SUSTAINABILITY COUNCIL of NEW ZEALAND

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**Submission by the Sustainability Council on:**

# "Improving Our Resource Management System: A Discussion Document"

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## Introduction

The Sustainability Council of New Zealand is an incorporated charitable trust whose overall objective is to assist the evolution of a sustainable New Zealand. One of the Council's concerns is the potential effect on the economy, the environment, and human health of resource management law.

The Council recognises that there are opportunities to improve the RMA but is concerned by a number of the proposals contained in *Improving Our Resource Management System* ('the document').[1] The Council in general supports those concerns identified in the submission of the Environmental Defence Society.[2] In order to focus resources during the brief time made available for comment on the document we focus on just the proposals in sections 3.1.2 to 3.1.4 - and particularly that to allow the minister to directly change a council's plan, which we oppose.

## A Proposal for Ad Hoc Standard Setting

Section 3.1.3 of the document proposes giving the Minister power "to directly amend an existing operative plan" following a staged process of engagement with the council and that "such a power would be similar to regulation-making powers" (p 40).

There is no adequate specification of the driver for this change. The one sentence description offered is to "ensure national policies are effectively delivered at regional and local levels, and adequately address regionally significant issues" (p 39). The only proposed limitation on its use is that this would be confined to "more urgent issues that are nationally or regionally significant" – which is so open to interpretation that it provides no meaningful limitation.

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[1] MFE, *Improving Our Resource Management System: A Discussion Document,* March 2013. www.mfe.govt.nz/publicati=ons/rma/improving-our-resource-management-system.html

[2] EDS, *Feedback On "Improving Our Resource Management System"*, Draft, March 2013, http://www.eds.org.nz/content/documents/submissions/130326%20EDS%20Draft%20Feedback%20on%20Discussion%20Document.pdf

The immediate question this leaves unanswered is if the need arises to resolve something that is urgent and nationally significant, why should responsibility automatically fall to central government? A council could just as easily be given special powers for urgency and if a resource decision has national significance, it may well have even greater local significance. Yet no case is presented for national significance trumping local significance as of right.

The position becomes more problematic when the document next explains the companion proposal to change the process for setting National Policy Statements (NEPs) and National Environmental Standards (NESs). There it states (p 40):

> Their development can be complex and time-consuming … . This limits the effectiveness of national direction and contributes to investment and regulatory uncertainty, because **investors and local government are unsure when and in what circumstances central government might impose** national policies and standards. (Emphasis added).

In other words, change is required to the NEP and NES processes because investors are "unsure when and in what circumstances central government might" regulate. This uncertainty is precisely what the proposal to allow largely unfettered ministerial intervention in the content of a council's plan would create, and to an even greater degree.

But the above statement is worse than just an apparent contradiction in the rationale for the proposals. The main proposed remedy to this investor uncertainty is to "clarify that NPSs and NESs can be targeted to a specific region or locality" (p 41).

This is remarkable given that the source of uncertainty is the paucity of binding environmental standards of any form. More than 20 years after the RMA was passed into law with the clear expectation that MFE would produce national minimum standards for councils to rely on, the virtual absence of legally binding environmental standards for water and soil is being cited as a source of uncertainty that is to be addressed through giving the minister the power to use that process to issue standards applying to just a region or district.[3]

The lack of commitment to national standards that is apparent throughout the document is best summed up by the statement that "their development can be complex and time-consuming and the tools themselves can be overly blunt" (p 40). This is the more substantial of the two sentences offered where a justification for reform would be expected.

It is as though the complexity and time-consuming nature of the development of tax law should be a clear argument for not bothering with setting out a code and the state should just reserve the right to set rules in any particular area of taxation as and when it chose – and that this would address investor uncertainty, no less. That there is no need to acknowledge the virtual absence of environmental standards and that this means there is a major hole in the Act's ability to deliver on its overall purpose of

[3] Just six NESs have been gazetted to date. Two relate solely to utility infrastructure, two relate solely to the human health impacts of certain contaminants in soil and water, one concerns air quality, and the last bans a small number of highly toxic pollutants as a consequence of New Zealand's ratification of the UN Stockholm Convention on Persistent Organic Pollutants – the only standards targeted even in part at environmental protection for soil and water.

promoting the sustainable management of natural and physical resources (RMA s 5). And rather than present a programme to systematically fill the gaps, the proposed approach is to focus on seeing which, if any, national standards would be worthwhile developing.[4]

## The Real Issue: Should Cabinet Dictate RMA Outcomes?

An obvious concern with the document is the thinness of the supporting material. In contrast to the very detailed work that underpinned development of the RMA, there is no stand back philosophical explanation of what the Government describes as a major rethink of the Act. In consequence, those commenting on the proposals have to try to derive some overall framework to gain a sense of what fundamentals are being targeted.

What the above and analysis of other parts of the document strongly suggest is that the unifying principle behind the proposals is providing central government with the ability to dictate the outcome of any consent process important enough to it to intervene in. That is rather different to statements about the need for "clarity", a "fast" response, and "a consistent approach". These just read as a publicist's attempts to provide coherence with neutral wallpaper. The statement that the purpose is to "ensure national policies are effectively delivered at regional and local levels" (p 39) gets closer but fails to communicate the depth and sweeping nature of the proposed changes.

The absence of a rationale beyond empowering the Cabinet to call the shots is further indicated by the failure to meaningfully specify how the new powers will be limited. The ultimate power contained in the package is that of the minister simply rewriting an offending provision in a council's plan. Nowhere in the documentation is it specified:

- Whether the minister would be subject to the s32 provisions that currently require councils to justify any change to a plan;
- Whether the minister's change could be appealed on more than points of law; or
- Whether the minister would be compelled to have any regard to the policies of the council or the preferences of local constituents.

Further, at a recent MFE forum on the proposals, neither the minister's representative (Nicky Wagner MP) nor MFE officials could answer any of the three points when these were put to them.

If the apparent intent of the proposals can now be addressed (rather than the publicist's cover text), then the real questions at issue revolve around the merits of the Cabinet holding the power to dictate local level planning outcomes.

## Lessons from Think Big

One of the strongest arguments against the proposed reforms is the experience of such an approach in the early 1980s. The National Development Act was passed in 1978 in preparation for executing the government's Think Big development strategy and it created a "fast track" for major projects that bypassed then current planning law. The three largest projects approved under this track and their financial fate is as follows:

[4] Page 41 states: "This proposal would also develop a non-statutory agenda, approved by Cabinet, to indicate which matters the Government would consider for NPSs or NESs. The agenda would set out the order in which issues would be examined to see if a NPS or NES would be of benefit."

**Motunui Synthetic Petrol Plant:** Constructed at a cost to the taxpayer of $2.4 billion (1984 dollars) through an effective underwrite of NZLFI, the plants making up the site and contractual obligations were eventually disposed of by the government at a further cost of $150 million to Fletcher Challenge in the mid 1980s.

**Marsden Point refinery Expansion:** Constructed at a cost to the taxpayer of $2.2 billion (1984 dollars), the plant was eventually disposed of by the government at a further cost exceeding $70 million to the NZ Refining Company in the mid 1980s.

**New Zealand Steel Glenbrook Expansion:** Constructed at a cost to the taxpayer of around $2 billion (1984 dollars), the plants making up the site were eventually disposed of by the government to a Chinese purchaser for a return of $320 million in the mid 1980s.

These projects represented a net loss to the taxpayer in excess of $6 billion dollars in 1984 dollar terms and further losses were incurred in lesser Think Big projects also fast tracked under the National Development Act. In today's dollars, the total losses would be in the vicinity of $15 billion.

A key lesson from that experience is that the greater the direct involvement of ministers with the projects and the more their political fortunes were aligned with them, the greater the pressures for everything from intervening in consenting through to the types of investment guarantees and underwrites that fueled the Think Big projects.

Given that the RMA already provides for the minister to call in projects of national significance, and to essentially hand pick the panel that would determine the consent, the current proposal reads as a bid to secure control over the last remaining lever that is out of reach and could be needed to guarantee that favoured new developments can proceed. That is the ability to rewrite provisions in a plan that could otherwise block a lawfully determined consent.

Once a minister holds such power, there is a propensity for developers to insist that it be used to provide "investment certainty" – that the investment can only progress if that occurs - and that the government align itself with the project and become entangled with the developer's commercial objectives.[5] This not only blunts the preparedness of departments to offer criticism, its effects creep through all aspects of considering a development proposal.

The government has been smart enough to dodge the multi-billion dollar lignite bullet that Solid Energy proposed, but if a new major gas field were to be discovered, what pressures would come on a future government as the field owners set out their 'bottom line' requirements before they would contemplate development?

[5] The hapless publicist's apparent contradiction identified above is of course remedied if it is assumed that developers that matter to the government will be in no doubt how the "uncertainty" created by such government powers will be resolved.

## Risk Bearers Best Placed to Make Decisions

The proposed ability to override local autonomy in planning law has constitutional implications that are summarized by EDS (p 11) as follows:

> Such a proposal is constitutionally obnoxious and resonant of 'unbridled power'. In New Zealand there are few checks and balances on the power of central government, due to the lack of an upper house or federal system. This means that it is critical that there is a clear distinction between central and local decision-making and that we have robust and transparent decision making processes.

Dame Anne Salmond further notes:[6]

> … a system of environmental decision-making that takes power away from communities and their knowledge of regional environments, and centralises this in the hands of ministers driven by short-term political imperatives, or in centrally appointed bodies is the opposite of what is required.

A key rationale for local control is that development carries risks as well as benefits, and benefits to the local council and/or economy may be less than the costs. There may also be a cost to the nation despite government support. The case of Golden Cross mine at Waitekauri illustrates some of the key issues here.

The Golden Cross mine was required to post a $12.1 million bond as a condition of its consent. Costs of remediation when the mine's tailings dam failed due to ground movement are thought to have been between $30 million and $60 million. While this dam was repaired at the company's expense, were the failure to have occurred after the company had left, such land would have been deemed an "orphaned contaminated site" as there would have been no legally liable party and it is local inhabitants who pick up the health and environmental costs unless and until the state does in these cases. As to the national benefits of the mine, BERL concluded that:[7]

> The sheer uncertainty and ignorance surrounding hard rock gold mining ventures, regarding both the direct costs and the opportunity costs, renders most such operations, including that of Golden Cross, marginal in terms of net economic welfare. Under [the] reasonably optimistic scenario the Golden Cross operation will probably manage a net positive net national benefit but it is not within our means to assess the likelihood of such a scenario.

So the overall result was probably a small national benefit, if any, while it posed the risk of a large cost to local constituents.

Even more difficult to assess than the full life cycle risks of a gold mining operation are those of activities that involve new technologies and processes for which health and environmental safety study has been limited or the issues are too complex to fully anticipate the effects. Hazardous substances such as certain classes of insecticides and new organisms such as those that are genetically modified present such risks.

There is no objective standard as to what is a correct level of risk. It is not an objectively determinable factor. It is subject to individual and collective

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[6] Dame Anne Salmond, *Submission on 'Improving Our Resource Management System'*, March 2013.

[7] Adolf Stroombergen, *The Contribution of Gold Mining to the New Zealand Economy – A Study of the Golden Cross Project*, Wellington: BERL, June 1990, p.12 pointed out that "the dam sits astride a fault".

determination, through evidence of what is, and judgements about what might be. The EPA's predecessor notes that:

> … the way individuals and communities perceive risk affects the way that they respond to situations that they perceive as risky and consequently the level of risk that they are prepared to accept (or tolerate) in any particular circumstance. Some researchers have found that risk analysts tend to consider only two components of risk – the likelihood of the event occurring, and the size of the event should it occur. The lay public, however, tends to consider risks within a much broader context, and takes into account a wide range of factors.[8]

The extent to which each community wishes to provision against risk is thus a critical input to policy formation. The RMA provides communities with the ability to set rules that embody community determined outcomes, including the level of risk it is willing to tolerate with respect to particular activities.

When large parts of any analysis are characterised by indeterminacy (and thus beyond the reaches of conventional risk analysis), and when a number of the potential effects are significant, it follows that communities should be able to set a floor on the extent of precaution to be specified, as they are the ultimate risk bearers. Consistent with this, MFE reported during the development of the RMA that:

> It has been decided that: **additional controls may be set on hazardous substances and new organisms under other legislation where these controls are more stringent or specific** than those under the hazardous substances and new organisms legislation, and are required to meet other outcomes or responsibilities.[9] [Emphasis added]

Accordingly, the HSNO Act's section 142 (3) provides that local government can set higher standards for hazardous substances through RMA conditions, as they may deem appropriate.[10]

When the full scope of RMA activities is considered, there are very few activities that have a national importance (not just significance) such that the activities either cannot be undertaken somewhere else, or alternative activities do not exist that can deliver similar opportunities for the nation. For example, a chosen energy resource for electricity development can ultimately be substituted for by another one.[11]

## Conclusion

If a local community does not itself want to amend a council plan to allow a particular activity to proceed then that is a good sign that it is either better sited somewhere else, and/or that alternative means of pursuing the goal should be examined, or the goal reframed. The Sustainability Council opposes the proposal that the minister be given the ability to direct a change to a council's plan.

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[8] ERMA, *Approaches to Risk*, December 2002, p. 11.

[9] *Hazardous Substances and New Organisms: Proposal for Law Reform*, Ministry for the Environment, October 1992, p 36.

[10] Nothing in subsection (2) of this section shall prevent any person lawfully imposing more stringent requirements on the storage, use, disposal, or transportation of any hazardous substance than may be required by this Act or regulations made under this Act where such requirements are considered necessary by that person for the purposes of the Resource Management Act 1991.

[11] If the gain to the developer from utilizing that particular resource is much greater than the alternatives, then it could be open to the developer to offer terms that would mitigate the negative impacts on the community, subject to appropriate environmental bottom lines.