FEEDBACK ON "IMPROVING OUR RESOURCE MANAGEMENT SYSTEM"

ENVIRONMENTAL DEFENCE SOCIETY

Introduction

The Environmental Defence Society ("EDS") welcomes the opportunity to comment on *Improving Our Resource Management System: A Discussion Document.*

EDS is a public interest environmental law group, formed in 1971. It has a membership that consists largely of resource management professionals. The focus of EDS's work is on achieving good environmental outcomes through improving the quality of New Zealand's legal and policy frameworks and statutory decision-making processes. EDS is involved in Resource Management Act 1991 ("RMA") processes at all levels and has substantial experience in the operation of the RMA.

This document contains a number of references to the report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group ("MFE TAG Report") and the Report of the Environmental Defence Society Technical Advisory Group on the Resource Management Act 1991 Principles ("EDS TAG Report"). [1]

Questions for Chapter 1

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

EDS supports a number of the issues identified in this section: the complexity and cost of the current planning system, the need to resolve tensions between difference community values upfront, the lack of a consistent service culture and the need to learn the lessons of Christchurch.

We challenge the assertion that the resource management system does not reflect up-to-date values. The discussion document states that the RMA's principles give greater weight to the sustainable management of natural and physical resources, than to social, cultural and economic matters, and suggests that this does not reflect modern values. This claim is based on similar claims made in the MFE TAG Report. However the MFE TAG gave no authority for such claims and carried out no process of assessing modern values. It is clear that New Zealanders value our environmental resources as much today as we did twenty years ago, if not more.[2]

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[1] www.eds.org.nz/content/documents/pressreleases/EDS%20TAG%20Report%20Document_COL%20FINAL.pdf

[2] A 2004 Growth and Innovation Advisory Board survey found that 87% percent of New Zealanders consider the environment is important or very important to them. In the same survey, New Zealanders rated the quality of the natural environment as the third most important aspect of New Zealand, behind only quality of life and the quality of education: www.mfe.govt.nz/publications/ser/enz07-dec07/chapter-2.pdf

The weighting between sections 6 and 7 reflects the design of the RMA. The RMA is an environmental statute. Its purpose is to promote the sustainable management of our natural and physical resources. The RMA has a role in ensuring social, cultural and economic matters are *enabled*, but these matters are *provided for* through other mechanisms, such as the market.

We support the identification of the need for greater policy direction from central government. However we would emphasise that greater policy *direction* does not require direct central government *intervention* in plan making.

The Discussion Document refers to Australia, Canada and Scotland as examples of countries which have greater central government involvement in planning. Those countries have more complex systems of government and planning law than we do so direct comparisons with these countries are not possible. In EDS's experience officials in Australia and Canada are generally envious of the RMA and its one-stop-shop approach to resource management issues. Furthermore, business comparisons between the New Zealand and Australian systems generally prefer the New Zealand system because of its greater transparency and fairness, compared to the Australian system which is subject to the proclivities of individual Ministers.

We believe further thought needs to be given to the assertion that there is insufficient proactive and integrated planning for future needs. The discussion document refers to the fact that the RMA focuses largely on managing the negative effects of resource use, and pays less attention to encouraging and managing positive effects. There is a clear reason for this state of affairs. The purpose of the RMA is to enable social, cultural and economic wellbeing – where it is sustainable . This means that any the negative effects of resource use must be avoided, remedied or mitigated Other mechanisms are in place to provide for proactive and integrated planning for future needs, such as plans developed under the Local Government Act 2002.

This section uses New Zealand's housing needs and affordability as an example. It is a mistake to conflate housing affordability into a simple proposition about land supply. Raw land value is only around 10-15% of the total house-land package in a greenfields setting. A build-ready section (as distinct from raw land) incorporates a number of other costs which have nothing to do with supply: resource consenting, development levies and provision of infrastructure. A build-ready section generally is around 50% of the total. Building costs are high by international standards, reflecting the small scale of New Zealand building companies and the high materials costs (partly attributed to the lack of a fully competitive market). Suggesting that housing will become affordable if the RMA enabled more land supply is a totally fallacious assertion. Housing affordability is a far more complex issue than that.

Questions for proposal 1: Greater national consistency and guidance

Do you agree with the proposals in 3.1.1-3.1.4? Could they be improved? Are there any issues that you think have not been considered? For each proposal you wish to comment on, are there any costs and benefits that you think have not been considered?

3.1.1 Changes to the principles contained in sections 6 and 7 of the RMA

(1) Codifying the overall broad judgment approach

The proposal to add the phrase "[i]n making the overall broad judgment to achieve the purpose of this Act" to section 6 is intended to codify the overall broad judgment approach. However, that approach has been applied by the courts for almost two decades. Legislative amendment is not required to ensure its continued use.

However, if the other proposals relating to sections 6 and 7 are adopted this would change the makeup of Part II considerably. New case law will have to be developed over time, leading to uncertainty, litigation, costs and delays. The approach that develops from this new case law may differ considerably to the approach which this amendment intends to codify.

Recommendation: Reject proposal to add the phrase "In making the overall broad judgment to achieve the purpose of this Act" to section 6.

(2) Combining sections 6 and 7 into a single section removing the current hierarchy between sections 6 and 7

The Minister for the Environment has stated that "core environmental protections have been maintained in the Resource Management Act, and will, in many cases, be strengthened by the Government's proposals". This is incorrect.

The Discussion Document relies heavily on the analysis contained in the MFE TAG Report. The MFE TAG report suggested that the overall broad judgment approach has effectively nullified the hierarchy between sections 6 and 7. This is incorrect and the MFE TAG's analysis of the law is highly misleading. The MFE TAG report quoted an extract from *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541 which describes the role of sections 6 and 7:

> *"[they] inform and assist the purpose of the Act. We may accord such weight as we think fit to any competing consideration under Part II, bearing in mind the purpose of the Act. These subsequent sections must not be allowed to obscure the sustainable management purpose of the Act. Rather, they should be approached as factors in the overall balancing exercise to be conducted by the Court."*

The MFE TAG Report concludes its quote at this point, failing to recognise that a paragraph later the Court continued to say:

> *"Where Part II matters compete amongst themselves,* ***we must have regard to the statutory hierarchy as between sections 6, 7 and 8 as part of the balancing exercise.*** *However, notwithstanding their importance, all of those sections are subordinate to the primary purpose of the Act." [emphasis added]*

An accurate analysis of the law shows that, although the final decision is an overall judgment based on the primary purpose of the RMA, the hierarchy between sections 6, 7 and 8 informs the weight a decision-maker should give to competing considerations. The requirement that decision-makers recognise and provide for matters of national importance in section 6 indicates that these values have a significant priority, are to be given more weight than section 7 and other matters, and cannot

be merely an equal part of a general balancing exercise: *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC) and *Harrison v Tasman DC* [1994] NZRMA 193 (PT). Therefore where a matter of national importance is at stake, stronger countervailing factors will be required to satisfy the decision-maker that sustainable management is being achieved.

Combining sections 6 and 7 will effectively elevate section 7 matters, as they will be given the same weight as section 6 matters (matters of national importance). Section 6 matters are predominately environmental matters. They set out biophysical bottom lines. Section 7 matters are a mixture of environmental, social, cultural and economic matters. Combining these two sections will dilute the importance of section 6 matters, as there will be more competing matters which must be given the same weight. This will make decision-making more difficult and will increase the level of discretion decision-makers will have. That will lead to greater uncertaintly of outcome and increased litigation costs. It will also likely to result a 'watering down' of the primacy of the section 6 environmental matters.

The MFE TAG Report suggested that section 6 is unbalanced, due to the lack of economic and social principles. The Discussion Document carries on this assumption. This is a misunderstanding.

First, the principles contained in section 6 provide guidance on the application of sections 5(2)(a) and (b). The predominant section 5 refers to the enabling of social and economic wellbeing. Secondly, when the RMA was introduced, section 6 was seen as *restoring* balance where the market and other mechanisms previously favoured economic and social factors. Any attempts to 'add balance' to section 6 will actually upset the balance - still only a tenuous balance - achieved by the RMA.

This proposal (along with the insertion of two new principles relating to infrastructure and built development) would shift the RMA from being a statute that enables development while managing its adverse effects, to one that actively promotes certain categories of development, favourites of the Government of the day. While section 5 recognises that the RMA has a role in *enabling* people and communities to provide for their economic, cultural and social wellbeing, at its heart the RMA is in place to ensure minimum standards of environmental management necessary for *sustainable* management. As such, section 6 should not extend to *providing for* activities which have nothing to do with environmental bottom lines. The RMA was intended to manage environmental effects and allow the market (and other forces) to provide for economic, cultural and social wellbeing. These recommendations would undermine environmental outcomes, which will have negative outcomes for New Zealand environmentally, socially and economically.

As the Discussion Document notes, the changes will involve considerable costs and will increase uncertainty in the short term, as they will require the review of all regional and district council plans as well as National Policy Statements. The changes will render much existing case law obsolete, providing interpretation challenges until new case law emerges which may take a decade. The consequences of introducing these changes at the same time as appeal rights are narrowed does not appear to have been considered. In our opinion (and based on an examination of the costs of implementing the National Policy Statement on Freshwater Management) the costs of these changes overall are likely to be in the order of $500 million over the next several years.

Recommendation: Retain the hierarchy between sections 6 and 7

(3) Insertion of two new principles "the effective functioning of the built environment including availability of land for urban expansion, use and development" and "the efficient provision of infrastructure"

We recognise the importance of infrastructure and the built environment to communities. However, the addition of these principles combined with the proposal to remove the hierarchy between sections 6 and 7 is of particular concern to EDS.

In many projects there is a conflict between the benefits and a section 6 matter: for example, the provision of infrastructure may conflict with the protection of the natural character of the coastal environment. These proposals will mean that there will be a principle relating to infrastructure which will be given the same weight as the existing principle relating to natural character. The benefits that the infrastructure project will provide are often able to be easily quantified. On the other hand losses to a value such as natural character are difficult to quantify and, because natural character is a finite resource, in some respects the loss cannot be quantified. However, there is a natural tendency for decision-makers to favour outcomes which are quantified. It is for this reason that we are concerned that this proposal will ease the path of inappropriate development and have the effect of lowering environmental standards.

Furthermore, the need for a principle relating to infrastructure has not been established. The MFE TAG Report notes that 90% of infrastructure projects are consented under the RMA. Recent changes to the RMA have created a fast-track consenting process for major infrastructure. These measures ensure that necessary infrastructure is able to be approved and in a timely manner.

The report noted concerns that some proposals are dropped after initial scoping because of foreseen RMA difficulties while other proposals require high levels of mitigation and environmental compensation. It is appropriate that some projects are not consented and that others require significant mitigation and compensation to go ahead – it is after all the role of environmental legislation to protect our environment where the effects cannot be avoided, remedied or mitigated.

We believe that, if the government wishes to establish national policy regarding infrastructure, the correct way to do that would be through a National Policy Statement (which has already been done with respect to some electricity infrastructure).

We are also concerned about the content of the proposed principle "the effective functioning of the built environment including availability of land for urban expansion, use and development". We recognise the value of quality urban design and the EDS TAG Report recommended that a principle be inserted into section 7 requiring decision-makers to have particular regard to "the maintenance and enhancement of a quality urban and built environment" and that greater guidance as to outcomes for urban and built environments should be pursued through a National Policy Statement, National Environmental Standard or best practice guidelines.

However, we are concerned that the proposed principle is limited to the 'effective functioning' of the built environment. The Urban Technical Advisory Group recommended a principle referring to

'the quality of the design and planning' of the built environment and the MFE TAG Report recommended a principle referring to 'the planning, design and functioning' of the built environment. It is our belief that 'quality' and 'design and planning' are key aspects to ensure good urban outcomes.

We are also concerned that the proposed principle assumes that urban expansion is occurring throughout New Zealand. While large centres, especially Auckland, are experiencing considerable growth, many smaller centres are shrinking. This creates considerably different urban issues. We are also apprehensive that this principle could be interpreted to favour particular outcomes for urban growth, such as urban sprawl. Urban sprawl is associated with significant negative environmental, social and economic outcomes in cities around the world and is becoming increasingly so in a carbon-constrained world. It is the antithesis of high quality urban form. It is important that local communities have the opportunity to determine how growth will be managed in their community.

Recommendation: Promulgate a NPS relating to infrastructure. Insert a principle into section 7 relating to "the maintenance and enhancement of a quality urban and built environment" and promulgate a NPS to provide further guidance as to outcomes for urban and built environments.

(3) Selectively retaining the directive language

We strongly support the retention of directive language in relation to natural character, outstanding natural features and landscape, and significant indigenous biodiversity. It is essential that this directive language is retained. A failure to do so would clearly signal a reduction in environmental outcomes.

We are concerned that the directive language has been removed from the principles relating to aquatic habitats, public access and historic heritage. This clearly signals a reduction in protection for these values. The Court, if it was to interpret the proposed changes, would note the retention of directive language for some principles and would be likely to conclude that the removal of the directive language for others must have been intended to have the effect of lowering the level of protection afforded to those values.

Maintaining and increasing public access to the coastal environment is a matter of considerable concern to the New Zealand public. Being able to access the country's beaches and sea is considered to be a national birth right, a fundamental part of what it is to be a New Zealander, and a significant component of the relative high quality of life in this country despite low incomes. The protection of historic heritage is also a matter of considerable national importance, and this was recognised when the matter was raised from a section 7 to section 6 matter in 2003. We note that no reasons have been provided in the Discussion Document for reducing the protection given to these two particular matters.

(4) Deletion of key environmental principles "the maintenance and enhancement of amenity values", "intrinsic values of ecosystems", "any finite characteristics of natural and physical resources", and "maintenance and enhancement of the quality of the environment" as well as "the ethic of stewardship".

The Discussion Document justifies the deletion of these key environmental principles on the basis that these matters are "already effectively encompassed in section 5 of the Act". However, all Part II matters are encompassed by section 5. We question why only these matters have been proposed for deletion. A court interpreting the proposed changes would note that some matters were retained, and conclude that there must have been a reason for removing selected matters; the likely conclusion is that those matters which are retained would be considered more important that those which are removed. These matters are not "unnecessary duplication" but are important issues which need to be part of the check-list of key matters to be considered by decision-makers within the Part II hierarchy.[3]

The proposals to delete these key environmental principles undermine the assertion of the Minister for the Environment that "core environmental protections have been maintained in the Resource Management Act, and will, in many cases, be strengthened by the Government's proposals".[4]

It has been suggested that the principles which are proposed to be removed are 'general' and 'woolly'. We accept that this may apply to the principle *"maintenance and enhancement of the quality of the environment"* but we do not accept that this applies to the other principles. In any case, the proposed principle *"the benefits of the efficient use and development of natural and physical resources"* is equally, if not more, general than the matters proposed for deletion, and yet it is proposed that it be retained. If this is the justification there appears to be a bias to application of this reasoning.

We are particularly concerned about the suggested removal of *"the maintenance and enhancement of amenity values"*. "Amenity values" are the characteristics that influence and enhance people's appreciation of a particular area and are derived from the pleasantness, aesthetic coherence and cultural and recreational attributes of an area. This principle covers those areas with special character, but which do not necessarily have specific features. Amenity values can be affected by, *inter alia*, noise, dust, smoke, smell, glare, light, shading, traffic, appearance, intensity, and development. The concept is essential to the 'quality of life' and 'sense of place' which is so important in respect of the places that New Zealanders live, work and recreate in. This principle is important with respect to recreational values in the rural environment (such as fishing and kayaking) and is particularly relevant in intensifying urban areas, such as Auckland, where it is very important that amenity is maintained. As Auckland and some other urban centres intensify and expand, the provision of adequate green space such as local reserves will become increasingly important. Amenity values are a critical value for New Zealanders in 2012 and in the future, and we are strongly opposed to the removal of express reference to them.

We accept that *"the ethic of stewardship"* overlaps with the principle relating to kaitiakitanga and could thus possibly be removed. However, we note that kaitiakitanga relates to the exercise of guardianship by tangata whenua whereas stewardship is broader.

We also accept that *"maintenance and enhancement of the quality of the environment"* is a very general principle, although it provides a key message – environmental degradation is unacceptable

[3] http://www.amyadams.co.nz/index.php?/archives/815-Environment-groups-out-of-touch-with-New-Zealanders.html
[4] Ibid.

as the quality of the environment should, at the very least, be maintained. However if this is to be removed we suggest that principle *"the benefits of the efficient use and development of natural and physical resources"* should also be removed for the same reasoning.

Recommendation: Consider the effects of removing *"the ethic of stewardship"*, *"maintenance and enhancement of the quality of the environment"* and *"the benefits of the efficient use and development of natural and physical resources"*. Retain *"the maintenance and enhancement of amenity values", "intrinsic values of ecosystems",* and *"any finite characteristics of natural and physical resources"*.

(5) Restricting the application of key environmental principles to "specified" areas

The discussion document does not propose how these areas will be "specified" nor does it discuss what will occur in the period before all areas are able to be "specified". This is a real deficiency in the in the information provided in the Discussion Document.

We support making policy statements and plans more specific. In particular we believe that outstanding natural landscapes, outstanding natural features, areas of high natural character and significant ecological areas should be identified in regional policy statements. However, we have concerns about the implementation of this proposal:

- The proposed amendments to appeal rights mean there would not be an adequate check and balance to ensure that the process used to specify areas is the result of a robust analysis.

- There is currently no established assessment process for identifying significant ecological areas or areas of outstanding natural character. It would take some time to establish such an assessment process.

- The proposal is likely to require areas to be assessed throughout New Zealand at the same time. This would place a significant burden on the party required to undertake the assessment and may not be practical given the limited number of experienced personnel.

- Careful thought would need to be given to transitional provisions. There would be a need for the existing provisions to apply so that protections remain, until assessment processes are established and robust assessments are carried out nationwide. This proposal could not come into effect until an assessment was undertaken to confirm that a robust identification process had occurred nationwide and all areas had been specified.

- It may be that some areas of outstanding natural landscape or character, or of significant ecological value, are not identified in regional plans. It should remain open for such identification to be made during resource consenting processes.

A better approach would be to promulgate a national policy statement requiring regional policy statements to identify outstanding natural features and landscapes, areas of outstanding natural character and significant indigenous biodiversity, including a process and timeframe for doing this, and setting out national policy direction for protection of these resources.

Recommendation: Promulgate a NPS setting out the process for identifying outstanding natural features and landscapes, areas of outstanding natural character and significant indigenous biodiversity, requiring regional policy statements to identify these areas within a specified timeframe and setting out national policy direction for protection of these resources. Retain a back-up entitlement of identifying such areas on an ad hoc basis during resource consenting to cover the situation where councils may have made errors of omission.

(6) Addition of "significant" in the principle relating to aquatic habitats

We welcome the extension of this principle to all aquatic habitats, while retaining the reference to trout and salmon which have high water quality requirements and significant recreational value. However the proposal to include the word "significant", alongside the proposed removal of the directive work "protect", in the principle relating to aquatic habitats will have the perverse effect of reducing protection for most aquatic habitats (those that are not "significant"), despite recent history showing how important it is to protect them. It is essential that this principle is able to extend to quality, but less "significant", freshwater systems.

(7) Proposed section 7

The proposed section 7(1), 7(2) and 7(4) are 'pure process' matters, which essentially direct best practice. It is clear that the majority of resource management failures relate to poor or inconsistent implementation, rather than the legislation, so this additional guidance could be of benefit. However, it would be preferable for best practice to be mandated through alternative mechanisms, such as National Environmental Standards, which can provide a much greater level of direction. An National Environmental Standard would also be a more flexible instrument, allowing easier adjustment as new lessons need to be included in RMA procedures. These measures could also be incorporated along with the proposed national planning template.

The proposed section 7(3) and 7(5) are substantive, not procedural, and as such do not fit well in a section headed 'Methods'.

The intention behind the proposed section 7(3) is unclear. It has been suggested that this is intended to prevent local authorities from requiring environmental compensation and to ensure it remains voluntary. We suggest this is an academic distinction: if an application is unlikely to be granted without some compensation being provided because it has significant adverse effects which cannot be avoided, remedied or mitigated, then in practice the applicant has the option of proposing compensation or not going ahead with the activity. We do support the clarification that environmental compensation can only be considered after the other matters contained in section 5(2)(c). We consider that it may be appropriate to clarify that there is a hierarchy from avoid, to remedy, to mitigate, and possibly, to compensate, if the prior cannot be achieved.

We are concerned the proposed section 7(5) which would require decision makers to "achieve an appropriate balance between public and private interests in the use of land". The term "appropriate balance" is meaningless and will open the 'method' up to considerable litigation. We are unsure what benefits this section is intended to confer. The interpretation of this requirement could favour

public interests, or private interests, depending on the outcome of litigation. The only inevitable result of this amendment would be increased uncertainty and litigation.

Recommendation: Do not proceed with the proposed section 7. Address best practice through a National Environmental Standard or best practice guidelines or the national planning template.

3.1.2 Improving the way central government responds to issues of national importance and promotes greater national direction and consistency

(1) Criteria for when which national tool (NPS, NES, call in, direction) is to be used

EDS supports the development of criteria which will establish when it is appropriate to use the available national tools. However, as set out below, EDS is opposed to any proposal to allow central government to directly amend planning documents, regardless of whether criteria are set for determining when the power is to be used.

Recommendation: Develop criteria for use of national tools through a full public process

(2) A streamlined process for urgent issues which allows central government to consult on a proposed rule for a limited period and then advise a final decision (avoiding the Schedule 1 process)

This proposal appears to be analogous to the proposal in 3.1.3 to allow a Minister to directly amend an operative plan through a power similar to a regulation-making power.

The Discussion Document contains very little detail surrounding this proposed process. It does not outline whether central government will be required to undertake a section 32 cost-benefit analysis, what level of consultation will occur, whether a hearings process will be utilised or what appeal rights will be available.

It is clear however that this proposal would cause a radical shift in decision-making power. It would take decision-making out of the hands of communities and their elected representatives and place it into the hands of the Executive. This proposal is offensive to New Zealand's tradition of local democracy. It goes well beyond providing central government direction over policy and allows central government to take over the reins. It is reminiscent of the 'Think Big' days of Prime Minister Muldoon's National Development Act. We are concerned about the potential for this power being used by Minister's to push through 'pet projects'.

Recommendation: Reject proposal to establish a streamlined process for urgent issues

3.1.3 Clarifying and extending central government powers to direct plan changes

(1) A stepped process for central government intervention:

1. Identification of issue and request council to set out how it has been addressed

2. Direct plan change, including matters to be considered and/or outcomes to be achieved

3. Directly amend operative plan through a power similar to regulation-making power

Section 25A of the RMA currently allows the Minister for the Environment to direct a council to prepare a change to its plan that addresses a resource management issue relating to its functions in sections 30 or 31. The Discussion Document states that the section 25A power has not been used because it is unclear what process should be followed and at what point ministerial intervention is appropriate. We believe that any deficiencies with the section 25A power could be addressed, and new powers are not required. We suggest the following amendments to the section 25A power:

- Any lack of clarity regarding when ministerial intervention is appropriate could be remedied by specifying that section 25A is to be used after the section 24A processes have been utilised and proven unsuccessful.

- Any lack of clarity around the process for issuing a direction could be remedied by specifying, for example, that the direction is to be set out in a letter to the Chief Executive specifying the plan to be altered, the issue to be addressed and the function it relates to, and the reasons why further action is required. This will also ensure the local authority is provided with clear direction regarding the issue that needs to be addressed, without specifying the outcome that must be reached.

- The perceived necessity for a step between making a direction under section 25A and removing the local authority under section 25, could be addressed by clarifying that a direction under section 25A can be enforced by an application for an enforcement order. This is more constitutionally robust than a power allowing the Minister to directly change a plan as it allows the court to act as a check and balance on the application of the section 25A power by the Minister.

We are strongly opposed to the proposal to allow the Minister to direct the outcome of the plan change process. This proposal would render the Schedule 1 process null, as the decision would need to accord with the outcome directed by the Minister, regardless of the submissions received and evidence presented. This would result in a predetermined, rather than a quality, outcome. This proposal would also be unnecessary if the suggestions above are adopted to ensure the existing section 25A power can be utilised and enforced.

We are firmly opposed to the proposal to allow the Minister to directly amend an operative plan through a power similar to a regulation-making power, for the reasons set out in 3.1.2(2). Again, this proposal would be unnecessary if the suggestions above are adopted to ensure the existing section 25A power can be utilised and enforced.

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.

Recommendation: Amend section 25A to address its deficiencies. The following wording is suggested for discussion purposes:

(3) The Minister may make a direction under subsection (1) or (2) if, after carrying out the steps in section 24A(a) to section 24A(d), in the Minister's opinion, the local authority has failed or omitted to act on a recommendation.

(4) The Minister may make a direction under subsection (1) or (2) by writing a letter to the Chief Executive of the local authority setting out;

(a) the regional plan to be promulgated, changed, or varied or the district plan to be changed or varied;

(b) the resource management issue to be addressed relating to a function in section 30 or section 31;

(c) the reasons the Minister determined that the local authority has failed or omitted to act on a recommendation.

(5) If the local authority fails to comply with section 65(1A), 66(1), 73(1b) or 74(1) the Minister for the Environment may apply for an enforcement order under section 316.

3.1.4 Making NPSs and NESs more efficient and effective

(1) A combined NPS and NES process

We support this proposal. This will allow policy and technical guidance to be developed at the same time resulting in improvements in efficiency.

(2) A clarification that NPSs and NESs can be targeted to a specific region or locality

We oppose this proposal. NPSs and NESs are promulgated by central government and by their very nature should be used for national issues. Local government is the most appropriate body to deal with issues which are region specific. There needs to be a clear separation of powers between central and local decision-making.

(3) Further streamlining processes for developing NPSs and NESs

We are unable to provide informed feedback on this proposal as the Discussion Document gives no details concerning the 'further streamlining processes' that being considered.

It is essential that NPSs and NESs are developed through a robust participatory process. Any streamlining that will weaken the integrity of the process is not supported. However, if efficiency gains can be made without affecting the integrity of the process those changes would be supported.

(4) Develop a non-statutory agenda to indicate matters to be considered for NPSs or NESs

We support this proposal. We believe that NPSs and NESs are under-utilised and there is potential for increased use of NPSs and NESs to significantly improve our resource management system. There are currently a number of NPSs and NESs under development. A number of these have stagnated at various stages of the process. It is essential that the development of these documents continues. We have listed below the matters that should be covered by NPSs and NESs.

Beyond the suggested additional matters in section 6 and 7, are there any matters of national importance that should be covered in Part 2 of the RMA?

The EDS TAG Report recommended that a new principle be added to section 7 to require decision-makers to have particular regard to 'the avoidance of encroachment of urban development on soil having a high actual or potential value for the production of food'.

This recommendation was made for a number of reasons:

- Soil is a vital natural resource for New Zealand. Soil underpins much of the New Zealand economy, including our agricultural, horticultural and forestry industries and provides essential ecosystem services such as retaining nutrients, breaking down pollutants, storing carbon and moderating water flow.
- The Town and Country Planning Act 1977 provided that "The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food" was a matter of national importance to be recognised and provided for. [Case Law]

What matters should additional NPSs and NESs cover?

NPSs and NESs which are under development and require progression:

- Indigenous Biodiversity
- Urban Design
- Sea level Rise
- Plantation Forestry
- Ecological Flows and water levels

NPSs and NESs which are required:

- Practice-related improvements
- Natural Character

- Outstanding natural features and landscapes
- Soils (including soil quality and avoidance of encroachment on high value soils)

Questions for proposal 2: Fewer resource management plans

Do you agree with the proposals in 3.2.1-3.2.4? Could they be improved? Are there any issues that you think have not been considered?

For each proposal you wish to comment on, are there any costs and benefits that you think have not been considered?

3.2.1 Require single resource management plans using a national template that would include standard terms and definitions

(1) A single resource management plan (per district, or broader area if agreed) to be in place within 5 years

A single resource management plan is supported as this would collate all planning documents relevant to the defined area in one location. This proposal would not improve the internal consistency of those documents, but will allow it to be more easily assessed.

We would prefer this to be implemented at a regional level rather than a district level. Regional level documents reflect catchment boundaries and allow for the management of environmental effects in a more holistic manner.

(2) A national planning template setting out the structure and format of the single plan, standardised terms and definitions, and possibly content for specific standardized zones and rules for particular activities

A national planning template is supported as this will improve consistency and result in significant efficiency improvements. There is considerable scope to make plans more prescriptive which will increase certainty and reduce costs and delays.

It is essential that this is developed through a robust process. This should involve:

- the preparation of a draft planning template by the Ministry for the Environment, in consultation with the Department of Conservation (particularly for coastal matters),
- appointment of a full Environment Court Inquiry to inquire into and report on the draft planning template,
- public notification of the draft planning template,
- a submission period of at least 30 working days,

- a full public hearing allow submitters to be heard and present evidence,
- allowance for cross examination of witnesses,
- a report and recommendations prepared by the Environment Court for the Minister,
- appeals on points of law or where the Minister does not accept the recommendations of the Environment Court.

The national planning template must give local authorities flexibility around the application of standardized zones and rules for particular activities. Local authorities should have the ability to depart from the template if they can demonstrate good reasons for doing so. The national planning template needs to be just that - a template that can be altered to reflect local circumstances.

3.2.2 An obligation to plan positively for future needs including land supply

(1) Amendments to ss 30 and 31 to indicate that planning for positive effects is a core function

The discussion document states that "planning has tended to focus on managing the negative effects of development … and to under-emphasise the consideration of how it might provide for the social, economic or cultural well-being of the community".

EDS supports the need to plan for positive social, economic, cultural and environmental outcomes. However the purpose of the RMA is to ensure sustainable management of natural and physical resources. It does this by enabling activities to occur unless their adverse effects are such that conditions must be imposed or the activity must be prevented from proceeding. In this context, it is appropriate that the focus of the RMA is on the adverse environmental effects of activities.

This proposal confuses the role of RMA plans with those developed under the Local Government Act (LGA). Long Term Council Community Plans, prepared under the LGA, are designed to plan for positive social, economic, cultural and environmental outcomes in communities. RMA plans have a very different role as they are designed to manage the adverse environmental effects of activities. EDS supports a closer relationship being provided for between the two plans, but this should not undermine their respective roles.

This has been largely achieved in Auckland. The Auckland Plan is an example of a long-term, visionary, positive plan for New Zealand's biggest council (by population). It was not an RMA document and so was free to cast a wide view across a range of issues. It has enabled Auckland to focus its future around a series of forward-looking propositions including tradional planning and also the timely provision of infrastructure. Its vision is now being translated into the Auckland Unitary Plan. We consider that legislative changes are not required for other regions to embark on similar long-term planning and that there are some real advantages in not being constrained by statute.

The Resource Management Reform Bill 2012 requires the hearings panel to have regard to" the Auckland Plan. A similar provision could be applied to other regions to ensure that RMA plans "have regard to" LGA plans.

(2) Amendments to ss 30 and 31 to require councils to ensure there is adequate land supply to provide for at least 10 years of projected growth in demand for residential land

EDS would conditionally support this proposal, if the amendments suggested below are accepted.

It is essential that local authorities determine how to provide land supply according to the wishes of their communities. This requirement must allow demand to be met by a variety of mechanisms. We are concerned to ensure that this requirement is not used to justify environmentally and economically unsustainable urban sprawl.

This proposal probably stems from the issues facing Auckland and Christchurch and fails to recognise that in many areas of New Zealand resident populations are decreasing. Any requirement relating to land supply needs to be nationally applicable, now and into the future, and therefore needs to be applicable to areas where there is projected to be decreases in demand, as well as areas where there is increasing demand.

This requirement seems to stem from an assumption that increasing land supply will singularly improve housing affordability. As we have argued above, that is a false assumption and we consider that the Discussion Document is misleading New Zealanders (and Parliament) on the point.

3.2.3 Enable preparation of single resource management plans via a joint process with narrowed appeals to the Environment Court

(1) Voluntary process allowing councils to jointly prepare a single integrated plan for each district or larger area

This proposal aims to ensure internal coherency between regional and district plan provisions. We agree this is an issue and in our submission on the Resource Management Reform Bill 2012 we suggested amendments to section 32 to require councils to address this matter. We suggest that other mechanisms, such as the suggested amendment to section 32, are required to improve internal coherence, as this proposal would only be utilised when councils choose this process over the standard process.

This proposal will only be workable if all districts within a region agree to prepare a single integrated plan for the region. A hybrid situation, for example, if in Northland an integrated plan was prepared for the Far North and separate regional and district plans remained in Whangarei and Kaipara, would be very confusing.

EDS is concerned to ensure that in such a scenario neither party would "take over the reins". Regional and district councils have very different skills. District Councils know about land and

infrastructure. Regional councils know about natural resources, such as water, air and soil. It is essential that people are making decisions on those matters in which they have the relevant expertise.

(2) A streamlined plan development process will be made available if the integrated plan would have one set of rules per area, enable effective catchment management, and bring material efficiency/cost gains

This proposal would essentially roll out the "Auckland Council plan-making process" throughout New Zealand.

Auckland is a special case because of its scale. We believe that it would be sensible to utilise Auckland as a 'pilot' to test the quality of the outcomes of this process before we consider applying it throughout New Zealand.

We are concerned that the streamlined process relies on independent commissioners to make decisions. Independent commissioners are not elected representatives, nor are they truly independent as they are dependent on their employer for their next job. They do not provide an adequate safeguard to ensure the robustness of decision-making. The Discussion Document states that the Environment Court should not be making policy decisions because it is not an elected representative. But neither are independent commissioners. On the other hand judges are appointed for life and are fully independent. To address this issue we suggest that a panel of independent commissioners be established. Members of the panel could be selected by the Parliamentary Commissioner for the Environment to ensure selection is not politicised. The panel members could be employed for a set term to ensure independence.

However, even with these improvements to the independence of independent commissioners, we consider that the Environment Court still has an important constitutional role to play. The Court does not make policy decisions: it hears competing arguments, from the council and the community, and adjudicates on which provisions are more in accordance with the provisions of the RMA. The Court is an expert Court and in our experience is seen as a model by other jurisdictions offshore.

We question the appropriateness of the local authority making the final decision in this process when they will not have heard all of the evidence presented by submitters. This requires further consideration.

3.2.4 Empower faster resolution of Environment Court proceedings

(1) Increase the Environment Court's powers to enforce agreed timeframes

(2) Strengthen provisions to require parties to undertake alternative dispute resolution

(3) Make law changes required to deliver electronic case management

We support these proposals and note that the Environment Court has itself made a number of improvements in its processes over recent times. These additional improvements to Environment

Court proceedings could yield further efficiency improvements. Further improvements to practice and procedure are also possible. One significant factor in ensuring the success of improvements to proceedings is ensuring that councils have adequate resources.

Two papers prepared by Acting Principal Environment Judge Laurie Newhook during 2012 provide a number of practices and procedures which could improve the efficiency of appeals:[5]

- As soon as appeals are filed, a case managing judge(s) commences working with the parties to identify issues and topics;
- Any negotiations with parties can take place parallel to court processes getting underway;
- Issues are tackled in a "top down" fashion, from objective, to policies, to methods and explanations;
- Close attention to the use of conferences to set mediation methodology and issue orders;
- Use of expert conferencing alongside mediation;
- All parties are to be represented in mediation by agents who have delegated authority to settle;
- A willingness for high level engagement in the mediation process by elected members and senior officials of councils;
- Councils committing sufficient resources to the process;
- Early warning from councils about prospective release dates of plan decisions;
- In a large review, caseload may be assigned to several judges and mediation to numbers of commissioners.

For processing large groups of plan appeals:

- Councils could consider releasing decisions in groups or stages;
- The Court could commence work significantly ahead of appeals arriving to discern likely topics and volumes;
- The attention of numbers of judges with appeals being divided by area or topic and chaired by one judge with a fill overview of all matters;
- Early effort on the identification of issues;
- Mediations and expert conferencing conducted by significant number of the Court's personnel;

[5] *Current and past practice of the Environment Court concerning appeals on proposed plans and policy statements* (July 2012) and *Concerning resolution of large groups of plan appeals (*August 2012).

- All parties come to mediations represented by people will full delegated authority to settle;
- Judicial settlement conferences and/or hearings on matters on which parties 'get stuck' set down as necessary.

Do you agree with our assessment that better quality plans and plan-making processes would significantly reduce costs and delays, including those associated with consenting and appeals?

We agree that better quality plans will reduce costs and delays associated with consenting. It is important that the tensions between different community values are resolved upfront during the plan-making process, rather than leaving decision-making to the resource consent process where the assessment must be made for each application.

We agree that better quality plans will reduce costs and delays associated with appeals. Increasing pre-notification consultation and improving local authority practices will result in higher quality plans and reduce the likelihood of appeals being filed.

We do not agree that alterations to plan-making processes will necessarily reduce the costs and delays associated with the plan-making process. For example a one-stop hearing will potentially cost more and take longer than the current process, despite the contraction of appeal rights. This is because the current process allows for the majority of issues to be dealt with at the council hearing with only a small number of issues proceeding to the Environment Court where they are subjected to greater rigour. Applying Environment Court-equivalent rigour to all the issues will considerably lengthen the hearing process and require submitters to prepare full evidence on all matters.

Further, limiting appeal rights to the High Court on points of law will require all Council hearings to be recorded and transcribed. This is an additional burden on local government.

Who should be responsible for making final decisions on resource management plans?

Democratically-elected representative local authorities should be responsible for making final decisions on proposed resource management plans. However, it is important that they have heard the evidence on the matters they are deciding. The Environment Court also has a crucial role in ensuring decisions are lawful, meet the purpose of the RMA, correctly apply the principles in Part 2 and give effect to NPSs. The role of the Environment Court must be maintained as it provides an independent check and balance on the power of local authorities.

<u>Questions for proposal 3: More efficient and effective consenting</u>

Do you agree with the proposals in 3.3.1-3.3.11? Could they be improved? Are there any issues that you think have not been considered?

For each proposal you wish to comment on, are there any costs and benefits that you think have not been considered?

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

(1) A new 10-working-day processing timeframe for straight-forward resource consent applications such as simply bulk and location breaches to residential zone rules, small-scale infill or unit title subdivision, land-use activities anticipated by plans

We have concerns about the practicality of this proposal and the potential for poor quality decision-making to result. For example, conditions that are not required may be imposed on the consent because the decision-maker has not been able to assess effects adequately.

We are also concerned about how "straight-forward" consents will be determined. There would need to be a list of specifically defined "straight-forward" consents. Otherwise a notification-like assessment will need to be carried out that will add additional time to all non-notified consents.

This proposal will result in minimal benefit as there is currently a 20-working-day time limit for non-notified consents.

3.3.2 A new process to allow for an "approved exemption" for technical or minor rule breaches

(1) An activity would be "deemed permitted" by giving councils a small degree of tolerance to decide on a case-by-case basis that a full resource consent is not needed, including when the rule breach is very minor, the environment and neighbours are affected to a very minor degree, objectives and policies are not compromised by granting an exemption, no other consents are required, there is no need for technical conditions to control effects.

This proposal could create a scenario of 'environmental creep' whereby each "approved exemption" creates a new permitted baseline. Furthermore, rules are intended to be definite and clear. Introducing approved exemptions creates uncertainty around the boundaries.

In order to address these concerns it will be necessary for 'technical or minor rule breaches' to be specifically defined. There will also need to be measures put in place to ensure that 'environmental creep' does not occur when the list is amended.

This proposal will result in minimal benefit as such consents will be processed on a non-notified basis within the 20-working-day time limit.

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

(1) Allowing other forms of regulations (other than NESs) to stipulate activities which will not be notified

We are concerned at any proposals to further limit notification which has been greatly constrained by several amendments over recent years. This proposal seems unnecessary when there is already a power for NESs to direct non-notification and for local plans to also direct non-notification. In addition, currently only X% of resource consent applications are notified.

Recommendation: REJECT

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

(1) Limit the scope of conditions that can be put on discretionary and non-complying activities by requiring conditions to be directly connected to the reason a consent is needed i.e. a condition can only be imposed where it directly relates to the provision of the plan which has been breached, or, the adverse environmental effects of the proposed activity, or content agreed to by the applicant.

The proposal would limit the scope of consent conditions for discretionary and non-complying activities to conditions which are directly connected to the reason a consent is needed. We are concerned about this suggestion as discretionary or non-complying activity status is generally used where there are a wide range of environmental effects to be considered, as opposed to restricted discretionary activity status which is used where the environmental effects can be confidently specified in the plan. The use of discretionary or non-complying activity status allows consideration of all effects. This allows an integrated assessment of the overall impacts of the activity before a decision is made on whether it should proceed or not, and if so on what conditions. This is an essential element of high quality environmental decision-making and the hallmark of the broad balancing approach taken under the RMA. It is essential that conditions can be imposed which relate to any adverse environmental effect of such activities. There is no point allowing full assessment of all the impacts of an activity, but limiting the scope of conditions which may be imposed. A result of this amendment may be that a consent is declined for an activity because of adverse effects on which a condition cannot be placed.

It would be more appropriate to ensure controlled or restricted discretionary activity status is used where environmental effects can be confidently specified and they are not of a level of concern that means a higher activity status is needed to indicate that the activity is discouraged.

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

(1) Limit the scope of submissions and third party appeals to the reasons the application was notified and the effects relating to those reasons. This would require the council to clearly identify the effects which meet the notification tests.

Where there is an overlap between the elements of a proposal the case law states that the consent authority should decline to dispense with notification of one element unless it is appropriate to do so with them all. Otherwise the consent authority would fail to look at the whole proposal and could not deal with it on a holistic basis: *Bayley v Manukau City Council* [1999] 1 NZLR 568.

However there is an exception where one of the elements is a controlled activity or a restricted discretionary activity, and the scope of the consent authorities discretion is relatively confined, and the effects of the elements would not overlap or have consequential effects, but are distinct: *Southpark Corp Ltd v Auckland City Council* [2001] NZRMA 350.

The case law generally requires elements of proposals to be considered as a whole. However it allows for elements to be considered separately where that is appropriate. We believe that this test is appropriate and that it would not be appropriate to allow elements of a proposal to be separated where the effects overlap.

If this proposal is implemented it would further limit public participation. This is inappropriate given the erosion of public participation that has already occurred in recent years.

3.3.6 Changing appeals from *de novo* to rehearing

(1) In certain circumstances, narrow the scope of Environment Court appeals on plans to appeal by way of rehearing. The Court would have some ability to choose to rehear certain evidence. This could possibly be applied to resource consents also.

This proposal combines with the proposal to limit merits appeals to situations where the local authority has not accepted the recommendations of the hearing panel. Together these proposals would significantly reduce appeal rights.

An appeal by way of rehearing would involve the Environment Court receiving the transcript of the council hearing and determining the matter on the papers. This is a completely different process to a *de novo* appeal.

There are a number of problems with this proposal:

- A complete transcript of the council hearing will be required. This will add considerable delay and cost to the council hearing.
- There will need to be increased robustness of the council hearing including cross-examination of experts.
- Parties will be required to apply for new evidence to be admitted. This will add considerable delay to the process.
- Parties will be likely to apply for judicial review where the process has inadequacies.
- The flexibility that the current system has to consider matters as appropriate will be lost.

EDS is opposed to this proposal. The Environment Court plays a key constitutional role, acting as a check and balance on the powers of local government, ensuring that decisions are lawful, meet the purpose of the RMA, correctly apply the principles in Part 2 and give effect to NPSs

EDS would also not support applying this suggestion to resource consents. A proposal is often modified as a result of the resource consent decision and new evidence is required on the modified proposal.

Recommendation: Reject proposal to change appeals from *de novo* to rehearing, for plans and resource consents.

(2) Lower cost tribunal style resolution process for minor matters. This will be part of further work given the scale of the changes required.

We support further work being carried out on the potential for a tribunal process for minor matters. We note that it is essential that any tribunal process is overseen by the Environment Court, perhaps hearings could be in front of a Judge or commissioner sitting alone.

3.3.7 Improving transparency of consent processing fees

This proposal would require councils to set fixed charges for certain types of resource consents. We are concerned about this proposal because of the uncertainty in the cost of consent processing. It is important that consent applicants cover consenting costs where the consent is sought for private benefit. Ratepayers should not be picking up the tab for private benefits. Fixed charges are only likely to be feasible for very simple consent applications.

EDS supports the requirement for councils to provide an estimate of additional charges in advance of an application being processed.

3.3.8 Memorandum accounts for resource consent activities

This proposal would require councils to publish memorandum accounts to disclose accumulated balance of revenue and expenses incurred for their consenting activities. EDS supports this proposal as it could provide useful information.

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

(1) Expand the call-in process to enable the Minister to designate nationally important issues to be eligible for an alternative consenting process in specified areas or circumstances.

This proposal is a further example of the clear intention expressed in the discussion paper to shift decision-making away from communities and their elected representatives and into the hands of the Executive (or their nominees). The call-in process already allows nationally significant proposals to be decided by a government-appointed body. There is no justification for establishing another body that is controlled by central government.

This proposal is offensive to New Zealand's tradition of local democracy, by allowing another opportunity for central government to take over the reins of local decision-making. It is reminiscent of the 'Think Big' days of Prime Minister Muldoon's National Development Act. We are very concerned about this power being used by Minister's to push through pet projects.

We are particularly concerned that this proposal is linked to the Government's desire to make available land in Auckland, which would result in *further* economically and environmentally unsustainable urban sprawl.

3.3.10 Providing consent authorities tools to prevent land banking

This proposal would enable councils to set conditions when approving section 223 survey plans requiring construction work to be completed in a shorter period. This would combine with the existing power to set shorter lapse periods to prevent land banking. EDS supports this proposal.

3.3.11 Reducing the costs of the EPA nationally significant proposals process

(1) Require BoI to have regard to cost-effective processes and the advice of the EPA on administrative matters when determining their procedures

(2) Parties to be provided with electronic documents in the first instance

(3) Draft decision stage could be deleted or reduced in length

(4) Clarify that the EPA can provide planning advice to a BoI

(5) Allow a consent process to be stopped if charges to date have not been paid in full

EDS supports these proposals as they will increase the efficiency of the EPA nationally significant proposals process, without detracting from the rigour of the process.

In our experience the draft decision stage is too limited in scope to be useful and could be deleted.

Questions for proposal 4: Better natural hazard management

Do you agree with the proposal in 3.4.1? How could it be improved? Are there any issues that you think have not been considered?

Are there any costs and benefits that you think have not been considered?

3.4.1 Learning the lessons from Canterbury

We support the inclusion of a principles relating to natural hazards in section 7 of the RMA. This will ensure that there is a mandatory requirement for local authorities to consider natural hazards when preparing and changing plans.

We support amendments to section 106 to ensure all natural hazards can be considered in both subdivision and other land-use consent decisions. This proposal will close some holes currently present.

Questions for proposal 5: Effective and meaningful iwi/Maori participation

Do you agree with the proposal in 3.5.1? How could it be improved? Are there any issues that you think have not been considered? Are there any costs and benefits that you think have not been considered?

3.5.1 Enabling more effective iwi/Māori participation in resource management planning

EDS supports the intent of enabling more effective iwi/Māori participation in resource management planning.

Questions for proposal 6: Improving accountability measures

Do you agree with the proposal in 3.6.1? How could it be improved? Are there any issues that you think have not been considered? Are there any costs and benefits that you think have not been considered?

3.6.1 Improving accountability measures

(1) An expectations system to specify key performance indicators (related to a customer-centric approach to service delivery and environmental and economic outcomes)

(2) A national monitoring system to provide information of performance in relation to ecological, economic, social and cultural outcomes

EDS supports the establishment of clear expectations and consistent monitoring. In relation to environmental outcomes monitoring is particularly important to ensure future policy and plan preparation reflects the lessons learnt from the past.