic growth agenda, to enable the aquaculture industry to grow.” (16 November 2010) 668 NZPD 15309 and “The bill will also enable the Government to take a more active role in aquaculture planning.” (16 November 2010) 668 NZPD 15310.

<sup>125</sup> Resource Management (Simplifying and Streamlining) Amendment Act 2009, section 100 – inserting section 140-149ZE into the Act.

<sup>126</sup> Resource Management Act Section 149V.

<sup>127</sup> *Environmental Defence Society & Sustain Our Sounds v The New Zealand King Salmon Company Ltd* [2013] NZHC 1992 at [18].

62. The 2009 reforms took as their starting point concern that existing procedures acted as a brake on development.<sup>128</sup> The list of matters which the Minister could “call in” was significantly extended.<sup>129</sup> The factors on which the Minister may base his or her decision were also expanded to include development-focussed objectives: “whether the matter would assist the Crown fulfil its obligations or functions regarding public health, welfare, security or safety”<sup>130</sup> and whether it “relates to a network utility operation that extends or is proposed to extend to more than 1 district or region”.<sup>131</sup> Specific provision was made for applicants themselves to circumvent the usual public consultation process and request that their applications be “called in”.<sup>132</sup>

63. The Ministerial “call-in” power has been exercised ten times since the power was expanded.<sup>133</sup> Only one “call-in” application has been declined as being not of “national significance” – even though it related to activities within the Tongariro National Park.<sup>134</sup> Proposals determined to be of “national significance” have included major roading projects, the expansion of an airport, and large-scale salmon farming. Only one application has been referred to the independent Environment Court. All others have been referred to Boards of Inquiry appointed by the Minister.

64. In nearly all cases, the use of the “call-in” power was initiated by the applicant. Eight applications have been made by the New Zealand Transport Authority acting under the Government’s “Roads of National Significance” policy – all of which were referred to a Board of Inquiry appointed by the Minister. Similarly, most “call-in” decisions have been justified under the expanded grounds adopted in 2009 – particularly “whether the matter would assist the Crown fulfil its obligations or functions regarding public health, welfare, security or safety”. In the case of

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<sup>128</sup> See, for example, the comments by Hon Dr Nick Smith in Parliament citing concern about “how long it takes to get major infrastructure projects through” the consent process (19 February 2009) 652 NZPD 1487.

<sup>129</sup> Section 141, as amended by section 100 Resource Management (Simplifying and Streamlining) Amendment Act 2009.

<sup>130</sup> Section 142(3)(a)(viii), as amended by section 100 Resource Management (Simplifying and Streamlining) Amendment Act 2009.

<sup>131</sup> Section 142(3)(a)(x), as amended by section 100 Resource Management (Simplifying and Streamlining) Amendment Act 2009.

<sup>132</sup> Section 142(1)(b), as amended by section 100 Resource Management (Simplifying and Streamlining) Amendment Act 2009). Note that applicants that are “network utility operators” may also be designated as “requiring authorities” enabling them to designate land for use in the future for their own purposes (sections 166-186). Current designated requiring authorities include telecommunications companies, electricity companies, as well as private oil, gas and irrigation companies (see Ministry for the Environment *Requiring Authorities under the Resource Management Act 1991* <<http://www.mfe.govt.nz/rma/central/designations/requiring-authorities-table.html>>).

<sup>133</sup> Details of applications considered under the “call-in” power are available on the website of the Environmental Protection Authority <[www.epa.govt.nz/Resource-management/Pages/default.aspx](http://www.epa.govt.nz/Resource-management/Pages/default.aspx)>.

<sup>134</sup> Minister for the Environment *Ministerial Decision on a Request from Ruapehu District Council to Call In a Matter under s142 of the Resource Management Act 1991* (17 October 2011).

roading projects, for example, “public health, welfare, security or safety” has been interpreted as extending to the delivery of a safe and efficient roading system.<sup>135</sup> In addition, although not listed as a matter to be considered under the Act, the potential economic benefits of proposals and links to Government economic policy have also been expressly relied upon as justification.<sup>136</sup> The power has thus been used directly as a tool to avoid judicial oversight and secure the achievement of Government economic policy.

### *Explicit Emphasis on Economic Growth*

65. The Resource Management Amendment Act 2013, just adopted, takes a further step down the path of national development. That Act amended section 32, under which councils must determine that planning rules are “the most appropriate” to achieve the RMA’s objectives.<sup>137</sup> The changes specifically require councils to:

- identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—
- (i) economic growth that are anticipated to be provided or reduced; and
- (ii) employment that are anticipated to be provided or reduced;;<sup>138</sup>

66. This change erodes the central concept of “sustainable management” by explicitly pitting “environmental, economic, social, and cultural effects” against each other. Further, the express reference to opportunities for “economic growth” and “employment” clearly gives these issues extra weight— a fundamental shift from the environmental effects-based principles on which the RMA was built. They provide a signal to decision-makers that “sustainability” may be sacrificed to “development”. As the New Zealand Law Society has commented “[s]pecifically identifying these two types of economic effect may result in them assuming a greater importance in the overall

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<sup>135</sup> See, for example: Environmental Protection Authority *Basin Bridge: EPA Recommendation to the Minister* (21 June 2013) at [34]-[37]; Environmental Protection Authority *Christchurch Southern Motorway: EPA Recommendation to the Minister* (27 November 2012) at [29]-[35]; or Environmental Protection Authority *Mackays to Peka Peka: EPA Recommendation to the Minister* (27 April 2012) at [38]-[41].

<sup>136</sup> See, for example: Environmental Protection Authority *Basin Bridge: EPA Recommendation to the Minister* (21 June 2013) at [37] “If granted and these benefits confirmed, the proposal would likely encourage economic growth thus contributing to the health and wellbeing of New Zealanders”; Environmental Protection Authority *Christchurch Southern Motorway: EPA Recommendation to the Minister* (27 November 2012) at [40] & [41]; Environmental Protection Authority *Mackays to Peka Peka: EPA Recommendation to the Minister* (27 April 2012) at [46]; Environmental Protection Authority *New Zealand King Salmon: EPA Recommendation to the Minister* (3 November 2011) at [39]-[42]; Environmental Protection Authority *Queenstown Airport: EPA Recommendation to the Minister* (2 February 2011) at [11] & [13].

<sup>137</sup> Resource Management Amendment Act 2013 section 70.

<sup>138</sup> *Ibid.*

cost/benefit analysis required by [the proposed] subsection 32(2)(a). While that may be the intention of the amendments, such an emphasis is not mandated by the RMA's purpose."<sup>139</sup>

### *Reduction in Public Participation and Judicial Oversight*

67. Alongside those changes, other amendments have significantly reduced the capacity for public participation in, and judicial oversight of, decision making processes under the RMA.

68. For example, changes have been made to make it easier for consenting authorities not to publicly notify resource consent applications. Public notification of a resource consent application is the key step that enables members of an affected community to have their say about a proposed activity. Prior to 2009, there was a presumption that consents should be notified unless they met a certain specified test. In 2009, that presumption was overturned and councils were given a discretion whether to publicly notify an application for resource consent.<sup>140</sup> The change was justified because of concerns about "cost and delay of assessing and justifying decisions not to notify resource consent application".<sup>141</sup>

69. The changes were widely criticised as being unnecessary, given the low rate of actual notifications.<sup>142</sup> Concerns were also raised that "the amendments undermine[d] public participation and risk[ed] undermining the quality of decision-making".<sup>143</sup> A council's decision not to notify a consent is not open to appeal – leaving concerned parties with no avenue other than the costly and limited mechanism of judicial review through the High Court.

70. Similarly, changes have been made to consistently limit rights of appeal to the Environment Court. The decision of a Board of Inquiry under the "call-in" procedures, for example, is subject only to appeal to the High Court on points of law.<sup>144</sup> Similarly, the Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 expressly excludes the jurisdiction of the Environment

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<sup>139</sup> New Zealand Law Society *Submission on the Resource Management Reform Bill* (28 February 2013).

<sup>140</sup> Resource Management (Simplifying and Streamlining) Amendment Act 2009 section 76 - inserting new sections 95-95F into the Act.

<sup>141</sup> Ministry for the Environment *Resource Management Amendment Act 2009 Fact Sheet 3: Improving Resource Consent Processes* (Ministry for the Environment, INFO 434C, October 2009).

<sup>142</sup> In the ten years up to 2009, the percentage of consent applications that were publically notified varied between only 4% to 6%: New Zealand Law Society *Submission on the Resource Management (Simplifying and Streamlining) Amendment Bill* (8 April 2009) at [78].

<sup>143</sup> *Ibid* at [81].

<sup>144</sup> Section 149V.



Court in relation to decisions made by the Ministerial-appointed ECan Commissioners.<sup>145</sup> Legislation recently adopted by Parliament also significantly reduces the right of appeal to the Environment Court in relation to the new Auckland unitary plan.<sup>146</sup> These amendments were resoundingly criticised by the New Zealand Law Society Submission which advised the Select Committee that it had “serious concerns” in relation to the proposals.<sup>147</sup>

71. These changes are justified as being “only procedural”. But they have significant substantive effect. Reversing the presumption on notification prevents members of the public, iwi, and environmental and recreational interest groups from expressing their views on all but a tiny proportion of consent applications.<sup>148</sup> Similarly, limiting appeals to points of law prevents the appeal court from hearing or considering environmental evidence.<sup>149</sup> These increasing restrictions can be seen to reflect an attitude towards public participation and the judicial process as simply impediments to development, rather than vehicles to ensure that development decisions are sustainable and meet the purpose of the Act.

### **Continued Environmental Decline**

72. At the same time that the RMA has been reshaped to facilitate development, the quality of New Zealand’s natural environment remains under pressure, and continues to decline in key aspects. Although in global terms New Zealand ranks highly in environmental protection,<sup>150</sup> the OECD has observed that New Zealand has not succeeded in decoupling environmental pressures from economic growth.<sup>151</sup> The Act’s central purpose of “sustainable management” – that is, growth within the constraints of the environment – has thus yet to be fulfilled.

73. Some environmental indicators are definitely improving. On-going monitoring by the Ministry of Environment shows that the number of days a year that air quality is worse than the

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<sup>145</sup> Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 section 52 & 66.

<sup>146</sup> Local Government (Auckland Transitional Provisions) Amendment Act 2013 section 6 - inserting new sections 155-159 into the principal Act.

<sup>147</sup> New Zealand Law Society *Submission on the Resource Management Reform Bill* (28 February 2013), at [139]-[148].

<sup>148</sup> Only 6% of resource consents were notified in some way in 2010/11: Ministry for the Environment *Resource Management Act: Two Yearly Survey of Local Authorities 2010/11* (Ministry for the Environment, Wellington, 2011).

<sup>149</sup> *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA). See also the comments of Dobson J in *Environmental Defence Society & Sustain our Sounds v The New Zealand King Salmon Company Ltd* [2013] NZHC 1992 at [84], [85] & [110].

<sup>150</sup> See, for example, Yale University *Environmental Performance Index* (2012) <<http://epi.yale.edu/>>.

<sup>151</sup> OECD Environmental Performance Reviews *OECD Environmental Performance Reviews: New Zealand 2007* (OECD, 2007) at 23.

National Environmental Standard continues to decrease.<sup>152</sup> Similarly, the amount of land under legal protection for conservation purposes continues to increase.<sup>153</sup>

74. But other significant measures of the health of the natural environment are much less positive. “Although New Zealand was one of the last places on earth to be settled by humans, it has one of the worst records of native biodiversity loss.”<sup>154</sup> Dozens of species have become extinct and hundreds remain threatened.<sup>155</sup> Land-use changes have resulted in a substantial loss of indigenous habitats and species over time.<sup>156</sup> Monitoring by the Ministry for the Environment of seven selected indicator native species shows a continuing decrease in range, due in part to land-use changes.<sup>157</sup> Pressures on land use only continue to grow.<sup>158</sup>

75. Perhaps the most dramatic deterioration is to the quality of our lakes, rivers and streams. 45% of popular freshwater swimming spots have “poor” or “very poor” water quality.<sup>159</sup> A 2010 analysis of river quality data commissioned by the Government identified overall trends showing reductions in water clarity, and increasing conductivity and levels of nitrogen and phosphorus – all of which indicate degrading water quality.<sup>160</sup> Official advice about declining freshwater quality has also

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<sup>152</sup> Ministry for the Environment *Air Quality (Particulate Matter – PM<sub>10</sub>): Indicator Update* (Ministry for the Environment, INFO 656, October 2012).

<sup>153</sup> Ministry for the Environment *Legally Protected Conservation Land in New Zealand: Environmental Report Card* (Ministry for the Environment, INFO 492, April 2010).

<sup>154</sup> Ministry for the Environment *Current State of New Zealand’s Biodiversity* <[www.biodiversity.govt.nz/picture/biodiversity/state/index.html](http://www.biodiversity.govt.nz/picture/biodiversity/state/index.html)>.

<sup>155</sup> *Ibid.*

<sup>156</sup> See, for example: Ministry of Environment indicators “Native land cover by LCDB class” and “Native land cover by LENZ class” <[www.mfe.govt.nz/environmental-reporting/biodiversity/native-cover/index.html](http://www.mfe.govt.nz/environmental-reporting/biodiversity/native-cover/index.html)>; Landcare Research *New Zealand’s Remaining Indigenous Cover: Recent Changes and Biodiversity Protection Needs* (Landcare Research, Dunedin/Hamilton, 2005).

<sup>157</sup> Ministry for the Environment *Environment New Zealand 2007* (Ministry for the Environment, Wellington, 2007).

<sup>158</sup> See, for example, Royal Society of New Zealand *Competition for Land Use in New Zealand* (Royal Society of New Zealand, Information Paper, 2011) <<http://www.royalsociety.org.nz/expert-advice/information-papers/>>.

<sup>159</sup> Ministry for the Environment *Recreational Water Quality in New Zealand: Indicator Update* (Ministry for the Environment, INFO 653, October 2012). The latest Ministry for the Environment indicator update does not provide comparative data: Ministry for the Environment *Suitability for Swimming: Indicator Update* (Ministry for the Environment, INFO 690, July 2013).

<sup>160</sup> NIWA *Analysis of National River-Water Quality Data for the Period 1998-2007* (NIWA, Wellington, 2010). But see the latest Ministry for the Environment river condition update, which describes generally improving trends although continuing deterioration with respect to nitrate levels in particular: Ministry for the Environment *River Condition Indicator: Summary and Key Findings* (Ministry for the Environment, INFO 689, July 2013).

been provided to the Minister of Conservation.<sup>161</sup> These reports note the clear correlation between the decline in freshwater quality and the increasing intensification of agriculture, particularly dairy farming expansion. Intensive agriculture also has a significant negative impact on soil health.<sup>162</sup> There is no question that the increased use of fertilizers, increased stock numbers, and increased irrigation together continue to have a significant environmental impact on our freshwater and near shore coastal environments.

76. Given the importance of the natural environment to New Zealand and New Zealanders, and to the perception of New Zealand in overseas markets, these impacts cannot be ignored in the drive for economic growth. They form the backdrop for significant new reforms put forward by the Government this year. Those reforms would fundamentally reshape New Zealand's freshwater management system and the principles at the heart of the RMA. Together they will erode the legal protections given to the natural environment and its enjoyment by New Zealanders – tilting the RMA even further away from its objective of sustainable management.

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<sup>161</sup> New Zealand Conservation Authority *Protecting New Zealand's Rivers* (New Zealand Conservation Authority, Wellington, 2011) ("*NZCA Protecting New Zealand's Rivers*").

<sup>162</sup> Ministry for the Environment *Soil Health Environmental Snapshot: Environmental Report Card* (Ministry for the Environment, INFO 471, January 2010).

## FRESHWATER MANAGEMENT REFORMS

All New Zealanders know how important water is to this country and to its people – fresh water is one of our primary national advantages. It sustains our unique environment; it supports a wide range of activities which are critical to our economy, including primary production and energy generation; it underpins our social values and our life-style, which attract (and retain) people and skills to the country; it is a key aspect of our reputation abroad, including for tourists and export markets. For iwi, fresh water is a taonga and part of their identity; for all of us, it is deeply embedded in our culture.<sup>163</sup>

77. New Zealand’s freshwater is a critical environmental, social and economic resource. Healthy freshwater lakes, rivers and streams are the basis of life – they are taonga with their own mauri; a source of drinking water; the habitats and ecosystems that nurture New Zealand’s biodiversity; places for New Zealanders to fish, swim and play; a source for generating electricity; and a resource to support important primary industries central to our economy.

78. Managing the health of New Zealand’s freshwater is no easy task.<sup>164</sup> Hydrological cycles are complex. The environmental vulnerability of water bodies varies considerably depending on the characteristics of the water body and the shape and geological structure of the surrounding landscape. There is often a significant lag-time before the environmental impacts of activities become evident. Effective water management requires a holistic view of the system – rivers for example need to be treated as linear systems connecting headwaters to the coast. Both *water quantity* (the flow of water in a river) and *water quality* (temperature, oxygen levels, and contaminant levels) are critical to water health.

79. Freshwater health is inextricably linked to the activities that take place on land. The three most significant and widespread pollutants in New Zealand are: pathogens (e.g. *E.coli*), which cause disease; sediments, which reduce water clarity and water flow; and nutrients (e.g. nitrogen and phosphorus), which lead to “over fertilisation” – choking waterways with weed and algal growth and depleting oxygen levels. Unlike many other countries, the main challenge for New Zealand is that these pollutants come mainly from diffuse “non-point” sources – such as erosion, animal excreta, or

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<sup>163</sup> Land and Water Forum, *Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water* (Land and Water Forum, Wellington, 2012) at [1] (“*Land and Water Forum 3*”).

<sup>164</sup> For a useful and accessible summary of the issues surrounding water quality see Parliamentary Commissioner for the Environment *Water Quality in New Zealand: Understanding the Science* (Parliamentary Commissioner for the Environment, Wellington, 2012).

run-off from the application of fertiliser – rather than factories or other easily identified sources. They are a particular legacy of our agricultural economy and the way in which we use our land. It is easy to see pollution coming from a smoke-stack or a waste-pipe – but harder to see the pollution that comes from clearing land for the farming of cows or sheep.

### **Current Management Framework**

80. Freshwater is primarily administered by regional councils under the Resource Management Act.<sup>165</sup> Regional councils are responsible for making decisions on the allocation and use of water within their boundaries. These decisions are set out in regional policy statements and regional plans adopted under the Act. Regional councils may also use their regional plans to set quality standards for water bodies, and to manage water quality and land-use activities that may affect water quality.<sup>166</sup> There is a presumption that those standards may not result in a reduction of the quality of water in any water body.<sup>167</sup>

81. Unless authorised by rules in a regional plan, anyone wishing to take or use freshwater (other than for domestic purposes or as drinking water for stock) must apply for a resource consent – commonly known as a “water permit”.<sup>168</sup> The RMA also requires that anyone wishing to discharge contaminants into water, or onto land where they can enter waterways, must have council consent.<sup>169</sup> That consent can be given either through rules in a regional plan or by attaching conditions to resource consents.

82. In setting rules under regional plans regional councils are required to consider alternatives, benefits and costs under section 32 and to act consistently with Part 2 of the Act. That means that water must be managed consistent with the central purpose of “sustainable management” under Section 5, taking account of the matters set out in Sections 6 and 7. These include several matters of particular significance in respect of water: including “the preservation of the natural character of ...

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<sup>165</sup> Section 30(1). For a useful summary of the current freshwater management system see: Ministry for the Environment “The Current Freshwater Management System: Meeting Demands?” in *Freshwater for a Sustainable Future: Issues and Options* <[www.mfe.govt.nz/publications/water/freshwater-issues-options-dec04/html/page6.html](http://www.mfe.govt.nz/publications/water/freshwater-issues-options-dec04/html/page6.html)>. Note that some areas operate under Unitary Authorities, which carry out the functions of both a Regional Council and a territorial authority – for example, Nelson City. A special management regime applies in Canterbury, under the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.

<sup>166</sup> Section 69 and Schedule 3.

<sup>167</sup> Section 69(3).

<sup>168</sup> Section 14.

<sup>169</sup> Section 15.

wetlands, and lakes and rivers and their margins”<sup>170</sup>; “the protection of ... significant habitats of indigenous fauna”;<sup>171</sup> “the maintenance and enhancement of public access to ... lakes and rivers”;<sup>172</sup> “the relationship of Maori and their culture and traditions with their ancestral ... water”;<sup>173</sup> “the maintenance and enhancement of amenity values”;<sup>174</sup> “the intrinsic value of ecosystems”<sup>175</sup> and “the maintenance and enhancement of the quality of the environment”;<sup>176</sup> and “the protection of the habitat of trout and salmon”.<sup>177</sup>

83. The importance placed on these principles under the RMA is significant:

Whereas resource managers were previously required to balance all of the competing demands on a particular water body and to weigh and balance the detriments of any particular use, there is now a statutory imperative which requires them to protect certain features which qualify for protection and to consider the appropriateness of any particular proposal.<sup>178</sup>

84. Regional councils must also give effect to the National Policy Statements for Freshwater Management and for Renewable Electricity Generation, adopted in 2011.<sup>179</sup> The Freshwater Management NPS identifies high level objectives and policies with respect to water quality and quantity, integrated management, and the roles and interests of tangata whenua – but no actual limits or standards. The Renewable Electricity Generation NPS contains a specific direction to councils to provide for hydro-electric generation<sup>180</sup> – potentially at the expense of other values under the Act.<sup>181</sup>

85. Water permits are issued on a “first come, first served” at no charge for use basis to applicants who can demonstrate that they have a reasonable need for water and can meet the RMA’s objective of sustainable management.<sup>182</sup> There are no mechanisms under the Act for councils

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<sup>170</sup> Section 6(a).

<sup>171</sup> Section 6(c).

<sup>172</sup> Section 6(d).

<sup>173</sup> Section 6(e).

<sup>174</sup> Section 7(c).

<sup>175</sup> Section 7(d).

<sup>176</sup> Section 7(f).

<sup>177</sup> Section 7(h).

<sup>178</sup> Nolan, above n 16, at [8.34].

<sup>179</sup> Section 55; “National Policy Statement for Freshwater Management 2011”, above n 114, at 1482; “National Policy Statement for Renewable Electricity Generation 2011”, above n 114, at 1180.

<sup>180</sup> Policy E2.

<sup>181</sup> See, for example, Parliamentary Commissioner for the Environment *Hydroelectricity or Wild Rivers? Climate Change versus Natural Heritage* (Parliamentary Commissioner for the Environment, Wellington, 2012) (“PCE *Hydroelectricity or Wild Rivers?*”).

<sup>182</sup> *Fleetwing Farms v Marlborough District Council* [1997] 3 NZLR 257 (CA); *Aoraki Water Trust v Meridian Energy* [2005] NZRMA 251; *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZCA 71.

to compare competing applications against each other. To a large extent, this reflects the assumption at the time the RMA was passed that New Zealand enjoyed an abundance of water and significant over-demand was not anticipated as a real possibility.<sup>183</sup> Permits only provide a right to take or use water – they are not a right of ownership over the water resource. They may be issued for up to 35 years, and are usually renewed on expiry.<sup>184</sup> They apply to a particular consent holder at the site specified. Although regional plans may allow for permits to be transferred,<sup>185</sup> in practice this is usually limited to new owners or occupiers of the specified site.

### *Water Conservation Orders*

86. The RMA also makes special provision for the permanent protection of “outstanding amenity or intrinsic values” of individual water bodies through the mechanism of Water Conservation Orders.<sup>186</sup> The concept of Water Conservation Orders was first adopted in 1981,<sup>187</sup> in response to a report by the Commission for the Environment that highlighted the inability of existing legislation fully protect “wild and scenic” rivers and other water bodies.<sup>188</sup> The Commission for the Environment’s report in turn followed several high-level cases taken by regional Acclimatisation Societies and the Royal Forest and Bird Protection Society in an effort to protect streams and rivers that provided high-quality habitat for trout, salmon and indigenous species.

87. The purposes for which Water Conservation Orders may be adopted are set out in Part 9 of the Act. They differ from the “sustainable management” purpose of Part 2 by giving express primacy to protection and conservation values:<sup>189</sup>

- (1) Notwithstanding anything to the contrary in Part 2, the purpose of a water conservation order is to recognise and sustain –
  - (a) Outstanding amenity or intrinsic values which are afforded by waters in their natural state;

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<sup>183</sup> See Ministry for the Environment *Water Allocation and Use* (Ministry for the Environment, Wellington, 2004), at 6: “Given that New Zealand has abundant (albeit variable) rainfall, the current allocation and use system has grown out of a situation where there was very little scarcity. This mindset is still common today; many New Zealanders believe that water should be ‘free’ and there is little appreciation of the number and intricacies of allocation issues.”

<sup>184</sup> Section 123. An application for the renewal of a consent has priority over other applications (sections 124A-124C).

<sup>185</sup> Section 136.

<sup>186</sup> Part 9. Note that a different process applies to Water Conservation Orders concerning water resources in the Canterbury Region under the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.

<sup>187</sup> Water and Soil Conservation Amendment Act 1981.

<sup>188</sup> For a useful summary of the historical development of Part 9 of the Act see, for example: *LexisNexis Resource Management Law Online*, above n 34, at [8.56] and following.

<sup>189</sup> Section 199(1).

(b) Where waters are no longer in their natural state, the amenity or intrinsic values of those waters which in themselves warrant protection because they are considered outstanding.

88. Water Conservation Orders can be sought for rivers, streams, lakes, ponds, wetlands, aquifers, or geothermal waters.<sup>190</sup> They can provide for restrictions and prohibitions relating to both water quantity and water quality – either preventing or closely controlling water use.<sup>191</sup> Orders may either be “preservation orders” (which aim to preserve outstanding waters that are in their natural state) or “protection orders” (which aim to protect particular characteristics of water body which are themselves outstanding).<sup>192</sup> As a national instrument Water Conservation Orders take precedence over regional plans – so that any new rules or consents must not be inconsistent with them.<sup>193</sup> However, they do not affect existing resource consents.<sup>194</sup>

89. Anyone can apply for a Water Conservation Order.<sup>195</sup> Nearly all applications have been spearheaded by conservation and other interest groups – particularly Fish and Game Councils.<sup>196</sup> Applications are considered through a hearing process before a specially convened expert tribunal, and may be appealed to the Environment Court. Orders are made by the Governor-General, on the recommendation of the Minister for the Environment on the basis of the tribunal’s advice. The application process is generally lengthy, rigorous and expensive.<sup>197</sup>

90. Water Conservation Orders can be useful for all parties, “because they provide a clear, transparent mechanism that sets real limits, provides certainty, helps the planning process, lower costs and makes effective use of stakeholders’ time and resources”.<sup>198</sup> There are currently 16 Orders in place across the country, protecting 14 rivers and two lakes.<sup>199</sup>

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<sup>190</sup> Definition of “water body”, section 2.

<sup>191</sup> Section 200(a)-(d). Note that Water Conservation Orders are not necessarily absolute and may still allow for some water use, such as for irrigation (see, for example, Water Conservation (Rangitata River) Order 2006).

<sup>192</sup> Section 199(2).

<sup>193</sup> Section 217.

<sup>194</sup> *Ibid.*

<sup>195</sup> Section 201(1).

<sup>196</sup> *NZCA Protecting New Zealand’s Rivers*, above n 161, at 32

<sup>197</sup> *Ibid* at 32 & 33.

<sup>198</sup> *Ibid* at 31.

<sup>199</sup> Ministry for the Environment *Water Conservation Orders*  
<<http://www.mfe.govt.nz/issues/water/freshwater/water-conservation/>>.



## Failures in the System

91. There are a number of deficiencies in the current management framework described above.<sup>200</sup> Relatively few regional councils have put the necessary management regimes in place to address water quality and quantity in an integrated way – including by managing diffuse non-point source pollution arising from activities on land. Those regional councils that have, have faced considerable legal and political opposition.<sup>201</sup> The consequent reliance on resource consents as a primary allocation and management tool results in decisions being made with little consideration of their cumulative impacts over a catchment. The “first come, first served” approach to allocation applications also prevents water from being put to its best use. The absence of clearly expressed national quality and quantity standards has left a significant vacuum. In some key areas Water Conservation Orders have operated to fill the gap, at least in respect of significant water bodies. But, although valuable, Water Conservation Orders are a limited tool – they are issued on a case-by-case basis rather than through a strategic representative approach. At present they are limited to in stream influences and cannot control activities on surrounding land. These deficiencies are exacerbated by a lack of baseline data and inconsistent approaches to accounting for activities and monitoring their effects.

92. Many of these shortfalls in the management system have been identified for decades.<sup>202</sup> But their significance has been highlighted as demand and competition for water continues to grow. Allocation has nearly doubled since 1999, and increased by 10 per cent in the last 4 years.<sup>203</sup> This can largely be explained by the increase in demand for irrigation. The amount of land irrigated by consented water takes has increased by 82 per cent between 1999 and 2010.<sup>204</sup> There is also demand for water for energy generation, as a result of renewed interest in hydro-electricity

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<sup>200</sup> See, for example: Land and Water Forum *A Fresh Start for Fresh Water* (Land and Water Forum, Wellington, 2010) (“*Land and Water Forum 1*”); NZCA *Protecting New Zealand’s Rivers*, above n 161; *PCE Hydroelectricity or Wild Rivers?*, above n 181.

<sup>201</sup> See, for example, the Minister for Agriculture’s public criticisms of the Horizons Regional Council’s “One-Plan”, which sought to impose nutrient limits on agricultural and horticultural land users: “This is a very serious plan that has the potential to dramatically reduce the productivity of the regional council’s catchment area. What is clear is that there is a very significant impact to productivity and production with the One Plan.” <<http://www.stuff.co.nz/dominion-post/news/7957358/One-Plan-consequences-dire-Carter>>.

<sup>202</sup> See, for example, P. Memon “Freshwater Management Policies in New Zealand” (1997) 7 *Aquatic Conservation: Marine and Freshwater Ecosystems* 305-322; Ministry for the Environment *Water Programme of Action: Water Allocation and Use* (Ministry for the Environment, Wellington, 2004); B Brunette “Freshwater Management and Allocation under the Resource Management Act 1991: Does First-in-First-Served Achieve Sustainable Management Principles?” (2006) 10 NZJEL 169.

<sup>203</sup> Ministry for the Environment *Freshwater Demand (Allocation)* <<http://www.mfe.govt.nz/environmental-reporting/freshwater/demand/>>.

<sup>204</sup> *Ibid.*

generation to help meet energy needs and renewable energy targets.<sup>205</sup> New Zealand's growing population and changing land uses (particularly the intensification of agriculture) also bring new consumption demands.<sup>206</sup> Policies and plans have not kept pace with the speed of development.<sup>207</sup>

93. New Zealand is lucky in enjoying a relative abundance of freshwater, particularly in international terms. However, abundant is not the same as infinite. New Zealand's rainfall is high on a nationwide annual basis, but many regions experience relatively little rain for several months of the year. Many catchments are already over-allocated or approaching full allocation, even if actual use generally remains below allocated levels.<sup>208</sup> "Increasing demands combined with current trends in climate change reinforce the need for careful management to protect water in New Zealand."<sup>209</sup>

94. These competing demands have already had a major environmental impact. Water quality in New Zealand, while generally good by international standards, is declining according to data from the National Rivers Water Quality Network.<sup>210</sup> New Zealand has made good progress in reducing point source pollution (e.g. from factories), but diffuse non-point source pollution – particularly from intensified agriculture – remains a growing problem.<sup>211</sup> 32 per cent of New Zealand's lakes are likely to have "poor" or "very poor" water quality.<sup>212</sup> 45 per cent of monitored freshwater swimming spots have been graded as "poor" or "very poor".<sup>213</sup> Freshwater quality is now the number one environmental concern amongst New Zealanders.<sup>214</sup>

95. These demands and impacts have led to disputes about how best to manage and protect New Zealand's freshwater resources for the future.<sup>215</sup> For example, attempts on the part of Horizons

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<sup>205</sup> Ministry for the Environment *Freshwater Availability and Use* <[www.mfe.govt.nz/issues/water/freshwater](http://www.mfe.govt.nz/issues/water/freshwater)>.

<sup>206</sup> *Ibid*; Ministry for the Environment *Water Programme of Action: The Effects of Rural Land Use on Water Quality* (Ministry for the Environment, Wellington, 2004); Parliamentary Commissioner for the Environment *Growing For Good: Intensive Farming, Sustainability and New Zealand's Environment* (Parliamentary Commissioner for the Environment, Wellington, 2004); Royal Society of New Zealand *Constraints to New Zealand's Sustainable Well-Being*, above n 34.

<sup>207</sup> *NZCA Protecting New Zealand's Rivers*, above n 161, at 36.

<sup>208</sup> *Land and Water Forum 1*, above n 200, at 6. See also: "The percentage of estimated actual water used compared with the maximum allocated volume in New Zealand is around 65 per cent" (Ministry for the Environment *Freshwater Demand (Allocation)* <<http://www.mfe.govt.nz/environmental-reporting/freshwater/demand/>>).

<sup>209</sup> Ministry for the Environment *Freshwater Availability And Use* <[www.mfe.govt.nz/issues/water/freshwater](http://www.mfe.govt.nz/issues/water/freshwater)>

<sup>210</sup> NIWA, above, n 160. Note, however, that the NRQWN only monitors water quality in larger rivers.

<sup>211</sup> See, for example, OECD *Environmental Performance Review of New Zealand*, above n 151.

<sup>212</sup> National Institute of Water and Atmospheric Research, *Lake Quality in New Zealand 2010: Status and Trends* (NIWA, Hamilton, 2010).

<sup>213</sup> Ministry for the Environment INFO 653, above, n 159.

<sup>214</sup> Hughey et al, above n 13.

<sup>215</sup> *Land and Water Forum 1*, above n 200, at 1.

Regional Council to take an integrated approach to land and freshwater management and to set binding nutrient limits on horticultural and agricultural activities within its catchment were legally challenged by industry groups. The Council's ability to make rules to control land use in order to protect water quality was confirmed by both the Environment Court and the High Court.<sup>216</sup> After hearing 22 appeals, the Council's plan was upheld by the Environment Court (although aspects remain under appeal to the High Court).<sup>217</sup> The Council's attempt to manage water quality through constraints on land use also received sharp criticism from the Minister of Agriculture.<sup>218</sup>

### **Advice to the Government on Freshwater Reform**

96. The Land and Water Forum was established in response to these challenges. It brought together a range of industry groups, electricity generators, environmental and recreational NGOs, iwi, scientists, and other organisations with a stake in freshwater and land management in order to develop a common direction for freshwater management in New Zealand and provide advice to the Government.<sup>219</sup>

97. The Forum has issued three reports, containing over 150 recommendations.<sup>220</sup> Together they emphasise several key themes:

- The central problem with New Zealand's freshwater management system has been the failure to set and manage binding limits – both for water quality and quantity.
- “National bottom lines” should be set for the state of New Zealand's rivers, lakes, streams, wetlands and aquifers.
- Within those bottom lines, specific water quality objectives for each catchment, and the appropriate management measures to achieve them, should be set through an inclusive and transparent process of collaboration – with greater recognition and involvement of iwi.
- Limits can only be effective if all activities within a catchment – both water and land uses – are managed in an integrated way and properly measured, monitored and enforced.

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<sup>216</sup> *Federated Farmers of NZ v The Manawatu-Wanganui Regional Council* [2011] NZEnvC 403; *Property Rights in NZ Inc v The Manawatu-Wanganui Regional Council* [2012] NZHC 1272.

<sup>217</sup> *Day v The Manawatu-Wanganui Regional Council (Proposed One-Plan Appeals)* [2012] NZEnvC 182 and [2012] NZEnvC 285.

<sup>218</sup> <<http://www.stuff.co.nz/dominion-post/news/7957358/One-Plan-consequences-dire-Carter>>.

<sup>219</sup> For more information on the Land and Water Forum see <<http://www.landandwater.org.nz/>>.

<sup>220</sup> Copies of the reports are available at <<http://www.landandwater.org.nz/Site/Resources.aspx>>.

- Management measures should be supported by a better, fairer and more efficient system of allocating water to users.

98. The Land and Water Forum is not the only body to have provided recent advice to the Government in relation to freshwater reform. In 2008 the New Zealand Conservation Authority developed a statement of “freshwater principles” in response to its concern that “economic drivers are dominating the management of freshwater issues to the detriment of other values”.<sup>221</sup> Those principles were reinforced in 2011 by a series of recommendations for measures to better protect New Zealand’s rivers.<sup>222</sup> Those measures included establishing a network of protected rivers and significantly strengthening the system for Water Conservation Orders.

99. Similarly, in 2012, the Parliamentary Commissioner for the Environment offered an analysis of how to manage the environmental effects of New Zealand’s growing demand for hydroelectricity generation.<sup>223</sup> That report also recommended a more strategic approach to identifying wild and scenic rivers appropriate for protection under a Water Conservation Order. The Parliamentary Commissioner suggested that such guidance could streamline the Water Conservation Order application process, reducing the costs associated with such applications.

### **The Government’s Proposals for Reform**

100. The Government responded to the Land and Water Forum’s recommendations in August 2013 by issuing a package of reforms it described as a “‘once in a generation’ opportunity”.<sup>224</sup> The reforms, built on an earlier discussion document released in March 2013,<sup>225</sup> are stated to be “based on and consistent with” the recommendations of the Land and Water Forum.<sup>226</sup> In fact, they contain some significant differences from those recommendations – although these differences are not acknowledged or explained. Less than half of the 153 recommendations of the Land and Water

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<sup>221</sup> New Zealand Conservation Authority *NZCA Freshwater Principles*, adopted 10 December 2008 <<http://www.doc.govt.nz/getting-involved/nz-conservation-authority-and-boards/nz-conservation-authority/policies-and-publications/policies/freshwater-principles/>>.

<sup>222</sup> *NZCA Protecting New Zealand’s Rivers*, above n 161.

<sup>223</sup> *PCE Hydroelectricity or Wild Rivers?*, above n 181.

<sup>224</sup> Ministry for the Environment *Freshwater Reform and Beyond: Key Decisions* <<http://www.mfe.govt.nz/issues/water/freshwater/freshwater-reform-2013/index.html>> (“*Summary of Freshwater Reform Proposals*”).

<sup>225</sup> Ministry for the Environment *Freshwater Reform 2013 and Beyond* (Ministry for the Environment, Wellington, 2013) (“*Freshwater Discussion Document*”).

<sup>226</sup> *Ibid* at 8.

Forum have been included in the reforms.<sup>227</sup> No references are made to the recommendations provided by the New Zealand Conservation Authority or the Parliamentary Commissioner for the Environment.

101. The Government's reform proposals centre on the identification of freshwater as "one of New Zealand's key economic assets".<sup>228</sup> They pick up many of the main themes emerging from the Land and Water Forum, to propose action in three key areas:<sup>229</sup>

- **Planning as a community** – starting by introducing a collaborative planning option as an alternative to the current system under the Resource Management Act 1991.
- A **National Objectives Framework** that requires national minimum environmental states in rivers and lakes for ecosystem health and human contact.
- **Managing within water quality and quantity limits** – starting by requiring councils to better account for how all water in a region is used, including how much is taken and what is discharged into it.

102. At a general level, the proposed reforms provide some valuable ideas to greatly improve the current freshwater management system. It is critical that objectives are set and binding limits are imposed on how much water should remain in and can be taken out of freshwater systems and how much pollution can be put into them in order to meet those objectives. Collaborative decision-making processes could enable those limits and accompanying management measures to enjoy greater "buy-in" and support from key participants. Increased recognition of the interests of iwi in freshwater management decisions is to be welcomed. And there is no doubt that better systems are needed to account for water use and to enable it to be used more carefully and efficiently – unless behaviours change, the problems will only continue to grow. Those changes will be meaningless unless they are supported by effective monitoring and enforcement.

103. However, there are significant points of detail with the proposals that raise real cause for concern about the ability of the new system to protect New Zealand's natural environment and its recreational enjoyment by all New Zealanders. Critically, there is no guarantee that the existing state of New Zealand's freshwater will actually improve.

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<sup>227</sup> New Zealand Society of Freshwater Scientists Inc *Feedback on the Freshwater Reforms Discussion Document* (8 April 2012) at [7].

<sup>228</sup> *Freshwater Discussion Document*, above n 225, at 7.

<sup>229</sup> *Summary of Freshwater Reform Proposals*, above n 224.

*National Objectives Framework Does not Guarantee that Water Health Will Improve*

104. The proposed “National Objectives Framework” leaves it open for communities to decide what values they want to place on freshwater and what limits they want to impose to protect those values.<sup>230</sup> That is, do they want to give preference to economic, environmental or recreational values? Do they want to set limits to achieve a high level of water health – or only to do the bare minimum?

105. There is no statement of principles against which those values will be selected. Under the Act as it stands, the overriding objective must be sustainable management – as defined in section 5 and supported by sections 6 and 7. It must be assumed that fundamental objective will continue to apply,<sup>231</sup> but the Government’s proposals contain no confirmation of this. Given the Government’s associated proposals to rewrite the provisions of sections 6 and 7, this can only be assumed to be deliberate. Those changes – discussed in detail in the next chapter – will weaken or delete many of the key environmental factors currently in the Act, with the result that they will be significantly diminished and more easily pushed to one side in decision-making.<sup>232</sup>

106. The absence of an express link to the decision making principles in Part 2 of the Act creates a “pick and choose approach” – leaving it open for communities to decide on only economic values, managing water for only its extractive uses, such as irrigation or stock watering. Only two values are mandatory – “ecosystem health” and “human health for secondary contact”.<sup>233</sup> The effect is that limits for nutrients (like nitrogen) or bacteria (like *E. coli*) could be set too high to allow for safe swimming or mahinga kai (food gathering). Likewise, water flows or levels of dissolved oxygen could be set too low to allow trout or native fish to survive.

107. That outcome is inconsistent with the approach taken by the Land and Water Forum – which emphasised that swimming, fishing and mahinga kai (food gathering) are “important activities which need to be addressed”.<sup>234</sup> It is also inconsistent with the sustainable management objective of the Act, and the requirements of sections 6 and 7. Under the Government’s proposals, for example, it will be possible for a community to decide not to manage a river for the value of trout fishing –

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<sup>230</sup> *Freshwater Discussion Document*, above n 225, at 29-32.

<sup>231</sup> Note that the Land and Water Forum did not recommend any amendments to sections 5, 6 or 7.

<sup>232</sup> See *infra* [129]-[149].

<sup>233</sup> *Freshwater Discussion Document*, above n 225, at 29 & 31.

<sup>234</sup> Land and Water Forum *Second Report of the Land and Water Forum: Setting Limits for Water Quality and Quantity, and Freshwater Policy and Plan-Making Through Collaboration* (Land and Water Forum, Wellington, 2012) at p. 11 (paragraph 51) (“*Land and Water Forum 2*”).

despite the fact that section 7 of the Act requires decision-makers to “have particular regard to... the protection of the habitat of trout and salmon”. Similarly, it will be possible to decide not to protect a river’s value for kayaking or other outdoor recreation – despite the fact that section 7 of the Act specifically requires decision-makers to consider the “maintenance and enhancement of amenity values”.

108. There is also no statement of principle that requires limits to be set at a level that will maintain or improve existing quality standards for each body of water. Instead, it appears that some water bodies could be allowed to degrade further down to a set of “minimum environmental states”.<sup>235</sup> In the case of “justified exceptions” they could even be allowed to fall below those levels.<sup>236</sup> The proposals implement the existing National Policy Statement for Freshwater Management, which has as its objective: “the *overall* quality of fresh water within a region is maintained or improved”<sup>237</sup> – allowing some water bodies within a region to be further polluted so long as others are improved. The clear intent behind the Government’s approach is to accept a level of calculated degradation of some water bodies as an inevitable cost of doing business.<sup>238</sup>

109. Again, this approach is inconsistent with the approach proposed by the Land and Water Forum.<sup>239</sup> The Forum proposed that the objective to “maintain” water quality should be defined to mean that water quality in any individual water body should not be allowed to deteriorate further.<sup>240</sup> Associated with that, the Land and Water Forum emphasised the importance of a precautionary approach,<sup>241</sup> and of identifying and imposing “thresholds” to trigger special steps to protect water bodies that are approaching, or are over, water quality or allocation limits.<sup>242</sup> That approach is fully consistent with the sustainable management purpose of the Act.

110. Many submitters raised concerns with these aspects of the proposed National Objectives Framework during the consultation process.<sup>243</sup> Many submitters expressed concern that the framework would not necessarily see water quality improve and that it could lead to water bodies

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<sup>235</sup> *Freshwater Discussion Document*, above n 225, at 31.

<sup>236</sup> *Ibid.*

<sup>237</sup> “National Policy Statement for Freshwater Management 2011”, above n 114, at Objective A2.

<sup>238</sup> See, for example, Submission to Cabinet by the Minister for the Environment *National Policy statement for Freshwater Management* 4 May 2011 <<http://www.mfe.govt.nz/rma/central/nps/freshwater-management.html>> at [31]-[33].

<sup>239</sup> *Land and Water Forum 2*, above n 234, at 22 (Recommendation 6)

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid* at [94].

<sup>242</sup> *Land and Water Forum 3*, above n 163, at Recommendations 12-14.

<sup>243</sup> Ministry for the Environment *Freshwater Reforms 2013: Summary of Feedback* <<http://www.mfe.govt.nz/issues/water/freshwater/freshwater-reform-2013/summary.html>> (“*Freshwater Summary of Submissions*”).

being “managed down” to national bottom lines. Particular concern was expressed about the provision for undefined “exceptions” and the concept of “trading-off” between water bodies. Such “trade-offs” are fundamentally inconsistent with the intentions of Parliament when it adopted the Act.<sup>244</sup>

111. The Government has announced that detailed work is continuing to develop the National Objectives Framework, with further opportunity for public consultation envisaged.<sup>245</sup> It is critical that this work addresses these central points if the framework is to deliver the better quality outcomes that the Government has promised.<sup>246</sup> Bare minimum “bottom lines” are not the objectives New Zealand should be aspiring to for its precious freshwater resources.

*Community Collaboration Could Overlook Broader Recreational and Environmental Interests*

112. A foundation principle of both the Land and Water Forum’s proposals and the Government’s proposed reforms is that of “collaborative decision making”. Under the proposals, councils may adopt a collaborative planning option as an alternative to the current system under the RMA.<sup>247</sup> Under this option, communities will be responsible for working with councils at the planning stage to set the rules and policies to govern freshwater management in their region.<sup>248</sup> The hope is that this will lead to better decision-making and avoid litigation.<sup>249</sup>

113. The value of a collaborative approach to decision making on freshwater has been acknowledged internationally for some time.<sup>250</sup> Applied properly, it can bring considerable benefits. But it also carries with it risks – as recognised by the Land and Water Forum itself.<sup>251</sup> The Government’s decision to introduce collaborative planning as an optional alternative rather than a compulsory process mitigates some of these risks. Not all councils may decide to adopt the collaborative planning approach. That in itself, however, introduces considerable uncertainty and confusion into the planning environment.

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<sup>244</sup> See, for example, Upton, above n 37, at 21.

<sup>245</sup> *Summary of Freshwater Reform Proposals*, above n 224.

<sup>246</sup> “Message from Ministers” in *Freshwater Discussion Document*, above n 225, at 5.

<sup>247</sup> *Summary of Freshwater Reform Proposals*, above n 224.

<sup>248</sup> *Freshwater Discussion Document*, above n 225, at 24-27.

<sup>249</sup> *Ibid* at 26.

<sup>250</sup> See, for example, the discussion by UNESCO in *Water for People, Water for Life* (World Water Development Report 1, 2003) at Chapter 15 “Governing Water Wisely for Sustainable Development”.

<sup>251</sup> *Land and Water Forum 2*, above n 234, at [125].



114. A central risk is that of “process capture by powerful or politically influential stakeholders”<sup>252</sup> – so that individuals or smaller parties become marginalised and their voices drowned out by louder and more powerful ones. Similarly, there is a real risk that “collaboration” becomes “compromise” – so that decisions are made on the basis of power of persuasion rather than objective evidence. This risk is increased by the absence of any clear principled framework against which decisions can be measured.

115. The emphasis on community level decision making must also be balanced with a consideration that the hydrological cycle does not observe local authority boundaries. To be effective freshwater management must be integrated across a catchment – so that a river is managed as a whole, and different communities along that river do not set conflicting values.<sup>253</sup> Similarly, the emphasis on community level participation in the collaborative process overlooks the fact that a water body is not of value just to the people who live alongside it. Recreational users may come from outside the district, but their interests are still just as real. Similarly, all New Zealanders have an interest in the preservation of New Zealand’s biodiversity, its scenic beauty, and the recreational opportunities our natural environment provides.

116. These risks are exacerbated by the Government’s decision to significantly limit the rights of appeal against decisions made under the collaborative framework.<sup>254</sup> For this very reason, there was explicitly no consensus within the Land and Water Forum that appeal rights should be limited in the way that the Government has proposed.<sup>255</sup> This aspect of the Government’s proposals received particular opposition during the public consultation process.<sup>256</sup>

#### *Water Conservation Orders Will be Weakened*

117. The original proposals put forward by the Government claimed to “improve the current process for Water Conservation Orders” by reducing costs and timeframes.<sup>257</sup> In fact, they would have weakened it. A new power would have been given to the Minister to refer applications to regional councils – demoting them from national instruments and sidestepping the specialist decision-making process that has been at the heart of the system since its inception.<sup>258</sup> This would

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<sup>252</sup> *Ibid*

<sup>253</sup> *Ibid* at [99]; *Land and Water Forum 3*, above n 163, at [38]ff.

<sup>254</sup> *Freshwater Discussion Document*, above n 225, at 26; *Summary of Freshwater Reform Proposals*, above n 224.

<sup>255</sup> *Land and Water Forum 2*, above n 234, at iv and note 18; *Land and Water Forum 3*, above n 163, at [330] & [331] and Appendix 5.

<sup>256</sup> *Freshwater Summary of Submissions*, above n 243.

<sup>257</sup> *Freshwater Discussion Document*, above n 225, at 33.

<sup>258</sup> *Ibid*.

have effectively eroded the special status of Water Conservation Orders, turning them into another element of the planning process to be assessed under the ordinary rules of the Act.<sup>259</sup> It was proposed that the Minister would also be given a new power to put an application “on hold” – to take no further action with respect to it.<sup>260</sup> The grounds on which he or she could decide to do so were not defined. At the same time, limits were proposed to the ability of interested parties to appeal application decisions.<sup>261</sup>

118. These proposals had no basis in the recommendations of the Land and Water Forum. To the contrary, they are in direct contradiction of its advice and acknowledgement that “Water Conservation Orders are a unique and important part of the freshwater management system in New Zealand”.<sup>262</sup> The Land and Water Forum in fact recommended that the system for Water Conservation should be strengthened to “achieve an integrated management approach including land use”.<sup>263</sup>

119. They also took no consideration of the advice that the Government has received from the New Zealand Conservation Authority and the Parliamentary Commissioner for the Environment that it should develop a strategic framework to identify rivers deserving of protection under Water Conservation Orders – despite the advice that this could reduce costs and timeframes.<sup>264</sup>

120. The Government’s proposals with respect to Water Conservation Orders were the subject of considerable concern during the public consultation process.<sup>265</sup> In response, the Government announced that it will defer consideration of these proposals under after a review that will begin in 2016 – although it has not said that it has abandoned them altogether.<sup>266</sup> It will be imperative that any such review takes account of these concerns and the full range of advice to the Government, including that from the Conservation Authority and the Parliamentary Commissioner for the Environment.

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<sup>259</sup> See, for example, Environmental Defence Society *Feedback on Freshwater Reform 2013 and Beyond* <[http://www.eds.org.nz/eresources/submissions.cfm?content\\_id=119896](http://www.eds.org.nz/eresources/submissions.cfm?content_id=119896)> at [25] & [26].

<sup>260</sup> *Freshwater Discussion Document*, above n 225, at 33.

<sup>261</sup> *Ibid.*

<sup>262</sup> *Land and Water Forum 2*, above n 234, at [140].

<sup>263</sup> *Land and Water Forum 1*, above n 200, at Recommendation 18.

<sup>264</sup> See: *NZCA Protecting New Zealand’s Rivers*, above n 161; and *PCE Hydroelectricity or Wild Rivers*, above n 181.

<sup>265</sup> *Freshwater Summary of Submissions*, above n 243.

<sup>266</sup> *Summary of Freshwater Reform Proposals*, above n 224.

### **Proposals Driven by Economic Development (At all Cost?)**

121. The proposals for changes to freshwater management need to be seen in the context of the Government's clear commitment to increasing New Zealand's agricultural outputs through irrigation and intensification.<sup>267</sup>

122. It seems that commitment, rather than a commitment to improved environmental standards, lies at the heart of these reforms. While economic development is an important aim, such development must be sustainable if it is to underpin the country's prosperity in the long term. It is clear that the interests of other New Zealanders in the preservation of our natural environment and enjoyment of the recreational opportunities it provides are secondary in the Government's eyes. Without careful attention to detail as the implementation of these proposals is developed there is a real risk that they will deliver a framework that will see worse – not better – outcomes for New Zealand's rivers, lakes and streams.

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<sup>267</sup> See Ministry of Business Innovation and Employment *Business Growth Agenda: Building Natural Resources: Progress Report* (MBIE, Wellington, 2012).

## RESOURCE MANAGEMENT REFORM 2013

123. The Government announced major proposals for amendment of the RMA at the National Party Conference on 10 August 2013.<sup>268</sup> Those proposals follow an earlier discussion document that was circulated for hasty public consultation in March 2013.<sup>269</sup> The proposals are declared to be “about providing greater confidence for businesses to grow and create jobs, greater certainty for communities to plan for their area’s needs, and stronger environmental outcomes as our communities grow and change”.<sup>270</sup> In reality, their intention is clear – to smooth the path for development. Their effect is similarly clear. The weight given to environmental considerations under the Act will reduce while the weight given to development considerations will increase.

124. The Government’s proposals represent a fundamental shift in the principles at the heart of the RMA. They have been proposed without any rigorous analysis or evidence against the overwhelming objection of public submissions.<sup>271</sup> Aspects of the proposals have been adjusted in light of public comment, but their essence remains unchanged. They represent bad legislative design and will result in considerable legal uncertainty. The ability of the RMA to protect New Zealand’s natural environment and its recreational enjoyment by all New Zealanders will be seriously undermined as a result of these proposals.

125. The Government’s proposals can be described in two ways: first, changes to the fundamental decision-making principles at the heart of the RMA; and second, changes to the processes by which decisions are made – many of which are themselves changes of substance in disguise.

### **Fundamental Changes to the Decision Making Principles at the Heart of the Act**

126. The heart of the Government’s proposals goes straight to the heart of the RMA – the decision-making principles in sections 6 and 7. The proposals would merge the existing sections 6 and 7 into a single list of matters to be “recognised and provided for” by decision-makers, and insert

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<sup>268</sup> Ministry for the Environment *Resource Management: Summary of RMA Reform Proposals 2013* (Ministry for the Environment, Wellington, August 2013) (“*Summary of RMA Reform Proposals*”).

<sup>269</sup> *RMA Discussion Document*, above n 12.

<sup>270</sup> *Summary of RMA Reform Proposals*, above n 268, at 3.

<sup>271</sup> Ministry for the Environment *Summary of Submissions: Improving our Resource Management System* (Ministry for the Environment, Wellington, August 2013) (“*RMA Summary of Submissions*”).

a new section 7 addressing decision-making methods.<sup>272</sup> In so doing, several established environmental principles are deleted and others are significantly weakened. At the same time new principles reflecting economic considerations are inserted and existing economic considerations are strengthened.

127. The proposals are built on recommendations delivered by a Government-appointed “Technical Advisory Group” in February 2012.<sup>273</sup> The reasons given for the proposals include a desire to “reduce duplication” by providing decision-makers with a single list of matters they should recognise and provide for in their decisions.<sup>274</sup> The Government cites “a concern that the predominance of environmental matters in section 6, and the hierarchy between sections 6 and 7, may result in an under-weighting of the positive effects (or net benefits) of certain economic and social activities”.<sup>275</sup> It also refers to what it describes as a “concern [...] whether these matters actually reflect contemporary issues”.<sup>276</sup>

128. No evidence or research findings are offered in support of these contentions. This point was clearly made by submitters during the consultation process – whether they agreed with the Government’s proposals or not.<sup>277</sup> Indeed, the Ministry for the Environment’s own advice to the Government is that only 0.56% of resource consents are declined.<sup>278</sup> It is hard to find empirical evidence within that finding to support the contention that the current decision-making principles in sections 6 and 7 of the Act are significantly frustrating New Zealand’s economic development.

#### *Merger of current sections 6 and 7 into a Single List*

129. The first proposed change to the fundamental principles in the Act is to merge sections 6 and 7 into a single list of “matters of national importance” that decision-makers must “recognise and

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<sup>272</sup> *Summary of RMA Reform Proposals*, above n 268, at 11-15. The text of the proposed new provisions is given in the Annex to this report.

<sup>273</sup> Ministry for the Environment *Report of the Minister for the Environment’s Resource Management Act 1991 Principles Technical Advisory Group* (Ministry for the Environment, Wellington, February 2012) (“TAG Report”).

<sup>274</sup> *Summary of RMA Reform Proposals*, above n 268, at 11.

<sup>275</sup> *RMA Discussion Document*, above n 12, at 35; see also *Summary of RMA Reform Proposals*, above n 268, at 11.

<sup>276</sup> *Ibid* at 35.

<sup>277</sup> *RMA Summary of Submissions*, above n 271, at 15: “Across all submissions, the majority of comments that were made in relation to this chapter were expressions of concern that the issues and opportunities, and the proposals derived from them, did not appear to be based on sufficiently robust or detailed analysis. Submitters were also concerned that there was an absence of reliable evidence – beyond anecdotes and case studies – for the statements made. Such concerns were evident irrespective of the submitter’s position regarding the intent of the discussion document.”

<sup>278</sup> Ministry for the Environment *Resource Management Act: Two-Yearly Survey of Local Authorities 2010/2011 “Key Facts”* <<http://www.mfe.govt.nz/publications/rma/annual-survey/2010-2011/index.html>>.

provide for” in their decisions. On its face, this might seem a reasonably benign change. It has the advantage of providing decision-makers with a single set of considerations. There was general support for this proposal from business and from some councils for that reason.<sup>279</sup>

130. However, the proposal does have a legal effect of some significance. The proposal will disestablish the existing hierarchy between the “matters of national importance” contained in the current section 6 and the “other matters” contained in the current section 7. All of the listed considerations will thus be treated on the same level. In doing so, the proposal will *increase* the relative significance of certain economic considerations currently contained in section 7 from “matters” to “matters of national importance”. At the same time, the relative significance of certain environmental considerations currently contained in section 6 will be eroded.

131. This is compounded by the proposal to insert new wording in the opening paragraph of section 6 to read: “in making the overall broad judgment under section 5 in order to achieve the purpose of this Act”. This proposal is an acknowledged attempt to shift the original intended purpose of the Act away from a focus on “environmental bottom lines”.<sup>280</sup> Although the phrase “overall broad judgment” has been used by the Courts to describe the assessment exercise required under the current sections 5, 6 and 7<sup>281</sup> that expression has been used as a general description of approach rather than a firm legal standard.<sup>282</sup> It is a very dangerous legislative technique to extract a single phrase from case law in isolation from the context in which it appears. Rather than being “consistent with the current purpose of the Act and the [...] approach taken by the Courts”,<sup>283</sup> the proposed change will impact not only on the interpretation of the new proposed section 6 but also on the interpretation of the very purpose of the Act given in section 5. As such it received an overwhelming number of objections during the public consultation process.<sup>284</sup>

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<sup>279</sup> *RMA Summary of Submissions*, above n 271, at 17.

<sup>280</sup> *TAG Report*, above n 273, at 16-20.

<sup>281</sup> *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59.

<sup>282</sup> See, for example, the fuller description of the “overall broad judgment approach” recently given by the Environment Court in *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 at [53].

<sup>283</sup> *RMA Discussion Document*, above n 12, at 38.

<sup>284</sup> *RMA Summary of Submissions*, above n 271, at 17. See, for example, the submissions made on this point by: the Parliamentary Commissioner for the Environment *Improving our Resource Management System: A Discussion Document* (Submission to the Minister of the Environment, April 2013); the Resource Management Law Association *Submission: Resource Management Reform 2013, Improving Our Resource Management System* (March 2013) at [12]; the New Zealand Institute of Landscape Architects *Submission: Improving our Resource Management System: A Discussion Document* (April 2013) at [21] & [22]; and Forest and Bird *Submission on Discussion Document: Improving our Resource Management System* (2 April 2013) at [45]-[50].

132. The proposal to merge sections 6 and 7 thus fundamentally alters the principles that drive the Act as a whole. It is not credible to suggest that the proposal addresses “balance in regard to broader social, environmental and economic outcomes”<sup>285</sup> without acknowledging that the effect of that new “balance” is to reduce the significance to be placed on considerations relating to the protection of the natural environment. For this reason, the proposal was overwhelmingly opposed by 99 per cent of public submissions.<sup>286</sup> It is simply not enough to dismiss those concerns – expressed by experts, councils, iwi and environmental organisations – as “howls of outrage from some of those that have made a nice industry from the very complexity we are seeking to address” as the Government has done.<sup>287</sup>

133. Far from removing confusion, the existing distinction between the principles in section 6 and 7 will now be replaced with internal tensions within section 6 itself. In many ways the proposal will re-introduce the difficulties inherent in weighing equal but potentially conflicting goals that the Act was deliberately designed to correct.<sup>288</sup> Decision-makers will still be required to provide for what might be considered to be “competing” considerations. But in doing so they will no longer have any legislative guidance as to the relative importance of those considerations, or be able to draw on the previous body of case-law built up over the past 22 years that the RMA has been in force.

134. In the words of one submitter, the proposal to merge current sections 6 and 7 “introduces confusion not clarity”.<sup>289</sup> Such confusion will inevitably increase uncertainty and costs. That point was made clearly to the Government by the New Zealand Law Society during the public consultation phase.<sup>290</sup> Indeed, that risk has been expressly acknowledged by the Government.<sup>291</sup> No clear explanation has been given by the Government for its decision to proceed in the face of such advice.

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<sup>285</sup> *Summary of RMA Reform Proposals*, above n 268, at 11.

<sup>286</sup> *RMA Summary of Submissions*, above n 271, at 17.

<sup>287</sup> Hon Amy Adams, Minister for the Environment “Resource Management Law Reform”, speech given to the National Party Conference on 10 August 2013 <<http://www.national.org.nz/Article.aspx?ArticleID=41692>>.

<sup>288</sup> A particular problem with respect to the Act’s predecessor legislation the Town and Country Planning Act 1977 was the failure to provide any relative weight between the conflicting goals of the wise use and management of resources and the conservation and protection of the physical environment: see, for example, Nolan, above n 16, at [3.35].

<sup>289</sup> Submitter #389, referred to in *RMA Summary of Submissions*, above n 271, at 18.

<sup>290</sup> New Zealand Law Society *Submission: Improving our Resource Management System*, 8 April 2013 at [14]: “Removing the hierarchy will not make decision-making any clearer. Rather, it is likely to lead to ancillary litigation, as various parties seek to advance one principle over another – especially where there is significant clash between the principles. Rather than lessening the costs associated with development [...] it is likely to increase the costs as parties and decision-makers re-open long settled debates, by seeking to re-establish some form of hierarchy to assist in decision-making.”.

### *Existing Environmental Considerations are Weakened*

135. The effect of the proposed merger of current sections 6 and 7 is amplified when a careful analysis is made of the proposed contents of the new “single list”. That list contains 16 separate principles. These are drawn from the current sections 6 and 7, with three new additions. Some are unchanged from the current language of the Act.<sup>292</sup> Others have, however, been substantially amended.

136. The proposed section 6(b) requires decision-makers to recognise and provide for “the protection of *specified* outstanding natural features and landscapes from inappropriate subdivision, use and development” (emphasis added).<sup>293</sup> It amends the existing provision by adding the word “specified”. This addition, which might seem to be minor on its face, significantly narrows the application of this principle. Only those “outstanding natural features and landscapes” that have been identified in advance in a planning document or National Policy Statement will now be protected.<sup>294</sup> Given that many local authorities have still failed, more than 20 years after the adoption of the RMA, to identify any outstanding natural landscapes in their plans the effect of this change can only be to weaken the degree of legal protection for outstanding natural features and landscapes under the Act. Many submitters objected to this proposal on that basis.<sup>295</sup>

137. Under the proposed section 6(o) decision-makers must recognise and provide for “the *maintenance* of *aquatic habitats*, including *significant* habitats of trout and salmon” (emphasis added).<sup>296</sup> This is the only principle in the proposed list that is directed specifically towards freshwater quality. The proposed language significantly alters the wording used in the current section 7(h), which refers to: “the protection of the habitat of trout and salmon”. The broadening of the provision to “aquatic habitats” is a positive development, as is its elevation to a “matter of national importance”. But no explanation is given in any of the documents surrounding the proposals for replacing the established term “protection” with the new term “maintenance”. “Protection” and “maintenance” are not synonymous – they have been interpreted differently under

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<sup>291</sup> *RMA Discussion Document*, above n 12, at 38: “These changes would involve some costs and may increase uncertainty in the short term, as they would require the review of some plans and render some existing case law obsolete providing interpretation challenges until new case law emerges.”

<sup>292</sup> See the proposed section 6 (a), (c), (d), (e), (f), (g), and (j). Note, however, that the wording of these provisions is expressly “subject to final drafting requirements” (*Summary of RMA Reform Proposals*, above n 268, at 13).

<sup>293</sup> *Summary of RMA Reform Proposals*, above n 268, at 13.

<sup>294</sup> *Ibid* at 14.

<sup>295</sup> *RMA Summary of Submissions*, above n 271, at 21.

<sup>296</sup> *Summary of RMA Reform Proposals*, above n 268, at 13.



existing case law under the Act.<sup>297</sup> The substitution of one term for the other will therefore inevitably lead to confusion on the part of decision-makers seeking to interpret the new provision. “Maintenance” has in the past been interpreted to allow for minor adverse effects on the environment.<sup>298</sup> Given that the term “protection” is retained elsewhere in the provision, it is reasonable to interpret substitution of the new term “maintenance” to conclude that a lower standard has been introduced. This is reinforced by the fact that “maintenance” has been used by itself, whereas other provisions refer to “maintenance and enhancement” – clearly a higher standard.

138. Similarly, no reason is given for limiting consideration to “significant” habitats of trout and salmon. The specific recognition of trout and salmon habitats in the RMA reflects both their historical recreational importance<sup>299</sup> and their role as an important indicator species for the health of our rivers, lakes and streams as a means of assessing ecosystem health.<sup>300</sup> The insertion of the term “significant” raises the threshold for the habitats that may be considered, thereby limiting the scope of the protection under the provision. Depending on how “significant” is interpreted,<sup>301</sup> this proposal has the potential to exclude the environmental impacts of activities on small streams and waterways – which not only provide angling opportunities for thousands of New Zealanders, but also play a critical role in the ecological integrity of river systems as a whole. The weakening of legal protection under the Act in this way, when combined with the Government’s proposed “off-setting

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<sup>297</sup> See, for example, the discussion of the meaning of “protection” and “maintenance” in *Port Otago Limited v Dunedin City Council* C004/02 [2002] NZEnvC 12 at [41] & [42].

<sup>298</sup> See, for example, *Shell New Zealand Ltd v Auckland City Council* (1996) ELRNZ 173 [1996] NZRMA 189.

<sup>299</sup> See, for example, Nolan, above n 16, at [3.45] and references therein.

<sup>300</sup> See, for example, Professor Jenny Webster-Brown (5 July 2011)

<http://www.sciencemediacentre.co.nz/2011/07/05/are-trout-to-blame-for-declining-water-quality/>: “Trout may be an introduced species, but they are also the most sensitive species to most contaminants, and the first to show the effects of water quality decline. Because they are widespread globally, there is also a great deal of toxicity data (data that tell us when a particular species will be affected by increasing contaminant concentrations) available for trout; certainly when compared to the data available for species which are endemic to New Zealand. Trout are therefore a very useful indicator of water quality, and protecting them ensures an additional level of protection for other species from the effects of poor water quality.” For an analysis of the key water quality parameters for which trout have among the highest requirements of the various freshwater values of New Zealand freshwater ecosystems see: Olsen DA, Tremblay L, Clapcott J, Holmes *Water Temperature Criteria for Native Aquatic Biota* (Prepared for Auckland Council, Environment Waikato and Hawkes Bay Regional Council, Cawthron Report No. 2024, 2011); Franklin P *Dissolved Oxygen Criteria for Fish and Determination of Ecological Flows* (NIWA Internal Report, Hamilton, 2010); Clapcott JE, Young RG, Harding JS, Matthaei CD, Quinn JM & Death RG *Sediment Assessment Methods: Protocols and guidelines for assessing the effects of deposited fine sediment on in-stream values* (Cawthron Institute, Nelson, 2011); . Hickey, C. *Updating Nitrate Toxicity Effects on Freshwater Aquatic Species* (NIWA Client Report No: HAM2013-009, Prepared for Ministry of Building, Innovation and Employment, 2013); Biggs *BJF New Zealand Periphyton Guideline: Detecting, monitoring and managing enrichment of streams* (Ministry for the Environment, Wellington, 2000).

<sup>301</sup> See, for example, the statement in Nolan, above n 16, at [3.38]: “The term ‘significant’ is difficult to define in a way which would enable ready application to individual cases”.

approach” to the management of freshwater,<sup>302</sup> opens the way for the managed degradation of these small waterways in the future. It is difficult not to conclude that the failure to provide protection for small streams is deliberate as most of them flow through farm land.

139. The proposed section 6(p) reads: “the effective functioning of ecosystems”. This replaces the existing statutory recognition of the “intrinsic values of ecosystems” contained in current section 7(d). The central concept of “intrinsic value” – the value of the environment for its own sake, not simply for its use by people – has thus been completely lost from the Act. The proposed definition of “effective functioning” only raises more questions than answers.<sup>303</sup> Again, no explanation is given in the documents surrounding the proposals to support this change.

140. Equally significant are the principles from the existing Act that have *not* been repeated in any form in the new proposed list. Several central environmental concepts have been deleted entirely. Under the proposals decision-makers will no longer be required to consider:

- “the ethic of stewardship”;<sup>304</sup>
- “the maintenance and enhancement of amenity values”;<sup>305</sup>
- “the maintenance and enhancement of the quality of the environment”;<sup>306</sup> or
- “the finite characteristics of natural and physical resources”.<sup>307</sup>

141. Each of these elements has played an important role in achieving the RMA’s purpose of sustainable management as defined in section 5. “Amenity values” represent the natural and physical characteristics of an area that contribute to people’s enjoyment of it – including the opportunities for outdoor recreation.<sup>308</sup> They are included within the definition of “environment” and so have a direct relevance in the application of section 5(2).<sup>309</sup> The “maintenance and enhancement of the quality of the environment” also directly complements the environmental bottom line obligations in section 5.<sup>310</sup> Similarly, “any finite characteristics of natural and physical resources” directs consideration to issues of allocation or use of resources which are finite in

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<sup>302</sup> *Infra* at [109].

<sup>303</sup> The proposed definition reads: ““effective functioning of ecosystems” means the biologic and genetic diversity of ecosystems and the essential characteristics that enable the proper functioning of an ecosystem.” (*Summary of RMA Reform Proposals*, above n 268, at p.14).

<sup>304</sup> Current section 7(aa).

<sup>305</sup> Current section 7(c).

<sup>306</sup> Current section 7(f).

<sup>307</sup> Current section 7(g).

<sup>308</sup> See the definition of “amenity values” in section 2.

<sup>309</sup> See, for example, Nolan, above n 16, at [3.45].

<sup>310</sup> *Ibid.*

nature.<sup>311</sup> The “ethic of stewardship” also links to the principle of inter-generational equity reflected in section 5(2)(a).

142. The reason given for deleting these principles is that these matters “are already effectively encompassed in section 5 of the Act”.<sup>312</sup> This fundamentally misrepresents the roles of section 5 and section 6 “at odds with the intentions of the original drafters of the [Act]”.<sup>313</sup> Section 5 describes the purpose of the Act, while sections 6 and 7 set out the particular matters to be considered by decision-makers in order to achieve that purpose.<sup>314</sup> If matters are not specifically listed it will be difficult for local authorities and decision-makers to recognise and provide for them. Any decision-maker interpreting the amended Act can be expected to conclude that the deletion of these principles is an indication of Parliament’s intention that they should no longer be considered. The extent to which environmental and recreational considerations will be taken into account will therefore inevitably be reduced as a consequence of this proposal. This point was made by local and regional authorities as well as iwi and environmental NGOs during the public consultation process.<sup>315</sup> The deletion of these provisions cannot be seen as anything other than a step back from core values of environmental protection.

#### *Development Considerations are Strengthened*

143. At the same time that environmental considerations are weakened, economic considerations are consistently strengthened under the Government’s proposals. Entirely new economic considerations have been inserted, while existing considerations have been made stronger.

144. Under the proposed new section 6(l) decision makers must recognise and provide for “the effective functioning of the built environment, including the availability of land to support changes in population and urban development demand”. The genesis of this proposal lies in an assessment that the Act’s current provisions do not adequately provide for consideration of urban planning and the built environment.<sup>316</sup> It is presented as an attempt to address rapid house price inflation by increasing the supply of land available for housing.<sup>317</sup> However, the specific emphasis on the “availability of land” will facilitate urban sprawl – particularly when read together with the proposed

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<sup>311</sup> *Ibid.*

<sup>312</sup> *RMA Discussion Document*, above n 12, at 37. See also the *TAG Report*, above n 273, at 83-85.

<sup>313</sup> *New Zealand Law Society Submission: Improving our Resource Management System* (8 April 2013) at [16].

<sup>314</sup> See *infra* at [23], [36] & [42].

<sup>315</sup> *RMA Summary of Submissions*, above n 271, at 20.

<sup>316</sup> See: *TAG Report*, above n 273, at 48-49; and *Ministry for the Environment Report of the Minister for the Environment’s Urban Technical Advisory Group* (Ministry for the Environment, Wellington, July 2010) at 68-69.

<sup>317</sup> *Summary of RMA Reform Proposals*, above n 268, at 29.

reversal of the existing presumption against subdivision in section 11 of the Act<sup>318</sup> and the relative weakening of environmental considerations in the new proposed section 6.

145. The proposed new section 6(m) requires decision-makers to recognise and provide for “the efficient provision of infrastructure”. This proposal is again explained on the grounds that the lack of a reference to infrastructure in the current Act “do[es] not reflect the broad scope of issues inherent in sustainable management” or “today’s values”.<sup>319</sup> That reasoning reflects a misunderstanding of the current interpretation of the Act – which has expressly recognised the national benefits of infrastructure when assessing whether a particular activity is consistent with the “sustainable management” purpose of the Act.<sup>320</sup> The true genesis for the proposal lies in the observation that the lack of a specific reference to infrastructure “has been repeatedly raised as an issue of concern to some groups” resting on “an assumption that less development is taking place” because of the current wording of the Act.<sup>321</sup> No analytical evidence has been given to support that “assumption”. To the contrary, 90% of significant infrastructure projects successfully progress through the RMA.<sup>322</sup> Specific advice to the Government on this point in 2010 concluded: “There is no empirical evidence to suggest that the lack of express recognition of infrastructure in sections 6 and 7 of the RMA is frustrating infrastructure development”.<sup>323</sup>

146. The inclusion of the new provision on infrastructure is therefore unnecessary. But it will still have a significant legal effect. The specific reference to infrastructure places it on a special footing under the Act, on a level with established principles such as “the the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins” or “the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga”. This inevitably tilts decision-makers towards the approval of proposals for infrastructure development. Given the size and impacts of many such proposals (e.g. major motorway extensions, hydroelectric dams, irrigation schemes, or wind farms) the consequences for the protection of the natural environment are clear.

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<sup>318</sup> *Ibid.*

<sup>319</sup> *RMA Discussion Document*, above n 12, at 35 & 38. See also *TAG Report*, above n 273, at 50.

<sup>320</sup> See, for example, the decision in *Auckland Volcanic Cones Society Inc v Transit New Zealand* [2003] NZRMA 54.

<sup>321</sup> *TAG Report*, above n 273, at 50.

<sup>322</sup> Hill Young Cooper and Enfocus *Providing National Guidance on Infrastructure through the RMA 1991* (Report Prepared for Ministry for the Environment and the Ministry of Economic Development, September 2010) at 38.

<sup>323</sup> Ministry for the Environment *Building Competitive Cities: Reform of the urban and infrastructure planning system – a technical working paper* (Ministry for the Environment, Wellington, 2010) at 28.

147. In addition to these new principles, existing economic and development considerations have been strengthened and given more weight under the proposals. The proposed section 6(h) elevates the “efficient use and development of natural and physical resources” to a “matter of national importance”.<sup>324</sup> The provision is further strengthened by the addition of new language specifically requiring decision-makers to provide for “the benefits derived from their use and development”. This addition changes the meaning of the provision from one currently focused on *efficient* use of resources to one focused on the *benefits* (but not costs) of use – tilting the provision towards increased use and development. “Benefits” are currently defined to include both monetary and non-monetary benefits.<sup>325</sup> But when read together with the increased emphasis on economic and employment benefits in the amended section 32,<sup>326</sup> this proposal can be expected to reintroduce attempts to distill this principle into an economic cost/benefit analysis of the kind that Courts have previously determined is inappropriate under Part II of the Act.<sup>327</sup> Such analyses inevitably favour quantifiable economic outcomes over more intangible environmental consequences.<sup>328</sup>

148. The proposed section 6(k) combines two existing provisions and provides for the “efficient energy use and benefits of renewable energy”.<sup>329</sup> This principle is also elevated to a “matter of national importance”. No explanation is given in any of the supporting documents for this change. The intention behind the proposal is therefore unclear. It can be assumed to be intended to elevate the importance given to renewable energy generation in line with the Government’s strategic target that 90 per cent of electricity generated in New Zealand should be derived from renewable energy sources by 2025.<sup>330</sup> A shift from non-renewable to renewable energy clearly has obvious environmental benefits and should be encouraged. However, at the same time it must be recognised that many forms of renewable energy generation are not without their own environmental costs. Hydroelectric schemes, for instance, can cause major destruction of the natural environment – much of which is irreversible.<sup>331</sup> For this reason they have been a major source of disputes over the years. As the Government itself acknowledges “the natural resources

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<sup>324</sup> *Summary of RMA Reform Proposals*, above n 268, at 13. The proposed section 6(h) is drawn from the existing section 7(b) “the efficient use and development of natural and physical resources”.

<sup>325</sup> Section 2.

<sup>326</sup> See *infra* at [65]–[66].

<sup>327</sup> *Meridian Energy Ltd v Central Otago District Council* [2010] NZHC 1390; [2011] 1 NZLR 482; [2010] NZRMA 477 at [95]–[116].

<sup>328</sup> See, for example, the comments of the Full Bench of the High Court in *Meridian Energy Ltd v Central Otago District Council* at [107] & [108].

<sup>329</sup> The existing provisions are section 7(ba) “the efficiency of the end use of energy” and section 7(j) “the benefits to be derived from the use and development of renewable energy”.

<sup>330</sup> See, for example, the confirmation of this target in the Preamble to the “National Policy Statement on Renewable Energy 2011”, above n 114.

<sup>331</sup> See, for example, the discussion of this issue in *PCE Hydroelectricity or Wild Rivers?*, above n 181.

from which electricity is generated can coincide with areas of significant natural character, significant amenity values, historic heritage, outstanding natural features and landscapes, significant indigenous vegetation and significant habitats of indigenous fauna.”<sup>332</sup> Existing considerations under the RMA already weigh in favour of hydroelectric generation as against the preservation of wild and scenic rivers.<sup>333</sup> The proposed amendment will tilt the imbalance even further. When added to the proposed weakening of environmental principles and the proposed changes to Water Conservation Orders<sup>334</sup> the level of protection given to New Zealand’s rivers under the RMA will be reduced.

### Substance under the Guise of Process

149. There is no doubt that there is a considerable degree of frustration with respect to the efficiency and accessibility of decision-making processes under the Act. Public satisfaction with the operation of the RMA remains low.<sup>335</sup> The impact of RMA processes on business performance has also been mixed.<sup>336</sup> Those concerns, however, do not align with international assessments of the Act’s efficiency. The World Bank, for instance, assesses New Zealand as the third easiest country in the world for ease of doing business – an assessment that included consideration of the resource consent process.<sup>337</sup>

150. The Government’s process-oriented proposals are presented as a response to those concerns. Many of the proposed process changes have considerable merit and will have no, or only a very limited, effect on the Act’s ability to protect New Zealand’s natural environment or its recreational enjoyment. The proposals to introduce a national planning template and move to a single resource management plan per district should make planning rules easier to understand and

<sup>332</sup> “National Policy Statement on Renewable Energy 2011”, above n 114, Preamble at 3.

<sup>333</sup> *PCE Hydroelectricity or Wild Rivers?*, above n 181, at 58. See also the discussion in *NZCA Protecting New Zealand’s Rivers*, above n 161, at 35-41.

<sup>334</sup> *Infra* at [117]-[120].

<sup>335</sup> In 2013 the service quality score for “National environmental issues or the Resource Management Act” was 37, the lowest score of any service surveyed: State Services Commission *Kiwis Count: March 2013 Quarterly Update* (June 2013) <<http://www.ssc.govt.nz/kiwis-count-update-mar13>> at 16. Note, however, that the question asked addresses both “national environmental issues” and “the Resource Management Act”, so responses could equally be interpreted as a reflection on the Government’s environmental performance: see the Survey Questionnaire at Appendix 1 *Kiwis Count 2.0 Technical Report* <<http://www.ssc.govt.nz/kiwis-count-survey-methodology>>.

<sup>336</sup> In 2012 32% of businesses reported that RMA processes “constrained” their business performance, while 29% reported that their business was “neither constrained nor enhanced” and 3% reported their business was “enhanced”: Statistics New Zealand *Business Operations Survey 2012*, Table 56 “Effect of Resource Management Act on Business Performance” <[http://www.stats.govt.nz/browse\\_for\\_stats/businesses/business\\_growth\\_and\\_innovation/BusinessOperationsSurvey\\_HOTP2012.aspx](http://www.stats.govt.nz/browse_for_stats/businesses/business_growth_and_innovation/BusinessOperationsSurvey_HOTP2012.aspx)>

<sup>337</sup> World Bank, above n 107. New Zealand was rated third overall and sixth in relation to “dealing with construction permits”.

more accessible.<sup>338</sup> Likewise, the proposals to deliver certainty around time and cost for consent applications will assist both the public and industry.<sup>339</sup> The proposed “fast-track” 10-day consent process for simple non-notified consents<sup>340</sup> could also be helpful, provided councils have sufficient resources to give effect to it and there is clear direction on which consents should be notified. The process to allow for an “approved exemption” for technical or minor rule breaches may deliver some efficiencies,<sup>341</sup> provided that adequate safeguards are in place to manage the cumulative effects of such exemptions so that the rules are not gradually undermined over time. Similarly, proposed amendments to reduce cost and complexity of the Environmental Protection Authority’s processing of applications for nationally significant proposals<sup>342</sup> will be useful and were widely supported during public consultation.<sup>343</sup>

151. However, some of the other proposals, although intended to improve the efficiency of processes, are likely to have the opposite effect. For example, it is now proposed that councils will have three planning tracks available to them when developing their resource management plans<sup>344</sup> – a recipe for fragmentation and confusion. Similarly, the proposed alternative procedures for objection to an independent commissioner rather than appeal to the Environment Court<sup>345</sup> are also likely to give rise to inconsistent outcomes and further undermine judicial oversight of the Act.

152. Further, other proposals – although presented in terms of “process” – actually have far-reaching substantive implications.

153. The first is the insertion of a new section 7 setting out “methods” to be adopted by decision-makers under the Act. This provision is described as providing “principles to guide decision-makers on how to manage resources sustainably”.<sup>346</sup> What it in fact contains is a combination of statements of “best practice” (for example, that processes should be “timely, efficient and cost-effective”) and statements of outcome.

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<sup>338</sup> *Summary of RMA Reform Proposals*, above n 268, at 6 & 7.

<sup>339</sup> *Ibid* at 18.

<sup>340</sup> *Ibid* at 17.

<sup>341</sup> *Ibid* at 17.

<sup>342</sup> *Ibid* at 18.

<sup>343</sup> *RMA Summary of Submissions*, above n 271, at 41.

<sup>344</sup> *Summary of RMA Reform Proposals*, above n 268, at 7.

<sup>345</sup> *Ibid* at 19.

<sup>346</sup> *RMA Discussion Document*, above n 12, at 36. See also the *TAG Report*, above n 273, at 85.

154. Particularly relevant is the new proposed section 7(d) requiring that decision-makers “must endeavour to ensure that restrictions are not imposed under this Act on the use of private land except to the extent that any restriction is reasonably required to achieve the purpose of this Act”.<sup>347</sup> That introduces an entirely new decision-making principle into the RMA. It elevates private property rights in a way that the original drafters of the Act considered but ultimately rejected on the grounds that it was fundamentally inconsistent with the purpose of “sustainable management”.<sup>348</sup> It is entirely inconsistent with the settled legal position that where pre-existing common law rights with respect to private property are inconsistent with the Act’s scheme, those rights are no longer applicable.<sup>349</sup> In the words of the High Court, the right of private property owners to decide what they want to do with their resources “is tempered by the fact that private use of resources can impose adverse effects on neighbours and upon the wider community. Hence the justification for the national, regional and district planning instruments, and the associated concept of resource consents, all of which lie at the heart of the RMA.”<sup>350</sup> Revisiting this principle in this way has significant implications for the management of activities taking place on private land that have environmental impacts and therefore public, not merely private, consequences. Turning the principle on such loose concepts as “endeavour to ensure” and “reasonableness” is also a recipe for future litigation and uncertainty.

155. Equally significant are the proposed changes around central government intervention in planning processes. The proposals contain some helpful reforms to make better use of the existing tools for National Policy Statements and National Environmental Standards.<sup>351</sup> The lack of effective guidance from central government has been a major failing in the operation of the RMA to date. However, the proposals go further than those initially outlined to enable central government to dictate the manner in which national directions must be implemented at the local level.<sup>352</sup> Further, new powers are proposed for the Minister to intervene directly in local planning processes.<sup>353</sup> Together, these proposals have the potential to prevent councils from adopting innovative

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<sup>347</sup> *Summary of RMA Reform Proposals*, above n 268, at 14. See also the *TAG Report*, above n 273, at 89-91.

<sup>348</sup> See, for example, the discussion by Hon Simon Upton, above n 37, at 39: “A concerted last minute attempt by the Chairman of the Select Committee to have me reintroduce into clause 6 a provision balancing public interest in achieving the purpose of the Act with any private interests in the “reasonable use of private or public property” was resisted. Such a move would have inevitably destabilised the notion of an environmental bottom line and replaced it with an indeterminate balancing exercise.” See also the *TAG Report*, above n 273, at 51-53.

<sup>349</sup> *Falkner v Gisborne District Council* [1995] 3 NZLR 622.

<sup>350</sup> *Meridian Energy Ltd v Central Otago District Council* at [119].

<sup>351</sup> *Summary of RMA Reform Proposals*, above n 268, at 16.

<sup>352</sup> *Ibid*: “These changes include [...] allowing an NPS to provide direction on delivery to ensure councils understand expectations for implementation...”.

<sup>353</sup> *Ibid* at 26-27.



approaches to implementation, such as the land-use restrictions adopted to improve water quality under the Horizon Regional Council's "One Plan".<sup>354</sup>

156. The reason given for these proposals is that "effective resource management requires government to have an active role in overseeing compliance with national direction".<sup>355</sup> However, as with other proposals, no evidence is provided in the documents surrounding the proposal to suggest that non-compliance is currently an issue. There is a serious question as to whether it is appropriate for the Minister, rather than a court, to act as the arbitrator of the meaning of the Act in this regard. The proposal has the potential to create a real collision course between councils and the Minister, and to open Ministerial decisions up to judicial review. In the absence of a clearly-identified problem, it is difficult to see these proposals as anything other than an attempt to enable central government to impose its planning decisions at the local level.

157. Finally, several aspects of the process proposals will have the effect of substantially limiting the ability of individuals, iwi, and environmental and recreational groups to express their views on resource consent applications. The threshold for non-notification of consents will be lowered.<sup>356</sup> At the same time, the definition of who is an "affected party" will be narrowed, limiting who may make submissions with respect to resource certain consent applications.<sup>357</sup> Submissions will be restricted to matters identified by the council in advance.<sup>358</sup> The conditions that may be imposed on the resource consent will be similarly limited. Restrictions will also be imposed on rights of appeal.<sup>359</sup>

158. These proposals are presented with reference to the relatively benign example of a consent application to build a deck on a residential property in an urban environment.<sup>360</sup> But it is not clear that their application will in fact be so limited. Should they be applied more broadly these proposals will substantially restrict the ability of the public, iwi, or environmental and recreational groups such as Fish and Game Councils to put forward evidence as to the environmental impacts of proposed activities and for that evidence to be properly considered. They also further restrict the role of the Environment Court – undermining the principle of evidence based judicial oversight on which the

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<sup>354</sup> See *infra* at [96].

<sup>355</sup> *Summary of RMA Reform Proposals*, above n 268, at 26.

<sup>356</sup> *Ibid* at 19.

<sup>357</sup> *Ibid* at 18.

<sup>358</sup> *Ibid* at 19.

<sup>359</sup> *Ibid* at 19 & 20.

<sup>360</sup> *Ibid* at p. 18.

RMA was built. It is little surprise, therefore, that concerns about the implications of these proposals were expressed by an overwhelming number of submitters during the public consultation process.<sup>361</sup>

### **Conclusions**

159. Taken as a whole the Government's proposed amendments will seriously weaken the level of protection given to New Zealand's natural environment under the Act. The changes of most concern are those proposed to sections 6 and 7. The need for these changes is not supported by the evidence. They will create legal uncertainty, open the way for litigation, and increase costs. The protection of the natural environment and its recreational enjoyment by all New Zealanders will suffer if these proposals are implemented in their current form.

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<sup>361</sup> *RMA Summary of Submissions*, above n 271, at 32, 33, 34-35

## CONSEQUENCES FOR THE ENVIRONMENT

160. Together the Government's proposed changes to the RMA and freshwater management will weaken the legal protection currently given to New Zealand's natural environment and its recreational enjoyment by all New Zealanders.

161. The changes of greatest impact are the proposed changes to sections 6 and 7 of the RMA. Those changes will reduce the level of legal protection for the natural environment by:

- Reducing the relative importance placed on environmental protection principles and increasing the relative importance placed on development principles.
- Limiting the outstanding natural landscapes that receive protection under the Act.
- Significantly reducing the level of protection given to the habitats of trout and salmon.
- Deleting any reference to the "ethics of stewardship", "amenity values", the "quality of the environment", and the "intrinsic value of ecosystems".
- Emphasising the benefits to be gained from the "use and development" of resources (but not the associated costs).
- Emphasising the benefits of urban development and infrastructure.
- Prioritising the rights of land-owners over the rights of the public to enjoy a clean natural environment.

162. These changes will inevitably change the decisions that are made under the RMA in the future. No evidence or analysis has been introduced to demonstrate the need for them. They will not only pave the way for weaker environmental outcomes. They represent poor legislative design and will introduce uncertainty and confusion and lead to significant implementation costs. I recommend that the New Zealand Fish and Game Council continue to advocate for sections 6 and 7 of the Act to be retained in their current form, except for an addition to recognise the importance of the management of significant risks from natural hazards.

163. At the same time, the proposed changes to freshwater management contain no commitment that the existing state of New Zealand's rivers, lakes and streams will not be allowed to degrade further. The emphasis placed on "minimum bottom lines" and "overall" water quality in the proposed National Objectives Framework paves the way for offsetting – allowing some water bodies to be further polluted so long as others are improved. There is a real risk that the ability of environmental groups and recreational users to express their views will be restricted by the new process of "collaborative decision-making". There remains a risk that the special status of Water

Conservation Orders, designed to protect New Zealand's most wild and scenic rivers, could be eroded in the future.

164. I recommend that the New Zealand Fish and Game Council participate actively in the public consultation process on the development of the National Objectives Framework. The Council should advocate strongly for a legal commitment that objectives will be set with reference to the purpose and principles of the RMA as currently drafted, and that all water bodies will be "maintained" or "improved" from their current state. I also recommend that the New Zealand Fish and Game Council seek a commitment that the Government's proposals with respect to Water Conservation Orders will not be progressed as part of the review scheduled for 2016.

165. Associated process changes fundamentally undermine the RMA's central commitment to open evidence-based decision-making at the local level. The powers of the Minister to intervene in planning decisions will be increased. The situations in which members of the public, iwi or interest groups may make submissions on resource consent decisions will be substantially limited. I consider that it is critical for the interests of groups representing the environmental and recreational interests of New Zealanders that these proposals are limited to non-significant urban land-use consents and are not applied more widely.

166. These reforms need to be assessed against the backdrop of other changes to the RMA over time. These changes have seen a steady tilting of the RMA away from sustainability, undermining public participation, local decision-making and evidence-based judicial oversight. Most significant amongst recent changes is the rewriting of the "appropriateness" test to be applied by councils when developing their plans and rules. The new language of section 32 makes clear that planning should be driven first and foremost by economic and employment opportunities – not by sustainable environmental outcomes, as is clearly directed by the purpose of the Act.

167. This analysis is consistent with the views that have been expressed by a wide range of experts. No reasoned response has been provided by the Government to rebut these views or to demonstrate that they are incorrect.

168. It is highly questionable that the Government's proposals are, in fact, "designed to deliver the natural environmental outcomes that New Zealanders want" as is claimed.<sup>362</sup> New Zealanders consistently identify quality of life and the quality of the natural environment as higher priorities

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<sup>362</sup> *RMA Discussion Document*, above n 12, at p.6.

than economic considerations.<sup>363</sup> The current proposals are completely out of step with those priorities. They represent a significant step backwards for environmental protection in New Zealand.

169. This opinion reveals a number of weaknesses in the Government's proposals. The most serious of these, in my view, relates to the proposed changes to section 6 and 7 of the Act. It is my recommendation that the New Zealand Fish and Game Council urge the Government to make no changes to these sections, except for an addition to recognise the importance of the management of significant risks from natural hazards. Such a step would, I consider, help to reduce the level of concern that has been raised in response to the Government's proposals.

**Sir Geoffrey Palmer QC**

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<sup>363</sup> Hughey et al, above n 13.

## NOTES



