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Resource Management Reform

"Improving" (sic) our Resource Management System – A discussion document

1.0 INTRODUCTION

The Environment and Conservation Organisations of NZ (ECO) is the national alliance of 58 groups with a concern for the environment. ECO has been involved in issues of resource management and land-use policy since its formation over 40 years ago. We were actively involved in processes and policy discussions that led to the RMA and in the debates about the law and the various discussions since then on amendments, and on the performance of the Act. This submission has been prepared by members of ECO Executive and is in line with ECO Policy.

We agree to some limited extent that there are ways to simplify the RMA processes, but we oppose the proposals in the document to demote the significance of environmental considerations and to remove the hierarchy of matters in sections 6 and 7, downgrade the role of the Environment Court. We agree with the decision to leave in the directive language in the subsections of section 6 and 7 is essential. Changes to section 6 and 7 will lead to environmental uncertainty especially as new case law will need to be developed.

Executive Summary

Chapter 1
Has this chapter correctly described the key issues and opportunities with New Zealand's resource management system?

Chapter 1 makes a number of claims that we think are not warranted and are not supported by facts, only the opinion of the so-called Technical Advisory Group which has a few genuine experts but the composition was clearly chosen by Cabinet to deliver the sorts of answers that key Ministers wanted, and had no explicit public participation process.

ECO has promoted the need for National Policy Statements and National Environmental Standards which can be used more to give greater national consistency and the proposals for common

definitions. These two sets of changes would provide more clarity to all parties about what to expect and as such would reduce both transactions costs and uncertainty.

The repeated failure of central government to develop national policy statements and national environmental standards has been a major failure in the implementation of the Act. These national policy and standards need to be tested through a robust public participation process and cannot be promulgated from on high without such a process.

We find that Chapter 1 and the document at large has an inconsistency in its attitude to elected representatives, in that the reforms proposed seek to subjugate local democracy to Ministerial directions in a number of situations while making claims for the propriety of elected representatives making decisions. We do not support this subjugation of local elected representatives and the community Policies and Plans to Ministerial directions.

We find the logic faulty in that if elected representatives should make decisions, then there is little justification for policies and plans developed by local representatives to be overridden by Ministerial fiat. We particularly do not support the centralisation of power with the use of "Henry XVIII" clauses that allow Ministers to direct that there be changes to the provisions and objectives of policies and plans. The Minister already has the due process of NES and NPS and there is no good reason for Ministerial intervention beyond these.

The document's Methods and Epistemology

The methodology and epistemology of the document is too often reliant on assertions unsupported by facts (eg the assertion that New Zealanders' values have changed) or single cases carefully chose to support the position that Ministers want. The case study approach is used to make it seem as though certain problems are more prevalent than they are. It amounts to policy by anecdote, rather than careful analysis of the extent to which perceived problems are widespread.

To the extent that figures are provided, we find the need for the changes to be overstated and/or often mis-analysed.

There is a strong bias to the interests of business, and we are concerned that the Ministry has cited the Productivity Commission survey of local government and business interests but there is no attempt to explore what the interests and concerns of civil society are.

The debate over the Resource Management Act has often occurred in the absence of fact or analysis. The focus has always been on speed of decisions rather than whether there were good environmental outcomes or that the purpose of the Act was being achieved. The Ministry for the Environment has failed in its role as a promoter of good environmental outcomes and must analyse the outcomes of resource management decisions rather than focus on speed of decisions. Anyone can make quick decisions but does that improve the state of the environment or lead to better environmental outcomes?

The quest for certainty

Too often the document treats certainty for business as though it were both a right and a free good. Capricious decision making by policy makers should be avoided, and it is sensible to adopt common definitions and the like, but it is not reasonable to portray certainty for business as a "good" that trumps the rights of affected parties or the environment. More use of NPS and NES and definitions

that are standard is sensible, but local variations of effects on people and the environment may warrant different local approaches.

Values

The claims in the document that New Zealanders' values have changed rely on claims made by the TAG group but neither the Discussion Paper nor the TAG group provides a shred of evidence of this claim. We understand that there is no such evidence and we reject the claim of changed values and see no foundation for the changes proposed in response to such.

Planning and Consents

We agree that some of the difficulties faced by those applying for consents could be limited by the provision of more NPS and NES, and we agree some proactive planning is a good idea. Further, we agree that a single Plan is a good idea, but we oppose ministerial interventions on such.

We agree with the need to plan to avoid natural hazards. We do not agree that this forms a basis for dismantling the distinction between S 6 & 7 or for the removal of the principles that the Discussion paper proposes to remove. These are essential principles and we do not accept their removal or the proposal to rely on the Section 5 Purpose, since this does not provide the operative sections that s 7 does.

Chapter 2 – Other Reforms

We note the other lines of work in Chapter 2 and while we support the improved environmental reporting, we do not support the removal of due process in s 2.1 or the elevation of the economic growth agenda to trump other matters.

We oppose the removal of the well beings in the Local Government Act and consider that many of the so-called reforms are retrograde and fail to give effect to the full range of values that New Zealanders actually value, such as social well being.

On housing affordability, it is not established that paving the way to have green fields development is really the solution of housing affordability. That case has not been made in the document or elsewhere.

Chapter 3 – The Proposed Reform Package
Will the aims listed be achieved by the reforms?

We have sympathy for some of the aims on p 33 but the case that these are made by the changes proposed is not made. We think it is likely that some of the changes will make matters less certain (particularly the removal of the s6 and s7 matters ranking) and will allow capricious ministerial decision making that will make predicting what will happen difficult.

Board of Inquiry and the Environment Court

We do not support the elevation of Board of Inquiry processes at the expense of the Environment Court. Some of the arguments advanced are for reducing costs, but the two track process of Board of Inquiry and the moves to shift from de novo appeals to appeals only on points of law remove accountability.

The appointment of Boards of Inquiry by Ministers introduces an unfortunate and to ECO unacceptable political bias into the RMA decision making. We are very concerned at this bias which is not only unfortunate in itself, but also it will lead to policy instability and flip-flops with changes of government. We consider a judicial process to be preferable, with the independence and expertise of a specialist court system far to be preferred on both constitutional and policy grounds to politically appointed Boards.

3.1 Greater National Consistency and Guidance.

3.1.1 We oppose the changes to the sections 6 & 7

a) We oppose the combination of these sections because it makes predictability and decision making more difficult – it is contrary to good policy making and to the government's own aim of predictability.

b) We strongly oppose the removal of the principles 7(aa), 7(c), 7(d), 7(f), and 7(g). Each of these are strongly valued and are important to case law. Their proposed removal is an outrage in that each of these principles are part and parcel of the responsibility of the present to the future and to the environment. This move is the move of philistines. We do not agree with the assertion that the matters proposed to be deleted are already covered in the Purpose, since the Purpose needs to have supporting operative paragraphs, and the removal of the principles listed above are bound to be read as a decision by Parliament that these matters do not matter. Clearly Ministers have that view. We reject that strenuously. The clear aim of Ministers is to remove the opportunity to have environmental protection considered to be a necessary part of doing activities, but rather to allow environmental harms if the economic benefits (often to an interested few while the harms affect all) are strong. We consider this is wrong in ethics but also wrong in terms of the functioning and productivity of society and the economy.

c) We support the retention of the words preserve and protect, and also the decision to not give effect to the recommendations of the TAG Report on the methodology.

d) We are not persuaded by the wording in the Principles in 6. We consider that the insertion in 6.1.b and c of the word "specified" is wrong and will involve labourious and difficult specifications which will then be contested.

e) We disagree with the language in 6.1.g and in particular the bias introduced to decision making by this formulation – in its reference to the benefits only of use and development of resources, without any consideration of the losses, the irreversibilities of effects, the irreplaceability of the losses to the environment or society. This particularly crass and odious formulation may have been a deliberate red rag to people concerned about the environment as a ploy to deflect attention from the other odious plans to remove the Principles to be deleted, or it may simply further reflect the deliberate bias of Ministers. Either way, we reject the proposal.

f) 6.1.i, We suggest that this should be the climate change implications of activities and the greenhouse gas emissions, not simply the impacts of climate change. The anyway flimsy argument that the ETS would provide the basis for not allowing consideration of the greenhouse gas emissions in the RMA, can no longer be sustained as the ETS has been made useless and ineffective by other government policies.

g) The consideration of the benefits of efficient energy use and renewable energy generation in 6.1.j should also involve the impacts of such use – and the Mokihinui dam proposal demonstrates.

6.2 We oppose the removal of the hierarchy between sections 6 & 7 because this removal is unhelpful for both decision makers and other parties.

6.2 As above, we oppose strenuously the removal of the principles from 7 because these are essential to environmental responsibility.

We are not persuaded by the argument that the Purpose of the Act in Section 5 covers these – any removal will be used as a basis for arguing that these are no longer important.

7 Methods

We support most of these requirements but would add "fair" and "transparent" to the list in 7.1.

In relation to 7.2, we support most of these, but (3) should be given the sort of limits proposed by the Biodiversity NPS proposal.

7.5 is vague and consequentially not particularly useful.

3.1.2 Improving the way central government responds

As above, we oppose the proposals for increasing Ministerial interventions and urge that only the due process system of the NES and NPS be used. Other ministerial intervention proposals should be dropped. We do not support the use of Ministerial influence via Boards of Inquiry.

Any Guidelines should have due public process for their development. We fear that the criteria used may be yet another mechanism to override environmental and social considerations in favour of investment and infrastructure and other economic activity. Thus we oppose these proposals for National Significance.

We do support the principle of templates but as ever, the devil is in the detail and if the templates are used to marginalise environmental, cultural and social concerns then we oppose them.

3.1.3 Clarifying and extending government powers to direct plan changes

Proposals in this section on p 39-40n are as odious as the changes proposed to the Principles. We do not agree with any proposals for Ministers to have the ability to require changes to Plans or their objectives. The arguments put forward in the paper are unconvincing. This is simply a power grab, and one ill disguised at that. We urge the Minister to withdraw the proposals.

3.1.4 Making NPS's and NES's more effective

a) We support the ability to combine NPS and NESs provided this does not reduce the robust public participation in there development.

b) We suspect that this proposal would take the form of requiring say, that exploration or mining be allowed, or a road or dam allowed because it is a matter of national importance, despite the impacts. We reject such proposals since this is not what NPS or NES is supposed to be about.

c) We distrust the intent of the third bullet point since "streamlining" has come to mean under this government the removal of processes for affected parties and the elevation of economic interests over all others. Until we see the specifics, we will have to oppose this particular proposal at the top of page 41.

We support some degree of proactive planning but not the imposition of central government agendas to override local democratic and due processes.

3.2 Fewer Resource Management Plans

Generally we agree with fewer, clearer and less repetitive plans.

We oppose the proposed narrowing of appeals to the Environment Court, and those changes to hasten decisions by the Court which will disadvantage citizens and community groups and others responding to applicants.

3.2.2 Positive planning

Land supply is not a proven issue when the problem of housing costs is primarily driven by excessive demand from immigration policies, economic conditions, the size of houses and other variables. We support positive planning driven by communities.

We will provide further detail on these and related other matters.

We consider that the so-called independent hearings panel may well be stacked by the government just as the TAG group was. Transparency and fairness are critical but it is not clear that the proposals would achieve this.

We strongly oppose the removal of de novo appeals and the limitations on the role of the Environment Court. We suggest instead that the Court be better resourced so that time is saved that way instead.

3.2.4 Faster resolution of Environment Court Proceedings

The raft of changes proposed are complicated and in some cases are absurdly prejudicial to submitters and to justice. We suggest less rush and more fairness and more consideration of time frames that would work for people who are not professionals in the process and who cannot simply cancel child care, jobs and other commitments for the sake of the court process. Time frames that

would be demanding on professionals may be impossible for ordinary mortals who may be affected. That is not fair.

Councils should be responsible in the first instance, the Environment Court in the second. Not ministers.

3.3 Proposal 3: More efficient and effective consenting

ECO welcomes moves to make things more efficient and effective, but some of the proposals outlined on p 48 will invite strategic behaviour and game playing by parties, and possibly also some degree of moral hazard (ie developers and others tempting officials with bribes, often of the mateship variety rather than the more formal cash transfers that corruption evokes).

We oppose attempts to limit the scope of participation and the limits to the scope of conditions that can be put onto the consents.

We also oppose the provision of a Crown established body to process some kinds of consents.

The document proposes the following:
To address these issues the following is proposed:

3.3.1 A new 10-working-day time limit for straight-forward, non-notified consents.

ECO considers that this proposed time frame is too short for Councils to have time to consider whether the application is straight forward, and it does not give enough time for Councils to manage bunching in their workloads which are demand driven and no able to be controlled by Councils who have difficulties matching the seasonal peaks. We suggest that the 20 working day period be used.

If a shorter period is adopted, then we agree there would need to be stringent criteria relating to quality. The fact that a land use is anticipated by plans should not be sufficient for there to be either non-notification or the short time period for processing.

3.3.2 A new process to allow for an approved exemption for technical or minor rule Breaches.

We foresee this provision being used and abused with “technical” and “minor” subject to inflation and expansion of meaning under the pressures of mateship. ECO opposes this provision which will invite people to “try it on”.

3.3.3 Specifying that some applications should be processed on a non-notified basis.

We strongly oppose this provision which is yet another case of the government directing communities and councils. We consider that not enough consents are notified, and that more should be because people and the environment are already affected though both the applicant and the council would often prefer to avoid the effort of consulting those who are directly affected or are informed enough to be know about environmental effects.

We disagree that Wellington and the developer-friendly Ministers know better than communities about what they consider should be notified. People and communities value some degree of

autonomy and control and this government's penchant for trying to control and direct everything is not welcome and is not good government. We can imagine the present government making minerals and oil extraction, road building, and much more non-notified activities, and we reject this.

As communities are robbed of local democracy more direct action will result. The present government's threats to fine people for such action in relation to oil and gas activity will alienate and criminalise those who have genuine environmental concerns. The result will be radicalisation and polarisation when peaceful routes of protest are denied people.

3.3.4 Limiting the scope of conditions that can be put on consents

We can see that the trivial examples cited would persuade some to support this proposal, but we do not support it. The more the scope of consent conditions is limited, the more applications will be likely to be turned down. We envisage other situations where for instance clearing of native vegetation is proposed and biodiversity, soil, water considerations are ruled out. We thus oppose this provision. It is also a good example of how the document uses examples that are low impact but omits consideration of the difficulties that would arise with other cases.

3.3.5 Limiting the scope of participation in consent submissions and in appeals.

We appreciate and support the discussion on p 55 about the need to retain parties rights to participate and to have a say. Being personally affected is not a necessary test however, given that the RMA has as its fundamental approach open standing and a good appreciation that knowledge of impacts resides in the community as well as councils. The expertise in the community about environmental impacts is often huge compared to that in councils and we urge that public notification and standing be retained as much as possible. Simple consideration of the approval of neighbours is not enough. Often immediate neighbours they will not know about ecological or biophysical impacts – it is the wider community that can provide such insights.

3.3.6 Changing appeals from de novo to merit by way of rehearing

ECO opposes this move away from de novo appeals. We can see the merit of low-cost dispute resolution for some aspects of consents and conditions, but this is already provided by the mediation process that is the first step after an appeal has been lodged. It is rare for people to actually intend to go through to the Environment Court hearing, and the mediation process is much used already. This proposal for independent oversight etc seems to replicate what we already have with court- appointed mediators. The council hearing which precedes the appeal process is a more lay-firendly process, and the moves for call -ins etc are contrary to this need for low cost resolution processes.

3.3.7 Improving the transparency of consent processing fees

In general we support this set of proposals, but there should be stronger penalties for incomplete information which can be used strategically by applicants to disadvantage affected parties.

3.3.8 Memorandum accounts for resource consent activities
There is no explanation for what a memorandum account is so this is difficult to respond to.

3.3.9 Allowing a specified Crown-established body to process some types of consent.

This is a very poor proposal in that it would fragment the decision making tracks still further and would lead to very inconsistent decision making in an area. The Crown is clearly looking to fast track certain activities and we reject this proposal, particularly since it would lead to promotion of activities rather than public interest regulation. We would end up with agencies such as the Crown Minerals agency promoting minerals activity or another promoting aquaculture and the distinction between a regulatory and planning agency v promotion would be lost. This proposal is very poor and should be withdrawn.

3.3.10 Providing consenting authorities tools to prevent land banking.

We consider the hysteria about land banking to be somewhat absurd.

3.3.11 Reducing the costs of the EPA nationally significant proposals process.

We support some but not all of these proposals.

1 The content of public notices should be sufficient and sufficiently in plain English to provide adequate notice of the substantive matters to people who are not technically informed and knowledgeable of jargon.

2 We support the use of electronic copies so long as hard copies are provided free in a timely manner, since many people will not be able to use GIS and other such programmes.

3 We suggest the draft decision process be retained, with existing time frames, since people may need to consult experts who may not immediately be available.

3.4 Better natural hazard management

In general we support better natural hazard management but this should be understood to include the hazards from climate change and other human-induced hazards from the natural environment, such as slips and flooding.

The low probability-high impact events should be planned for, we agree.

3.5 Effective and meaningful iwi\Maori participation.

We agree this is a good thing and is in part derived from the Treaty relationship, aboriginal title and democratic good.

Rights to democratic participation are also the right of other citizens and should also be well provided for rather than curtailed as they have been by the Local Government Bill, the RM Bill 2012 and some of the proposals in the RM Reform proposals in the discussion paper.

3.6 Working with Councils to improve practice,

We support improved practice but urge the Ministry FOR the Environment not to become the apologists for unsustainable short term economic growth. Performance reporting should not be used to bully councils into allowing inappropriate and/or harmful development.

3.8.4

We note and welcome the statement that other changes will be available for comment at the Select Committee. We hope this means that the government will not use the device of SOPs to introduce ill thought out changes.

Finally, we thank you for the opportunity to comment and wish the time were longer for this.

Please contact ECO's Executive officer on 04-385-7545 and eco@eco.org.nz for further information.