

**Improving our resource management system:
A discussion document**

Submission to the
Minister for the Environment

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Parliamentary Commissioner
for the **Environment**
Te Kaitiaki Taiao a Te Whare Pāremata

Introduction

In this country of ours, we have a wonderful natural environment that is renowned globally for its diversity and uniqueness. It is fundamental to how we see ourselves as New Zealanders. And a large part of our economy is built on our environmental credentials – we market ourselves internationally as ‘clean and green’.

For over twenty years the Resource Management Act has been the primary means for protecting our environment.

There is much that can be done to improve the efficiency of RMA processes and reduce costs. Some proposed changes in this discussion document are steps in the right direction. An example is the provision of a template for council plans with standardised terms and definitions to reduce unjustified inconsistency and duplication across the country. The Minister for the Environment has rightly pointed out that there is no reason for different councils to specify different ways of measuring noise levels.¹

But some of the changes proposed in this discussion document go much further than improving processes, and indeed are far more radical than any previous amendments to the RMA.

It is not an exaggeration to say that the RMA has become somewhat vilified in public discourse, often acting as a ‘whipping boy’ for all manner of frustrations with government processes. Certainly, its operation can often be far too time-consuming and unnecessarily costly, perhaps because of the over-enthusiastic application of one aspect of the law. Sometimes it is other laws like the Building Act or the Public Works Act that are causing frustration. But the primary purpose of the RMA is to protect the environment, and in so doing, it must inevitably lead to restrictions of various kinds.

My submission addresses one set of changes that would fundamentally alter the role of the RMA and erode the environmental protection it provides. These are the proposed amendments to the Purpose and Principles that underpin the entire Act.

There has already been strong criticism of these proposed changes. A Nelson Mail Editorial stated that “... *any move that tilts the balance away from protection and towards development should be staunchly opposed.*”² And agricultural columnist Jon Morgan went as far as describing them as “*emasculating*” the Act, and noted that the “*reforms are being pushed through with unseemly haste*”.³ The month provided for public response to this discussion document is in stark contrast with the four years of consultation that preceded the establishment of the RMA.

The remainder of this submission is divided into seven sections followed by two appendices.

The origin of the RMA

International and national concerns about environmental management in the 1980s led to the Resource Management Act 1991.

In 1980 the Organisation for Economic Cooperation and Development (OECD) highlighted the need for New Zealand to improve its local environmental management. Seven years later the Brundtland Report created international impetus behind the concept of 'sustainable development'.

In New Zealand, there was a growing appreciation that the Water and Soil Conservation Act 1967, the Town and Country Planning Act 1977, and other legislation needed reform. The purpose of the Town and Country Planning Act, for example, mandated councils and authorities to have "*direction and control*" of local development, and came to be seen as too prescriptive and inflexible. The National Development Act 1979 facilitated projects believed to be in the national interest with little regard to the environmental effects. The highly contentious Clyde Dam was one such project.

In the late 1980s the Government began a review of environmental laws including an extensive consultation process, which led to the proposal for an integrated resource management law. The RMA would eventually repeal more than 75 laws and amend 150 others.

A change of Government in 1990 saw the Bill undergo another review. Among the recommendations of the Review Group was that less emphasis should be placed on the direction and control of development, moving instead to a focus on the management of any adverse effects of development on the environment.⁴ This effects-based approach became codified into law in the new Act in August 1991.

At the time the Minister for the Environment, Hon Simon Upton, clarified that the focus of the Act is on the environment:

*"... the Government has moved to underscore the shift in focus from planning for activities to regulating their effects of which I have spoken. We run a much more liberal market economy these days. Economic and social outcomes are in the hands of citizens to a much greater extent than they have previously been. The Government's focus is now on externalities - the effects of those activities on the receiving environment - and those effects have too often been ignored."*⁵

The Purpose and Principles of the RMA

Sections 5, 6, 7, and 8 together form Part 2 of the RMA – the Purpose and Principles of the Act.⁶

Section 5 sets out the overall purpose of the RMA, which is “to promote the sustainable management of natural and physical resources”.

This section then explains what sustainable management of natural and physical resources means. It is about enabling social, economic and cultural development while protecting the environment. Three subsections outline what protecting the environment means. (See Appendix 1)

No changes are proposed to section 5.

Sections 6 and 7 list a variety of ‘matters’ that are to be considered to be important aspects of the environment. The matters listed in section 6 are considered more important than those in section 7.

- Section 6 – Matters of national importance – which decision makers must “recognise and provide for”.
- Section 7 – Other matters – which decision makers must “have particular regard to”.

These two sections thus elaborate on what protecting the environment means. Each ‘matter’ is best understood as an *environmental priority* – they are aspects of the biophysical environment that decision makers must consider.

In the discussion document, it is proposed that the two sections be combined into one titled 'Principles', and that:

- some environmental priorities be removed;
- all the remaining environmental priorities be amended; and
- some new priorities be added.

The reason given for the proposed changes to the priorities is concern that *"the predominance of environmental matters ... may result in an under-weighting of the positive effects ... of certain economic and social activities"*.⁷

This is consistent with the Minister for the Environment's stated desire to put *balance* into the RMA – in particular, that environmental matters should not be treated as more important than economic matters. This issue of balance is examined next.

‘Balance’ and the RMA

The rationale given for increasing the weighting given to “*certain economic and social activities*” is a claimed divergence between the way the law is written and the way the law has been put into practice.

There are always two dimensions to a law. The first is the *statute* itself – the actual wording of the legislation. The second is *case law* – the interpretation of the statute made over time from decisions made by judges and the precedents that have been established.

The contention is that while the RMA was written with environmental concerns placed above economic and social concerns, case law has developed differently, with decisions made using “*an overall broad judgement*”.⁸

This is based on advice provided to the Minister that RMA case law:

*“... gives no primacy to bio-physical effects, but embraces instead a broad “integrated” approach in which ecological, economic, social and cultural values are given equal consideration”.*⁹

However, this is a fundamental misinterpretation of the case law. An “*overall broad judgment*” is a “*weighing rather than a balancing exercise*.”¹⁰

The RMA as written did anticipate that economic, social, and cultural matters would carry some weight. Section 5 states that sustainable management includes enabling “*people and communities to provide for their social, economic, and cultural well-being*”. Different weighting is given to protection of the environment than to other considerations because that is the primary role of the Act.

Individuals, businesses and other organisations plan and invest in economic activities. Economic development is also promoted and supported by a variety of Government subsidies, agencies and policies.

Balance of the kind where environmental and economic concerns are given equal weight does not belong *inside* the RMA. The RMA itself provides the balance to the economic imperatives of the marketplace.¹¹ It is not, and should not become, an economic development act.

Examining some of the proposed changes

Almost none of the environmental priorities listed in sections 6 and 7 have been left unchanged in the discussion document. Several are proposed for removal, others to be altered, and new ones to be added. And while all are to be “*recognised and provided for*”, none are to retain their status as Matters of National Importance.

Because so many changes are proposed and because some are so subtle, Appendix 2 at the end of this submission lists them in their current and proposed versions.

Time does not allow for an examination of all the proposed amendments. Some are discussed briefly below to illustrate the nature of the changes.¹²

Removal of environmental priorities

One environmental priority envisaged for removal is “*the maintenance and enhancement of amenity values*”. Amenity values incorporate our appreciation of the beauty of the natural environment and our use of it for recreation.¹³ To quote Jon Morgan again: “... *swimming, canoeing, a quiet walk with the dog – not important*”.

In all, five environmental priorities are proposed for removal. The reason given for their removal is that they are already encompassed in the purpose of the Act. But the function of the priorities is to ‘flesh out’ the purpose in more detail – to elaborate, rather than duplicate.

It is possible that with the passage of time some of the existing priorities may have become irrelevant or no longer reflect New Zealanders’ environmental values. But no evidence or reasoning is presented that this is the case.

Amendment of environmental priorities

It is proposed that a number of priorities be amended. Such changes can appear small, but can have significant and far reaching effects. As for the deleted priorities, no reasons for making these particular changes are given in the discussion document.

It may be appropriate to reword some priorities, but it is unclear what is being sought by the changes proposed. For example, why is *“the effects of climate change”* changed to *“the impacts of climate change”*? And why is this phrased differently to *“the risks and impacts of natural hazards”* when the two are closely related?

Another example is the addition of one word to *“the protection of areas of significant indigenous vegetation...”*; changing it to *“the protection of specified areas of significant indigenous vegetation...”*

The addition of the single word means that only **specified** areas will be protected, and any area of significant indigenous vegetation that has not been specified will not, regardless of how significant it is. Its protection will therefore rely entirely on whether some unidentified specification process has taken place.¹⁴

Addition of economic activities to the list of environmental priorities

The most significant of these proposed changes is the addition of two new “principles” to the list. These are:

- *“the effective functioning of the built environment including the availability of land for urban expansion, use and development”,* and
- *“the efficient provision of infrastructure”.*

These proposed additions are *socioeconomic* priorities, not environmental priorities. They can be read as priorities of the present moment, such as the provision of more greenfield land for development in Auckland, and the construction of large water storage projects and major roads.

Any government is, of course, completely entitled to encourage particular kinds of development. But putting them in a list of environmental priorities is not only an odd way of advancing preferred economic developments, but it would undermine the very reason for the existence of the RMA.

For instance, a decision-maker would be forced to give equal weighting to the provision of infrastructure and the management of its effects on the environment.

Further, these two additions *promote* particular activities, rather than manage the effects of activities on the environment. Recall that the RMA has been designed as effects-based legislation.

While infrastructure and the availability of land for urban use are socioeconomic priorities rather than environmental priorities – and therefore inappropriate additions to the Purpose and Principles of the RMA – a third addition is appropriate. *“The risks and impacts of natural hazards”* is an effects-focused environmental priority.

Conclusion and recommendation

Overall, the changes proposed to sections 6 and 7 will weaken environmental protections and undermine the role of the Resource Management Act.

This is not to say that sections 6 and 7 cannot be amended. Just as “the effects of climate change” was added in 2004, it is appropriate to periodically update the list of priorities. But they should be *environmental* priorities – that is why the Act exists.

I recommend that the changes to section 6 and 7 proposed in the discussion document do not proceed.

Endnotes

- 1 *Improving our resource management system: A discussion document.* Ministry for the Environment. February 2013. Part of proposal 3.2.1 on page 42.
- 2 Editorial: RMA must keep role of defending nature. Nelson Mail, March 26 2013.
- 3 RMA overhaul won't help the environment. Jon Morgan. The Dominion Post, Thursday March 21 2013.
- 4 Tony Randerson, "The Beginings of the Resource Management Act", Beyond the RMA Conference Proceedings, 30-31 May 1997
- 5 Resource Management Bill - S.O.P. 22 : Referral to Planning and Development Committee, May 9 1991 – Hon Simon Upton
- 6 Section 8 requires that the principles of the Treaty of Waitangi be taken into account; no changes are proposed to this section of the Act.
- 7 *Improving our resource management system: A discussion document.* Ministry for the Environment. February 2013, page 35.
- 8 Ibid, page 35. See also 'Report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group', February 2012. Available at <http://www.mfe.govt.nz/publications/rma/tag-rma-section6-7/tag-rma-section6-7.pdf> [accessed 27 March 2013]
- 9 'Report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group', page 35. February 2012. Available at <http://www.mfe.govt.nz/publications/rma/tag-rma-section6-7/tag-rma-section6-7.pdf> [accessed 27 March 2013]
- 10 Skelton, P. and Memon, A. (2002). Adopting sustainability as an overarching environmental policy. Resource Management Journal 10(1), March 2002, page 8.
- 11 Environmental impacts often do not feature in economic decision-making because they incur no monetary cost; in economic language, they are externalities.
- 12 In addition to the proposed changes to sections 6 and 7, it is proposed to add a new section setting out 'methods' for decision-making. Such a section is quite different in nature to sections 6 and 7 and this submission does not comment further on this proposed new section.

- 13 The definition of amenity in section 4 of the Resource Management Act is: *“amenity values means those natural or physical qualities and characteristics of an area that contribute to people’s appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes”*.
- 14 While the above example makes a clear priority too specific, another example removes the specificity and clarity of a priority altogether. The clear *“protection of the habitat of trout and salmon”* is to be replaced with a less clear *“areas of significant aquatic habitats, including trout and salmon”*. In this instance the word ‘protection’ conveyed a strong sense of the outcome that Parliament sought by including this priority. The proposed wording is much less clear and can only result in less protection for New Zealand’s freshwater environment. Note that the TAG recommended removing all use of the directional words ‘preserve’ and ‘protect’ in sections 6 and 7. The discussion document states that, in general, this recommendation has been rejected in the Ministry’s proposals, which is welcome. However, these words have only been selectively retained as the proposed change to 7(h) illustrates.

Appendix 1: Resource Management Act 1991 Purpose and Principles

Part 2 Purpose and principles

5 Purpose

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

6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

- (a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
- (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
- (c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
- (d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
- (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:
- (f) the protection of historic heritage from inappropriate subdivision, use, and development:
- (g) the protection of protected customary rights.

7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to —

- (a) kaitiakitanga:
- (aa) the ethic of stewardship: *(inserted 1997)*
- (b) the efficient use and development of natural and physical resources:
 - (ba) the efficiency of the end use of energy: *(inserted 2004)*
- (c) the maintenance and enhancement of amenity values:
- (d) intrinsic values of ecosystems:
- (e) *[Repealed]*
- (f) maintenance and enhancement of the quality of the environment:
- (g) any finite characteristics of natural and physical resources:
- (h) the protection of the habitat of trout and salmon:
- (i) the effects of climate change: *(inserted 2004)*
- (j) the benefits to be derived from the use and development of renewable energy. *(inserted 2004)*

8 Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Appendix 2: Resource Management Act 1991 Part 2 Purpose and Principles

Comparison of current with what is proposed

Current sections 6 and 7	Proposed section 6
6 Matters of national importance	6 Principles
the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development;	the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development;
the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development;	the protection of specified outstanding natural features and landscapes from inappropriate subdivision, use, and development;
the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:	the protection of specified areas of significant indigenous vegetation and significant habitats of indigenous fauna;
the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:	the value of public access to and along, the coastal marine area, wetlands, lakes and rivers;
the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:	the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga including kaitiakitanga ;
the protection of historic heritage from inappropriate subdivision, use, and development:	the importance and value of historic heritage;
the protection of protected customary rights.	the protection of protected customary rights;

Current section 7

7 Other matters

kaitiakitanga:	added above
the ethic of stewardship:	removed
the efficient use and development of natural and physical resources:	the benefits of the efficient use and development of natural and physical resources;
the efficiency of the end use of energy:	the benefits of efficient energy use and renewable energy
the benefits to be derived from the use and development of renewable energy.	generation ;
the maintenance and enhancement of amenity values:	removed
intrinsic values of ecosystems:	removed
maintenance and enhancement of the quality of the environment:	removed
any finite characteristics of natural and physical resources:	removed
the protection of the habitat of trout and salmon:	areas of significant aquatic habitats, including trout and salmon;
the effects of climate change:	the impacts of climate change; the effective functioning of the built environment including the availability of land for urban expansion, use and development ; the risk and impacts of natural hazards ; the efficient provision of infrastructure.