

Cover Note - Improving the Resource Management Act 1991
[Ref: CAB Min (04) 30/10]

On Monday 13 September 2004, Cabinet considered the paper “Improving the Resource Management Act 1991” [Ref: CAB Min (04) 30/10]. This paper is included.

1. Where information from the paper has been withheld under the Official Information Act (1982) it is clearly labelled. That information has been withheld under:
 - i. s 9(2)(f)(iv) on the grounds that withholding of the information is necessary to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials;
 - ii. s 9(2)(h) on the grounds that withholding of the information is necessary to maintain legal professional privilege.

OFFICE OF THE ASSOCIATE MINISTER FOR THE ENVIRONMENT

The Chair
CABINET

Improving the Resource Management Act 1991

Proposal

1. This paper seeks Cabinet agreement to proposals that will improve the *Resource Management Act 1991* (RMA or the Act).
2. On 10 May 2004 Cabinet invited me to lead a review of the RMA that would develop a straight forward and understandable package of improvements (both legislative and non-legislative) for the Act (Cab Min (04) 15/12). The focus was on improving the quality of decisions and processes (more specifically increasing certainty and reducing delays, costs and abuse of processes), while not compromising good environmental outcomes or sacrificing public participation.
3. On 8 September 2004 the Cabinet Policy Committee considered the proposals and agreed to, subject to some further work as indicated, the recommendations included in this paper.
4. This paper concludes a four month review of the Act and identifies proposals for improving the Act that seek to:
 - Enable central government to better express the national interest so as to provide decision makers with clear guidance on how to take these matters into account.
 - Enable consent processes to be undertaken in a manner that is effective and efficient, and that provides certainty of process for applicants while ensuring appropriate public participation and the meeting of environmental objectives.
 - Improve the effectiveness of planning documents, and enable their timely development.
 - Provide certainty over the allocation of natural resources.
 - Further improve the implementation of the RMA by local authorities and ensure that decision-making is of a high quality.
 - Improve public and user awareness of the RMA and its processes.

Executive summary

5. The RMA is complex law. Upon its enactment in 1991, there was little effort made to manage the big changes in approach needed. The frequent criticism of the RMA is largely about process. Some of this criticism is justified, but most of it is not soundly based.
6. The approach to promoting the sustainable management of natural and physical resources (the purpose of the RMA) in New Zealand is enabling rather than prescriptive.
7. For 13 years there has been a lack of formal national guidance to assist local government in the implementation of the RMA, apart from the mandatory coastal policy statement. The transition to the RMA way of thinking, however, has not been easy, with previous governments consciously adhering to a 'hands off' approach to its implementation. No significant effort or additional resourcing was provided to assist local authorities to meet the demands of implementing the new legislation. Only now is government starting to promote the adoption of consistent standards at the regional and district levels through regulation.
8. Uncertainty and inefficiency in the process of obtaining approval for projects under the RMA has led to high costs and delays for applicants in some cases. There are also concerns from consent applicants about consultation requirements, especially with iwi - case law is unclear and councils take an inconsistent approach.
9. Further, fewer than half of the district plans required to be produced under the Act have been completed and are operational, and some are overly complex. At the regional level some water short regions do not have plans. On the other hand, where good water plans have been produced the community has more certainty, reduced compliance costs and environmental issues are being addressed.
10. In general, allocation of natural resources has not been handled consistently well and there is uncertainty in the legislation regarding the issue.
11. Local government practice in implementing the RMA has been steadily improving. However, there is still variability in the capacity and capability of councils to respond to resource management issues, and some councils fall short in their performance.
12. Any legislation that deals with conflicting values and property rights will generate friction. Public concern and frustration are manifest in the media and in the Minister's mail bag, reflecting the voices of business and environmental groups.
13. In summary the problems fall into the following categories –

- achieving the right balance of RMA national and local interests in sustainable development
 - poor design and process of local plan making
 - inconsistent, uncertain, costly and lengthy consent decision making process
 - inefficient allocation or lack of allocation mechanisms for natural resources
 - practice and capacity limitations of some local authorities
 - public concern and frustration
14. The review of the RMA to address these problems has been guided by the following broad principles: achieving good environmental outcomes; certainty of process but not outcome; certainty of cost; local decision making; public participation; and central government leadership.
15. The outcome of the review is that it is proposed to amend the RMA. I believe the following amendments will have a significant bearing on the performance of the RMA:
- Moving to a requirement that the majority membership of hearings panels are 'accredited' for hearing notified consenting matters.
 - Empowering all hearings panels with more inquisitorial powers and therefore increasing the robustness of the first (local authority) hearing.
 - Focusing appeals in the Environment Court on testing the merits of the first (local authority) hearing.
 - Providing a new shared mechanism for non-local decision making that builds on the existing ministerial call-in mechanism.
 - Streamlining the plan making process, including limiting appeals on local authority planning documents to ensure greater maintenance of locally developed outcomes.
 - Clarifying processes for iwi consultation and iwi resource planning.
 - Providing clarity for business about whether existing investment is recognised when consent terms are due to expire.
16. It is also proposed that central government takes a greater leadership role through:
- the development and implementation of national policy statements and national environmental standards

- increased use of non-local decision making processes
 - greater engagement in local decision making.
17. There are benefits in initiating longer term work to further improve the linkages of local plans with other strategies, and new work programmes such as for geothermal energy allocation and air shed allocation to complement work already happening for water.
18. Finally, one of the key roles for central government under the wider RMA is to help improve practice and build capacity of the Act's primary implementation sector – local government. Although some efforts have been made in recent years, more concerted effort is required to reduce sub-optimal performance of participants in resource management and to improve environmental outcomes and long term investment certainty.
19. Limited discussion has been undertaken with key stakeholders in developing these proposals. The Ministry for the Environment had already extensively consulted with the public, and the problems and need for reform are apparent. The process of review has confirmed outcomes from previous discussions. There has been good buy-in to the review process to date, especially from local government. The message received from stakeholders has been that the RMA is an important environmental safeguard.
20. This cabinet paper is formatted into the following parts:
- Part A – Background (page 6)
 - Part B – Improving expression of the national interest (page 7)
 - Part C – Improving consent decision making (page 14)
 - Part D – Improving local policy and plan making (page 24)
 - Part E – Improving certainty for iwi consultation and iwi resource planning (page 27)
 - Part F – Improving natural resource allocation (page 27)
 - Part G – Improving practice and building capacity (page 33)
 - Part H – Other matters and recommendations (page 35)
21. To avoid duplication, details of the proposals appear in the recommendations section of this paper.

Part A – Background

22. There has been a lot of conflicting publicity about the RMA, with non-governmental organisations (NGOs) saying compliance costs are modest, while the business sector maintains that compliance costs are burdensome.
23. It is difficult to assess the influence that negative perceptions of the RMA have on investment certainty and decision making. However, the time an application takes to be granted is a useful indicator of compliance costs under the RMA. The majority of resource consent applications are dealt with in a timely manner. 83% of all non-notified consents and 69% of all notified consent applications are processed on time. Problems remain with the proportion of applications that are delayed or incur undue costs.
24. Research on large and complex projects by the Ministry for the Environment in 2003 indicated that the cost of RMA delays is a significant issue - particularly, holding costs and opportunity costs of a project being delayed.
25. Compliance costs typically increase if statutory time limits are not met, the application is publicly notified (so that members of the public can submit on the proposal), a decision is appealed to the Environment Court (or subsequently other Courts), or the duration of consents is shortened.
26. Issues can arise at any stage of an application, including from:
 - Tension arising between reconciling local environmental costs and national environmental benefits. Although these are not necessarily in conflict, resolution of this tension has to date been through local authorities and the courts, with only the provisions of the Act to assist (s6 and s7). Local Government New Zealand considers that the Act's provisions have provided insufficient guidance and as a result the national interest has seldom been represented in a form that provides useful input to decision making. This has left local authorities and the courts to decide what the interest is and how much bearing it should have on the decision.
 - Poor articulation of what rules must be complied with and inconsistency in those rules where applicants face multiple authorities to apply to and multiple plans to comply with.
 - Consultation, for example, identifying which iwi or group to consult.
 - Consent authorities requesting excessive further information.
 - Vexatious, single-issue or simply ill-focused submitters can result in substantial compliance costs.
 - Full *de novo* hearings at the Environment Court covering matters in similar detail that were already covered at the council level (and not always changing those earlier decisions).

- The cost of approvals is not proportional to the business size, so any unanticipated costs can have implications for investment decisions.
 - Holding costs – while awaiting consent approvals – can be substantial (although difficult to quantify).
 - Uncertainty over water allocation issues in the absence of regional plans.
 - Numerous consent conditions, and variations between different authorities on conditions.
27. A complex set of issues and processes underpin the RMA. This paper highlights the key issues with policy proposals as appropriate.

Part B – Improving expression of the national interest

Improving expression of the national interest through national policy statements

Background

28. National policy statements (NPS) can be used to “state policies on matters of national significance that are relevant to achieving the purpose of the Act”. Such statements guide subsequent decision making under the RMA at the national, regional and district levels. NPSs can therefore significantly affect resource management practices in New Zealand. The Minister of Conservation is required to prepare a New Zealand Coastal Policy Statement, but other national policy statements (prepared by the Minister for the Environment) are optional. Arguably, NPSs can be prepared on almost any matter, including different types of infrastructure, eg. electricity transmission and roads.
29. An NPS has immediate effect on consent applications once it is gazetted (being a matter to have regard to when making consent decisions on projects (s104)). It can, however, take anywhere between three and ten years from when a decision is made to prepare an NPS, through promulgation to when provisions of an NPS are reflected in plans. This is made up of four phases:
- *preparation of the proposed document* – depending on the complexity this can take anything from six months to some years (including the consultation needed and inter-departmental processes)
 - *public submission stage* - hearing and recommendations by a Board of Inquiry – at an absolute minimum this would take 9 months
 - *Ministerial decision making* – at a minimum this would take 2 months (including Cabinet processes)

- *implementation by local authorities* – up to six years depending on the transition time allowed by the NPS for councils to give effect to it, and then the length of time it takes for councils to have hearings and resolve appeals.

What is the problem?

30. Other than the New Zealand Coastal Policy Statement, there are no other NPSs. A number of issues arise once an NPS is initiated:
 - *Timeliness* – as an absolute minimum the submission and Board of Inquiry process takes 9 months and then it may take 4-5 years before the policy is reflected in plans
 - *Cost* – so far the NPS on biodiversity has cost over \$1.2 million and it has not even been notified. There is also potential for it to impose costs on all local authorities to implement should it require their own interpretation and amendments following a first schedule plan change process
 - *Potential for inconsistent implementation* – by definition NPSs are pitched at a policy level ie. it is up to local authorities to decide how they give effect to them.

What is the outcome sought?

31. Analysis undertaken as part of the review has indicated that an NPS could be prepared on:
 - various types of network infrastructure (eg. electricity transmission, roads)
 - water management issues (eg. allocation or use, quality, waters of national importance subject to the outcome of the Water Programme of Action)
 - other allocation or nationally important resource issues (eg. renewable energy, geothermal).
32. Priorities for other NPSs to follow, would be determined by topical issues under consideration (eg. urban design) and guided by the matters of national importance identified in the Act (eg. landscape, biodiversity, historic heritage, public access, relationship of Māori with natural resources).
33. Changes could be made at both the beginning and the end of the NPS process to improve the timeliness of NPSs, reduce costs and simplify implementation. For those more complex policy issues a more complex approach may be appropriate.

What is proposed?

34. It is proposed that the government initiate the development of NPSs. The first priorities are for a series of NPS on infrastructure (eg. electricity transmission lines, roads, telecommunications), likely to be notified with complementary national environment standards (eg. electromagnetic radiation). Issues for water and other allocation issues could follow as identified above.
35. The Minister for the Environment and the Minister of Economic Development will report back on the detail of NPS proposals for infrastructure by 3 November 2004. The Minister for the Environment will report back by early December 2004 with a programme for developing other NPSs, following consultation during the Ministry for the Environment's November 'Talk Environment' roadshow.
36. It is considered that there should also be amendments to the Act to facilitate the use of NPSs. It is proposed to make a full Board of Inquiry process for NPS, at the front end, optional. The alternative process will be one that involves a "duty to consult" similar to that currently specified in s44 for national environmental standards and outlined below in paragraph 44 (this could reduce the time taken by about six months). This "duty to consult" follows the general principles of consultation. If this approach is adopted the NPS will be treated as a regulation and a draft could be referred to the Regulations Review Committee for consideration.
37. To address consistency and timeliness issues it is proposed to allow the NPS to specify the provisions that a local authority shall include in their planning documents (ie. a standard set of policy wording) without the need for normal notification and hearing processes, but only where local discretion in implementation is not required or is very limited. This will avoid unnecessary duplication and cost.
38. The two processes above would also apply to the New Zealand Coastal Policy Statement.

What are the risks, costs and benefits?

39. An abridged NPS development process will provide a quicker process for expression of the national interest. There should, however, be a direct correlation between the process requirements and the instrument's legal effect. To address concerns raised by Federated Farmers and Local Government New Zealand as part of the review, an NPS expressing national interest that impacts on private property rights would follow a normal board of inquiry process, for example biodiversity protection on private land.

Improving expression of the national interest through national environment standards

Background

40. National environmental standards (have direct effect on council rules and resource consent decisions, and indirectly influence council policies.
41. The RMA provides that standards can address a range of environmental management issues including: use of land, the coastal marine area and beds of lakes and rivers; water; discharges to air, land and water; noise; and monitoring. They currently cannot address subdivision issues.
42. National environmental standards may contain: qualitative or quantitative standards; discharge standards; methods for classifying a resource; methods, processes or technologies to implement a standard; exemptions from standards. Standards may also incorporate the requirements or recommended practices of international organisations.
43. A standard may prohibit an activity; allow an activity if it complies with conditions specified in the standard or rules in a regional or district plan; restrict the making of a rule or granting of a resource consent; require the review of a consent; require that consent be applied for.
44. The process adopted by the Minister for Environment for developing standards is as follows:
 - The Minister must provide the public with adequate time and opportunity to comment.
 - The Minister must notify the public of the proposed subject matter of the standard and the reasons for developing it.
 - The Minister must commission a report and recommendation on the proposed standard.
 - The report and recommendation must be publicly notified.
 - The standard is legally established when the Governor-General, by Order in Council, adopts the relevant regulations.
45. The Ministry for the Environment has already developed 14 standards for air quality, dioxins and other toxics, and is proposing a standard on raw drinking water.

What is the problem?

46. The way local authorities have addressed similar activities in district and regional plans is varied and in some cases unexplainably inconsistent. These concerns are centred around:

- the uncertainty this creates for landowners and developers when dealing with different local authorities
 - unnecessary compliance and regulatory costs
 - a number of local authorities spending time and resources producing a range of approaches to common issues.
47. These issues contribute to a perception that the RMA is not working well and is a road block to development. The standards would be designed to reduce some of the 50,000 resource consents required annually by plans.
48. Standards should address matters under which duties and restrictions apply under the Act. This is the case for all matters except subdivision – eg. access requirements for allotments
49. Unfortunately, the usefulness of a standard is somewhat restricted under the RMA, especially in setting default standards for land use matters where consistency is desirable. Local authorities can make standards stricter than a standard for their district/region. While this is desirable when setting environmental bottom lines (eg. air quality) it tends to defeat the purpose of national consistency.

What is the outcome sought?

50. The contents of plans and the number of consents required could be reduced with more standards.
51. Standards could include the best elements of current industrial codes of practice and other forms of agreed standards – provided they meet the requirements of the Act, eg. agrichemical users' code of practice.
52. Use of a standard will:
- reduce the need for additional technical detail in plans, including the adoption of unnecessarily prescriptive technical rules
 - promote consistent approaches across local authorities for nationally-based standards
 - provide guidance on the way a specific activity ought to be undertaken or method of application adopted.
53. Standard could be further be developed for water issues (arising out of the Sustainable Development Water Programme of Action); network utilities (ie. radio frequency fields, substations, underground and overground lines, utility structures within the road); noise (ie. from roads, airports, ports, construction noise); parking, loading and site access provisions; agrichemical use; and domestic wastewater.

54. Standards should be developed in a manner that promotes consistency. At the moment a local authority can choose to adopt a more stringent standard if this can be justified. To achieve consistency the Act should allow for the standard to specify in what instances more stringent local standards can be adopted (set through district and regional plans).

What is proposed?

55. More standards will be developed by the Ministry for the Environment or other departments. The Minister for the Environment will report back by early December 2004 with a programme for developing standards, following consultation during the Ministry for the Environment's November 'Talk Environment' roadshow.
56. It is proposed to amend the list of matters that a standard can be prepared on to include subdivision standards.
57. To promote greater consistency it is proposed that the provisions of the Act be amended so standards could:
- (a) set standards 'absolutely' throughout the country (replacing local controls)
 - (b) where allowed for in the standard, enable district or regional variation to set a more stringent standard.
58. In the case of the second matter (b), it is also proposed that more rigour be required for variance from a standard in s32 of the RMA (consideration of alternatives, benefits, and costs), with an extra test requiring local authority policy makers to prove that it is necessary to deviate from a standard. An extra test is justified in that the setting of standard has already undergone the rigour of an 's32 evaluation' as to the most appropriate way to achieve the purpose of the Act.

What are the risks, costs and benefits?

59. The contents of plans will reduce with greater use of standards – especially in use of codes of practice and other forms of agreed standards. Some of the more ubiquitous land use controls will be standardised, significantly reducing compliance costs.
60. If standards are not carefully designed and implemented they could impose costs and stifle innovation or local flexibility. Standards developed in conjunction with local government and industry, and through adequate consultation with other stakeholders, should achieve good results.
61. The costs and benefits of adopting individual standards are matters for consideration by local authorities at the time of adoption (s32 of the Act).

Improving expression of the national interest through central government advocacy

Background

62. Only a few government departments take active involvement in making submissions on RMA matters. When submissions are made they are usually reflective of that department's interests and roles and are not developed using a whole of government approach. Situations can arise where government departments present conflicting submissions.

What is the problem?

63. Local Government New Zealand has indicated that local authorities feel aggrieved at criticism that they are making decisions that do not reflect national interests. These concerns are real if those national interests have not been expressed in Part II of the Act, a NPS or through a hearing. The Act already contains a method for government to promote the national interest by advocacy – the submission process.
64. To be genuinely useful and influential, the government's position needs to be expressed coherently in a submission and not comprised of multiple positions articulated by individual departments –for local authorities to reconcile.
65. More use of national instruments is also an option, but in some cases direct input from central government is needed – to explain, in the context of a consent or plan, the national significance of a proposal including its effects, both positive and negative, from a national perspective.

What is the outcome sought?

66. It is considered that government should promote the use of a “government submission” for government departments to articulate the national interest for consent applications and in plan development. A similar mechanism is used to articulate government economic policy in section 26 of the Commerce Act 1986.
67. Such an approach in terms of RMA decision making is about central government providing leadership and in doing so reconciling views across the range of government ministries and departments in-house, to ease local government's task of trying to reconcile those views during the decision making process.
68. The Minister for the Environment will still be able to call-in projects, but in that regard a new process for non-local decision-making is outlined later in this paper.

What is proposed?

69. An agreed administrative protocol for the use of government submissions is proposed to be presented to Cabinet by 3 November 2004.
70. The submission could be in support or opposition, or would simply state the government's position on the proposal. The submission will be considered by the consent authority along with other submissions.
71. If a government submission were not lodged, individual Ministers or departments could continue to lodge submissions in the normal manner. The decision to make a whole of government submission would follow a Cabinet process. This would also provide for any Minister to opt out of a government submission by agreement or for legal reasons.

What are the risks, costs and benefits?

72. At present government does not participate regularly and consistently at hearings to represent the national interest. The submission process is an *ad hoc*, costly and time consuming manner of expressing national interest. However, government submissions present an opportunity for government to articulate matters of national interest.
73. The different policies, mandates and legislative responsibilities of different central government agencies will present problems in resolving view points (without resorting to oversimplified, 'lowest-common-denominator' statements that provide little direction). A robust process (most likely a cabinet process) to develop a government submission is necessary so that the submission may add value to local decision making.
74. The main risk with the development of a government submission is the possibility of not being able to agree on a submission within the timeframes of the Act. However, this can be overcome with sufficient resourcing and mandate.
75. There is also potential for lobbying by sectors seeking that government take a certain position on a project, and for the government position to be controversial.

Part C – Improving consent decision making

Improving consent decision making at the local authority level

Background

76. Approvals for projects are gained under the RMA via resource consent applications where activities are not permitted by the Act or district or regional plans. Designations are an alternative approvals process. A designation is a provision in a district plan for a public work or project. Only a Minister, a local authority or a network utility operator approved as a

requiring authority by the Minister for the Environment can give notice of a requirement for a designation.

77. Both resource consents and designations are processed through a number of stages including preparation of appropriate information, consent authorities requesting further information, making a decision on notification and issuing a decision, and (if notified) receiving public submissions, in some cases holding a pre-hearing meeting and a public hearing.
78. At the local authority level, the process of hearing tends to be adversarial where cases are 'party controlled' rather than consent authority controlled. That is, the parties define the dispute, shape the issues and the evidence that is to be determined, and then each party has the opportunity to present his or her side of the argument. After conducting a 'trial,' the decision-maker, acting as an impartial, but 'passive' arbiter (except on questions of law), then makes a decision. There are few (if any) truly inquisitorial processes in the sense that the local authority is "actively involved in determining the facts of the case." However, the Act does provide for informality and flexibility in procedure, particularly in terms of case management powers which may make for a more non-adversarial approach to hearings.

What is the problem?

79. In a minority of cases, there is inconsistent and unsound decision making at approvals hearings. These cases however tend to be for critical projects. There are perceptions by applicants and the general public of bias in decision making. There is belief that the decision making process is easily captured by vexatious litigants or abused by trade competitors, and that this is creating unnecessary delay.
80. The Act allows informal and flexible procedures which provide scope for a less adversarial approach. However there are few truly inquisitorial processes at local authority level. Local authorities vary in the use of their powers – perhaps with a wish to avoid unnecessary formality (as directed by the Act), or to reduce the risk of judicial review of their actions, or due to a lack of knowledge about the extent of their powers.
81. The lack of a consistently robust first hearing at the local authority level has precluded a more streamlined approach to appeals in the Environment Court. To reduce duplication and delays local authorities should be given direction to use more inquisitorial processes. This will give greater consideration of issues from the beginning of the process.
82. The 2003 Amendment to the RMA addressed the majority of concerns with approvals processing outside of hearings, although some problems remain, including:
 - ambiguity around the role of local authorities and applicants in consulting with persons affected by projects

- unreasonable requests from consent authorities on applicants for further information and the continued potential to delay projects.

What is the outcome sought?

83. Ministers are interested in addressing concerns about the quality of consent hearings, making the local authority process less adversarial and reducing the number of appeals. It is also sought to address some problems with consent processing that can contribute to delays, and clarify areas in the mechanics of consent processing where uncertainty exists.

What is proposed?

84. The following is proposed to improve consent processing and hearings at the consent authority level (first hearing):
- (a) Clarify that consent authority's role in consent processing is to encourage applicants to consult with all affected parties (which will include Māori if they are an affected party), and confirm that there is no specific requirement on local authorities (as consent authorities) to consult with affected persons *per se* – their obligation is notification of affected persons.
 - (b) Reduce the delays caused by further information requests on consent applications, by allowing an applicant to refuse to provide information with full knowledge that the application may be rejected by the consent authority because of insufficient information.
 - (c) Allow submissions to be neutral (ie. not just in support or opposition) as the current status is too constraining and it will enable submitters (such as government departments) to present information that may not otherwise have been presented if a position of support or opposition was required from the submitter.
 - (d) Make greater use of the pre-hearing stage for consent applications and provide clarification about the role of the pre-hearing process.
 - (e) The role of consent authorities will be clarified as inquisitorial bodies, with enhanced powers to direct the hearing process. Rather than a passive role of enabling parties to direct the hearing and evidence processes, etc (which occurs in an adversarial setting), the consent authority will take a more active and direct role in conducting the hearing, evidence heard, etc (an inquisitorial approach). The use of these powers will be governed by Regulation, to ensure they are employed in a manner appropriate to the scale and significance of the matters heard. The objectives will include sufficient testing of evidence to avoid duplication of processes in the Environment Court.
 - (f) Provide assurance about the skills and knowledge of those hearing consent applications through training and accreditation requirements. This will occur through a transitional requirement that chairpersons of

hearings panels shall be 'accredited'¹ (within 12 months of legislation commencing), followed by a requirement that the majority of the hearings panel be 'accredited' (within 24 months of legislation commencing). In the longer term, following monitoring of the effectiveness of 'accreditation', there could be opportunities to extend the requirement to all members of the hearings panel.

85. Although the above is aimed at resource consent hearings, the new empowering provisions are appropriate for hearings on plans too, as outlined later in this paper. Mandatory accreditation would not apply to hearings on plans. Consideration of submissions and decision making on plans are the primary realm of local democracy and it is therefore inappropriate to require such measures.

What are the risks, costs and benefits?

86. Increasing the robustness of the hearing may lead to increased costs for all parties and increase local authorities' exposure to judicial review. Further, the New Zealand Law Society has expressed concerns that more formal hearing powers being given to the consent authority will unnecessarily complicate the first hearing process. However, the proposals will provide clarification of existing roles and empowering a hearings panel with the tools above in a way that corresponds with the scale and significance of the hearing.
87. The implementation and maintenance of a mandatory training and accreditation requirement for hearings panels will require support and funding. Mandatory accreditation for members of hearings bodies could adversely impact on the diversity of people willing to put themselves forward for election, especially to smaller local authorities.

Improving consent decision making at the Environment Court

Background

88. The Environment Court is a specialist court having jurisdiction over environmental and resource management matters. The RMA confers powers on the Court and the Court operates under guidance of formal practice notes. The work of the court is predominantly plan and resource consent appeals. Although only a small proportion of local authority resource consent decisions are appealed to the Court (1%) the workload is demanding (1,000 – 1,200 new cases per year) and until recently there has been a significant level of complaint about delay in getting hearing dates.
89. Because the Court's workload is largely generated by decisions of local authorities the Court considers itself to be essentially an appellate court.

¹ 'Accreditation' will follow passing of a suitable training course approved by the Minister for the Environment.

Nevertheless, a hearing before the Court is a '*de novo*' hearing (a full hearing of the entire matter), and the Court considers afresh all matters of fact and law, unless the parties mutually agree to some limiting. It is the first point in the RMA process where these issues are tackled in an adversarial court setting with cross-examination taking place as a matter of course.

What is the problem?

90. Appeals to the Environment Court often duplicate the processes at the (first) consent authority hearing and new issues and evidence can be raised on appeal. The parties frequently 'hold back' matters and then enlarge the scope of matters taken on appeal through their ability to introduce evidence that was not presented at the consent authority (first level) hearing. Further, the Court may not fully utilise all of its inquisitorial powers, and its processes tend to be adversarial.
91. Under current legislation the only way to challenge decisions to notify or not to notify a resource consent is to seek a judicial review by the High Court. The Environment Court is better placed as a specialist court to deal with challenges on notification. The judicial review procedure in the High Court is expensive and time-consuming for all the parties involved. The problem with giving this function to the Environment Court is that it could overload the work of the Court and although delays have reduced, they would need to reduce workloads even further to allow additional functions to be added to the Court.
92. There is some concern that in the absence of clear guidance (either through the Act or the Court's practice notes) variation has occurred in the Environment Court's approach to mediation. Clear guidance is also absent on when Commissioners will sit alone to hear matters.

What is the outcome sought?

93. Move the Environment Court away from a *de novo* hearing to a 'focused' rehearing approach. This proposal will enable the Court to have regard to the consent authority decision, reconsider the evidence recorded at the hearing, and decide whether further evidence should be admitted. This change complements, and depends upon, a more robust (first) consent authority hearing. However, there will need to be a transitional lead in time to ensure sufficiently improved local authority processes in the first instance.
94. The Court already has most of the powers it requires in order to control its proceedings. However, additional powers will be given to the Court such as the power to seek a report from an independent expert. An 'objectives' clause will emphasise the inquisitorial nature of the Court. The Court will be expected to use its inquisitorial powers, and to move to a more inquisitorial approach.

95. Provision should also be made for notification and non-notification decisions to be appealed to the Environment Court. This provision should be included in the Act, but only implemented at a point when the Court's backlog has reached equilibrium (note: current backlog is approximately 1400 cases and equilibrium is suggested to be 1100 to 1200 cases or 200 cases per Judge).
96. Greater consistency between the various registries of the Environment Court is proposed to deal with issues around mediation and Commissioners sitting alone.

What is proposed?

97. It is proposed that the Act clarify the roles of the Environment Court, to inquire into applications and to further define issues and call for independent reports. Further, the Court will be required to run a focused hearing, having regard to the (first) consent authority's decision and thus conduct a rehearing, rather than a hearing *de novo*. *De novo* would only be used if the Environment Court determined that it was appropriate to do so based on the following criteria:
 - (a) evidence relied upon at the consent authority hearing was unsafe
 - (b) evidence relied upon was insufficiently tested by the panel at the consent authority hearing
 - (c) principles of natural justice were not observed at the consent authority hearing
 - (d) important new information has become available but wasn't available at the time of the initial hearing.
98. A rehearing in this context would require the Environment Court to determine the legal rights and obligations of the parties as at the date of the rehearing. The Environment Court has the ability to consider new circumstances or changes in the law. It may also admit further evidence, though it does not hear all the witnesses again. In deciding whether to admit new evidence the Court must ask whether the new evidence was reasonably available at the time of the original hearing. This contrasts with a hearing *de novo*, where the Court hears the matter afresh and all the evidence is usually called before the Court. The appellant must start again in making out his or her case.
99. It is proposed to broaden the ability of the Environment Court to hear appeals on decisions to notify or not notify resource consents. To achieve this, provision will be made so a declaration by the Environment Court can be sought for whether an application for resource consent was correctly notified (this gives the Environment Court jurisdiction to hear challenges to such notification decisions)
100. These new provision would be commenced by order in council following a decision of the Minister for the Environment that the Environment Court

backlog had reached equilibrium and the Court could cope with the new function (ie. the provision will come into force when it is decided is appropriate).

101. Further, the Environment Court will soon be issuing guidance through practice notes that will assist in the consistent application of alternative dispute resolution (mediation and arbitration) and Commissioners sitting alone.

What are the risks, costs and benefits?

102. The Environment Court has made huge inroads into reducing delays and the leverage of an appeal. Without undermining the new case track system the proposals will have the benefit of sharpening attention in the first hearing (local authority level) and avoiding duplication that occurs at different steps. The proposal to move away from *de novo* hearings in the Environment Court will potentially reduce the game playing that occurs between a decision from the first hearing and the Environment Court hearing.
103. There may be increased costs transferred from the Environment Court process down to the local level as a result. These would apply to all participants.
104. There will be a settling in period for the new process of appeals. Until such time as the discretion afforded to the Court over whether it should adopt a focused appeal or *de novo* is clear, appellants are likely to seek leave for *de novo* appeals. There may be increased costs while the Court determines these applications.
105. It is opportune to provide policy that allows for challenging consent notification decisions in the Environment Court, as opposed to the High Court. Allowing flexibility as to the commencement will enable the provision to be applied when Environment Court backlogs have reduced to appropriate levels. There is opposition to the inclusion of these provisions from the Treasury and Local Government New Zealand. The concerns are from business that the proposals would impact on the ability of the Court to function and that there is little justification of the action.
106. Guidance through Environment Court practice notes on the use of alternative dispute resolution will assist in its consistent application, irrespective of the Registry within which an appeal is lodged. Further, the use of 'Commissioner Alone' hearings will provide a low cost option for the adjudication of disputes that cannot otherwise be resolved via alternative dispute resolution procedures. However, there are some instances when these less formal mechanisms are unable to be utilised because of complex or significant questions of law, or where there is sufficient public interest to justify a decision of an Environment Judge.

Improving non-local (call-in) consent decision making

Background

107. The RMA enables central government (via the Minister for the Environment) to 'call in' applications of national significance. A board of inquiry processes such applications. The Minister for the Environment then makes the decision as the consent authority in place of the council. The decision of the Minister can still be appealed to the Environment Court and heard a fresh (*de novo*).

What is the problem?

108. The RMA promotes devolved environmental decision making to local authorities. However, there are situations where the devolved model is not optimal:

- insufficient capacity, preparedness and information by local authorities to make decisions
- community of interest is larger than the local level or there will be significant effects beyond the local authority's boundary
- costs of the project faced at the local level but the benefits are national
- some over-riding need to avoid inconsistency unrelated to the need to recognise different environments or communities
- values or effects are the same everywhere in the country meaning that individual devolved decisions are an unnecessary cost.

109. Ministerial call-in is presently the only option within the RMA for changing the decision-making model at the project (consent) level. Call-in does not overcome the issues outlined above – it simply changes the first hearing decision maker and leaves decisions appealable to the Environment Court.

110. There are also difficulties with the call-in process itself:

- The call-in process only applies to resource consents. Most projects involve plan changes or notices of requirement rather than, or in conjunction with, resource consents.
- Applications are either called-in or not, there is no middle ground option that might better address the particular issues at hand.
- The process used to decide whether or not local decision-making is appropriate is unclear.
- The Minister for the Environment must make the final decision and is left with little discretion to alter the recommendation of the board of inquiry.

- Clear statements of the government's interest in projects of national significance can only be made in call-in (with Minister's reasons for call-in being considered alongside other relevant matters such as district/regional plan provisions) or through a submission that must state support or opposition to the proposal.

What is the outcome sought?

111. Modify the existing call-in provisions to provide a greater range of more flexible and supportive tools to better meet the needs of applicants, submitters, local authorities and government.

What is proposed?

112. The following proposal was specifically put to me by and is supported by Local Government New Zealand.
113. The proposal will modify the existing call-in process and in doing so provide a menu to better balance national and local interests and improve administrative efficiency.
114. It is proposed to allow a specific ability in the Act for applicants or local government to request that the Minister for the Environment make an assessment as to the government's involvement in the decision making. The Minister for the Environment could also decide to instigate the process without a request. In practice the assessment undertaken by the Minister for the Environment will involve representations from the relevant local authorities and will likely follow a cabinet process.
115. The outcome of the assessment would instigate a decision that:
- the local (standard) process is appropriate (ie. as has been identified above)
 - the local (standard) process should be undertaken with assistance (from central government)
 - the decision-making process should include national representation (ie. change the notion of Ministerial call-in to one of non-local decision making).
116. If the middle road were chosen, of a local (standard) process with assistance, the government would be able to:
- provide a government funded independent project coordinator to provide extra capacity
 - direct that applications be heard jointly where more than one local authority is involved in a project (as may be the case with a network utility)

- appoint a person on the locally led hearing panel (like the Minister of Conservation can appoint a person to committee hearing a restricted coastal activity (s117(5) of the Act))
 - issue a government submission as an input into the decision-making process alongside other public submissions and the application (see section above on central government advocacy for detail).
117. If the government decides, after consultation and assessment, that an application should be heard by an entity other than a local authority the Minister for Environment would instigate the modified call-in procedures. The Minister would then establish a board of inquiry as occurs in the current call-in mechanism. The board of inquiry would have all the powers described above for local authority consent hearing processes. Members of this board of inquiry would be called on from an established standing body of commissioners. The members of the board of inquiry would have a combined skill set specified in the statute.
118. The decision of the board of inquiry would be final, with appeals only on points of law (to the High Court). Decisions on designations will not be referred to requiring authorities for final decision as is currently the case.
119. It is proposed that the board of inquiry be directed to issue an interim decision, so parties (applicants, the Minister and submitters) involved can comment before a final decision is issued. This will avoid appeals on minor matters and allow for modifications of proposals to occur in a more informal setting.
120. Section 140 (the call-in section) will also be amended so that it applies to notices of requirement for designations and heritage orders, and private plan changes, as well as resource consents. Another amendment is proposed to include cross-district issues as well as cross-regional issues in the call-in criteria (s140(2)(d)).

What are the risks, benefits and costs?

121. The proposal addresses capability issues for local decision makers (and associated processes), while reflecting local values and maintaining opportunities for local participation. This will come at a cost to government for resourcing support for the process.
122. The proposal is favoured by local government (as expressed by Local Government New Zealand) and many businesses, and recognises that in limited circumstances some enhancement and integration of local decision making processes is warranted.
123. Appealing the decision of the board of inquiry on points of law only has varying support (most support comes from business and local government) and moves from a legal justice principle of two hearings on the merits of a case. It will also limit mediated settlements. The proposal is not supported by the Department of Conservation, its view is that an interim decision will

reduce appeals and national policy issues should be debated, if necessary, at the Environment Court.

124. A move to appeals on points of law only is justifiable if the first hearing is robust and contains a thorough testing of evidence (eg. chaired by someone with judicial skills). To achieve this, skill requirements would be specified in the statute and the membership of the board of inquiry might include current or past Environment Court judges or commissioners, as well as representatives of the relevant local authority.

Part D – Improving local policy and plan making

Background

125. The Act provides for a hierarchy of policy statements and plans at the local level. At a regional level Regional Policy Statements (which are compulsory) and Regional Plans (which are optional with the exception of a regional coastal plan) are prepared. District Plans must be prepared at a territorial authority level. District-level plans must not be inconsistent with regional policy statements, and regional-level plans (in respect of matters of regional significance), and all these documents must in turn give effect to national policy statements. This helps to promote consistency and integration.

What is the problem?

126. Most regional councils have developed regional plans which cover the majority of natural resources, but after 13 years some water short regions do not have plans.
127. Conversely, some local authorities have spent a lot of time producing dense plans that do not provide certainty or the environmental outcomes desired by the community. The documents are difficult to interpret or do not achieve an intended purpose to reduce the need for consent applications.
128. The policy statement and plan making process under the RMA has proved to be burdensome, with variable consistency throughout the country. An acceptable level of public participation needs to be agreed upon so that consultation and public input do not create delays that exacerbate the difficulties. Litigation has delayed progress with some plans (the median time from local authority decision to Environment Court resolution has been 9 years – 60% of the time to prepare plans) and the threat of litigation has added to the bureaucracy surrounding plans.
129. The process of preparing plans has also been costly - the total average cost of preparing a plan is estimated at \$1.8m.
130. Interpretation of the RMA by the court has lead to a diminished role for regional policy statements inconsistent with government's current

application of the instrument, for example, as proposed for Auckland's regional policy statement through the Local Government (Auckland) Amendment Act 2004.

What is the outcome sought?

131. The primary outcome sought is a streamlined plan making process - getting plans operative quicker and reducing compliance costs associated with lengthy and protracted debates. The Environment Court will be dissuaded from determining matters of local policy, instead referring these back to local authorities to determine.
132. Further goals are to increase the effectiveness of local policy documents, make them simpler for people to interact with and have plans in place to address significant resource management issues.
133. Regional policy also needs to be more influential and strategic in its direction to address land use conflicts, providing increased certainty to promote sustainable urban form, manage infrastructure and its integration with land use activities and allocate natural resources.

What is proposed?

134. Improvements are proposed to the way plans are developed as follows:
 - (a) Provide clear mandate for government to require local authorities to develop plans to address specific issues (such as water allocation).
 - (b) Achieve more effective regional policy statements and in addition to the matters of regional significance require regional councils to consider: promoting sustainable urban form, timely and effective provision of infrastructure and its integration with land use policies, and allocation of natural resources.
 - (c) Reduce the range of matters to be included in regional and district plans to only require those matters essential for regulatory management – ie. policies (that identify action) and rules (that identify what you can and cannot do). The remainder of matters currently required (eg, objectives, non-regulatory methods, monitoring requirements, anticipated environmental results) could be included in supporting 'section 32 documentation' (required by the Act to contain the analysis of proposed provisions).
 - (d) Streamline the plan making process by:
 - Clarifying consultation requirements of local authorities, particularly in relation to the requirements of the Local Government Act 2002.
 - Requiring local authorities to undertake every reasonable endeavour toward consultation with the persons identified in clause 3 of the first

schedule over a period of time (ie. not just a single attempt)². An exemption will be considered if, despite every reasonable endeavour the person does not wish to or does not take any action toward responding to the local authority.

- Permitting local authorities to use pre-hearing meetings that allow up front negotiation of issues (similar to that occurring for resource consents now – s99).
- Allowing submissions to be neutral (ie. not just in support or opposition) as the current status is too constraining.
- Retaining further submissions (on original submissions to proposed plans), but preventing people from impeding the system by making numerous unnecessary further submissions (in support) that replicate their original submission. Those making further submissions must be directly affected by the original submission, ie. there must be an effect on their private property rights.
- Adopting a more inquisitorial approach at hearings as is outlined for consents (in Part B of this paper at paragraph 84 (e)).
- Limiting the ability to re-litigate local policy direction in the court. The Environment Court's role will be redefined as an appeal authority to test whether local policy meets the requirements of the Act and referring the matters back to the local authority for reconsideration, with directions as appropriate. Failure to comply with directions will see the Environment Court making appropriate steps necessary to achieve the desired outcome.
- Requiring the Environment Court (as is proposed for consents) to have regard to the local authority's decision and conduct a 'rehearing', rather than a hearing *de novo*.

135. In the longer term it will be desirable to undertake further work on improving the operation of local policy and plan formulation. It is appropriate to signal government's intention to work on the following areas following the completion of this review of the Act:

- how explicit recognition of other government statements and strategies can be better undertaken

² Clause 3 of the First Schedule to the RMA requires:

(1) *During the preparation of a proposed policy statement or plan, the local authority concerned shall consult:*

- (a) *The Minister for the Environment;*
- (b) *Those other Ministers of the Crown who may be affected by the policy statement or plan;*
- (c) *Local authorities who may be so affected; and*
- (d) *The tangata whenua of the area who may be so affected, through iwi authorities and tribal runanga.*

(2) *A local authority may consult anyone else during the preparation of a proposed policy statement or plan.*

- improved linkages to long term council community plans under the Local Government Act 2002, and to regional land transport strategies under the Land Transport Act 1998.

What are the risks, benefits and costs?

136. When the RMA was passed, it was intended that plans would simplify decision making. Unfortunately this objective has not been widely achieved. The proposals will result in less cumbersome plan making and present fewer opportunities for unnecessary litigation of community values.
137. Local Government New Zealand has indicated support for more effective regional policy statements, and for retaining them as a mandatory requirement, but indicated no support for a mandatory requirement for regional plans. The proposals are in accord with this stance, but recognise the need for central government leadership where issues are not being addressed, such as in relation to the Waitaki Catchment. Local Government New Zealand has also given considerable support for the Court to not make local policy decisions and to instead refer these matters back to the local authority for determination.
138. The proposals do not address concerns strongly expressed by Federated Farmers about compensation for impinging on private property rights. Such an issue is a long term matter with the potential to be addressed through the next generation of plans.

Part E – Improving certainty for iwi consultation and iwi resource planning

Background

139. With regard to iwi resource management issues, the Act is silent as to how decision-makers should give effect to the principles of the Act (s6 and s7) and the principles of the Treaty (s8). Guidance has largely come from the courts.
140. Regarding notified consents, there is an obligation on local authorities to notify affected parties (s93 and 94B). In relation to Māori the RMA provides specific obligations to notify iwi authorities where they should have notice of an application (having regard to statutory acknowledgements).
141. The courts have interpreted this as implying:
- That consent authorities have a higher obligation to consult with tangata whenua when they know the tangata whenua have a special relationship with the area affected by a proposal.
 - That consent authority officers in preparing reports may have a duty to consult the tangata whenua, to enable the consent authority to take

account of matters arising under s6(e) (the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga), s7(a) (kaitiakitanga) and s8 (the Treaty) when making decisions. However, depending on the circumstances, the applicant's consultation with tangata whenua may be sufficient.

- That the Crown, as applicant and as consent authority, is required to consult with tangata whenua.
142. The Foreshore and Seabed Bill proposes additional requirements. The Bill proposes that the holder of a customary rights order must be treated as being adversely affected for the purposes of notification of a resource consent if, in the opinion of the consent authority, the grant of a resource consent may adversely affect a recognised customary activity.
143. There is no specified consultation obligation on the Minister when preparing national policy statements, national environmental standards, water conservation orders or call-ins, but case law on s8 strongly implies the need for the Crown to consult in order to inform decisions.
144. Regarding plan making, clause 3 of the First Schedule to the Act, requires local authorities to consult "*the tangata whenua of the area who may be so affected, through iwi authorities and tribal runanga*" when preparing a policy statement or a plan (ie. it is mandatory). Further, sections 61(2A), 66(2A) and 74(2) require local authorities when preparing or changing a plan "*to take into account any relevant planning document prepared by an iwi authority and lodged with the council, to the extent that its content has a bearing on resource management issues of the region/district*".

What is the problem?

145. Most commentators agree that, whilst practice is developing across the country, there are still practical problems with the administration of the iwi provisions under the RMA.
146. Some local authorities are unclear about their consultation requirements or are unwilling to implement them. Some iwi lack capacity, resource management skills or the desire to engage.
147. There can be issues identifying the appropriate iwi or persons within an iwi – this leads to delay.
148. Some Māori use the RMA consents and appeals processes as a means to express dissatisfaction, where they may consider that consultation and engagement have been unsatisfactory earlier in the process. Engagement is sometimes related to lack of progress in other fora, such as negotiation of Treaty claims. The RMA provides unclear and open-ended obligations on local authorities and in some cases has raised unrealistic expectations with iwi. On the other hand, some iwi argue that despite explicit obligations the mono-cultural nature of some local authorities means the decision making fails to recognise and provide for their interests.

149. There is no specific provision or framework for co-management in the RMA that enable co-operative agreements between iwi and local authorities. Absence of such provisions may deter local authorities from exploration of these options and requires *ad hoc* solutions to be developed.
150. Although practice is improving, performance is varied. Looking forward, and especially as Treaty claims are settled and the Māori fisheries settlement is rolled out to iwi, the RMA process will work better - greater clarity should exist as to who the mandated bodies are.

What's the outcome sought?

151. Improving practice needs to be built on clear law. There is no doubt that the RMA could be clearer about many issues – greater clarity on consultation obligations for local authorities, iwi and applicants is at the top of the list. This would reduce uncertainty and cost and avoid raising unrealistic expectations that have a corrosive effect on local authority / iwi relationships. The focus should be on consultation at the plan level, removing the burden on iwi, applicants and consent authority (especially councils) during the consent process.

What is proposed?

152. It is proposed to improve the quality of engagement with iwi authorities at the front end of the planning process, ie. in plan and policy preparation. This currently occurs through taking into account any relevant planning document recognised by an iwi authority and will be enhanced with greater certainty on when iwi authorities should be consulted, which iwi authorities should be consulted, and how, and what the process and scope of consultation should be.
153. In this regard, it is proposed to require local authorities through the *plan making* process to:
- (a) keep a register of iwi authorities prepared by Te Puni Kokiri and their rohe for their regions/district (not specific, only stated tribal areas)
 - (b) establish a consultative procedure with iwi authorities (similar to the requirements under the Local Government Act)
 - (c) identify matters that have bearing on resource management issues (including s6(e)), and how the issues have been dealt with
 - (d) identify and take into account any iwi authority planning and/or other relevant documents (as is already required by the Act)
 - (e) undertake 'reasonable endeavours' to consult with iwi authorities.
154. If the process for involvement with iwi authorities is achieved in plan making then when it comes to consents greater understanding of Māori issues will occur and Māori will have the same opportunities as other groups to

participate where they are affected parties. A transition will be required so that requirements to consult Māori on consents reduce only once consultation at the plan level has been undertaken.

155. It is also proposed to recognise the government's role in consultation with iwi, by providing a clear process for iwi consultation on the development of national policy statements and national environmental standards.
156. Explicit empowering framework for co-management will be provided under the Act, building on existing examples such as Tuwharetoa/Lake Taupo, Okahu Bay, and Te Arawa Lakes.
157. A number of the changes highlighted elsewhere in this paper will also have a positive bearing on the practical performance in relation to iwi issues (eg, promoting accreditation of decision-makers – that would include training in Te Ao Māori).
158. Amendments to the Act should work in tandem with improved best practice, but probably the biggest improvements will come from more investment in the promotion of best practice.

What are the risks, costs and benefits?

159. The proposals above were developed by officials in consultation with a group of experienced Māori RMA practitioners.
160. Some iwi will see these proposals as a diminishing their ability to influence development of natural resources. The proposals do not generally appear to alter what is already required by the RMA, instead they create greater certainty. Crown Law advice is that it is unlikely the proposals would be a contemporary breach of the Treaty of Waitangi - especially since there is no proposal to alter s8.
161. In contrast business and the wider community will see this as a fairer approach. Special transitional processes will overcome most issues. There will, however, likely be increased costs for local authorities and iwi in the establishment of processes for taking into account interests in a more certain way through plan making. But it is most important that iwi interests are addressed during the plan making stages of RMA processes.

Part F – Improving natural resource allocation

Background

162. The RMA establishes a regime where natural resources (freshwater, geothermal, coastal space and assimilative capacity of air) are allocated on a “first- in first-served” basis. First in first served gives preference to current rather than potential users, and avoids having to address the most economic allocation of the natural resource.

163. The RMA does not identify specifically that it is the role of regional councils to undertake natural resource allocation in their function. Nor does it provide any certainty for current resource users beyond the term of the consent that has been granted.

What is the problem?

164. Problems in the allocation of natural resources in New Zealand are caused by a mix of changing demand and supply, legislative constraints, capability, council conservatism and lack of guidance. Resources are scarce in some regions with growing environmental pressures. Users have concerns about security of rights which affect investment. The problems are often, though not always, specific to resources and regions.

165. The legislative issues concern competing demand for resources and managing pollution. Managing discharges becomes an allocation issue when a cap or standard is set and reached, and allowing new discharges requires reductions by existing users because an acceptable level of pollution has already been reached.

166. Some of these issues are already being addressed through work such as the aquaculture reforms (for which legislation is to be passed this year) and the Sustainable Development Water Programme of Action (half-way through a two year schedule)³.

What is the outcome sought?

167. In the short term the focus will be on:

- [Information from the paper has been withheld under s 9(2)(h) of the Official Information Act (1982).]
- clarifying for business that existing investment can be considered when consents are 'renewed' (common practice but no explicit policy)
- providing abilities for plans to transfer discharge permits within catchments/airsheds, eg. when this may be the most efficient means of allocating air shed emissions
- addressing natural justice issues (recently emerged) where an existing permit holder can be 'gazumped' (prevented from applying) by someone applying for their current activities ahead of them.

³ The Water Programme of Action seeks to achieve the following outcomes: freshwater is allocated and used in a sustainable, efficient and equitable way; freshwater quality is maintained to meet all appropriate needs; and water bodies with nationally significant natural, social or cultural heritage values are protected. It is looking at a range of new allocation tools and methods that can provide greater flexibility.

What is proposed?

168. There are some simple amendments considered necessary to proceed with now to address resource allocation issues:

- (a) Explicit recognition of natural resource allocation as a role and responsibility of regional councils.
- (b) Allow for the Minister for the Environment to require a natural resource allocation plan.
- (c) Require consent authorities, when considering applications to allocate resources following the expiry of consents for the use of resources, to recognise existing investment as a factor in their decision making.
- (d) Allow plans to specify that discharge permits can be transferred in a similar manner to water permits and coastal permits, and that discharge and water permits can be transferred temporarily or in part within a catchment or airshed (subject to limitations in national environmental standards).
- (e) Establish a default rule (as per the aquaculture reform), except where a plan or policy statement provides otherwise, that where a consent for use and take of a resource is about to expire, the current consent holder shall have an opportunity to have an application for a new consent considered before a competing application, based on the following criteria (in addition to meeting the requirements of the Act):
 - compliance with any plan;
 - compliance with consent conditions (including consideration of track record for enforcement action); and
 - whether the applicant operates under current industry good practice.

If these criteria are met, other applications will not be considered. If the incumbent fails to meet the criteria, then the next application in the queue will be considered.

This proposal will not create a right in perpetuity for the incumbent consent holder.

169. To complement work programmes for water under the Sustainable Development Programme of Action, it is considered that new additional and parallel work programmes be initiated on geothermal energy allocation (Ministry of Economic Development lead) and air shed allocation (Ministry for the Environment lead).

What are the risks, costs and benefits?

170. The matters dealt with in terms of natural resource allocation have been limited to those more pressing and amenable to a solution. Pursuit of these matters is being done in a manner that codifies best practice to provide more legal certainty. However, it does not preclude effective consultation or more innovative solutions that may emerge from the Sustainable Development Programme of Action on Water.
171. The RMA review presents an opportunity to reinforce the importance of longer term issues being addressed in Sustainable Development Programme of Action on Water. These proposed amendments will be seen by business and local authorities as a first step, but may (mistakenly) be viewed as cementing a bias in the RMA toward existing users.
172. The default rule allows regional councils to exclude water (or any other resource) themselves from this rule if that is necessary in their region. There is no intention to create a right in perpetuity and guarantee future allocation, only that the default position for an existing consent holder will be an opportunity for their application to be considered ahead of other competing applications (assuming “first in first served” remains). A generic legislative approach across all resources, subject to local authority amendment as and where appropriate, is a more balanced solution.

Part G – Improving practice and building capacity

Background

173. Decision making on the management of resources is largely devolved to 74 territorial and 12 regional authorities. Devolved decision making is based on the assumption that local authorities are better placed to make decisions about the use and development of natural resources at the local level. The RMA is the most devolved system of environmental management in the world.

What is the problem?

174. Overall, local authority practice has steadily improved over the last 13 years, but the performance of some local authorities still falls short of what is acceptable. Some of the issues relate to lack of knowledge, some to lack of capacity, but for the main implementers of the Act, local authorities, there are huge differences in abilities to respond to resource management challenges.
175. The performance of other RMA participants – applicants, submitters, RMA professionals, NGOs, Māori, can also be significantly improved.
176. There is no specialised review of complaints office for poor RMA processes and few options for the government to address inadequate council

performance under the RMA. The roles of existing Offices of Parliament (the Office of the Ombudsman, the Office of the Auditor General and the Parliamentary Commissioner for the Environment) are not well known and there are detached linkages with the Minister for the Environment who is responsible for monitoring the effect and implementation of RMA.

What is the outcome?

177. There is little doubt that improvements in quality and consistency can be made in practice under the Act. Significant gains in resource management practice will only come with central government assistance over the long term.
178. There are currently three different Officers of Parliament who deal with RMA concerns. Their roles need to be better coordinated with work of the Minister and Ministry for the Environment. In line with current practice the following roles are:
 - Office of the Ombudsman: complaints about local authority practices
 - Office of the Auditor General: review of local authority performance
 - Parliamentary Commissioner for the Environment: environmental outcomes

What is proposed?

179. The package of best practice and capacity building initiatives includes:
 - commissioner and councillor training to support mandatory accreditation of members of hearings bodies
 - providing the Ministry for the Environment with an enhanced ability to take a stronger leadership role in implementing and monitoring the RMA
 - targeted one-on-one assistance to local authorities in need of support
 - national guidance through the delivery and sharing of good practice between resource management practitioners
 - resource management user awareness/education, targeted to particular sectors (eg. investors and small business)
 - guidance on iwi engagement and iwi capacity building.
180. Details of these initiatives are contained in **Attachment 1**.
181. The Office of the Ombudsman, the Office of the Auditor General and the Parliamentary Commissioner for the Environment already serve the role of complaints and review on the RMA. It is proposed that there be better coordination between the roles. For example, sharing of complaints

information; agencies recommending remedial action and provide the Minister for the Environment and the Ministry with advice on where to target assistance.

182. The Minister for the Environment is responsible for monitoring the 'effect and implementation' of the Act (s24(f)). To be more effective in this role, it is considered that the powers of the Minister need strengthening by providing:
- an ability for the Minister to request information relating to the Minister's functions from a local authority without being charged for that information
 - an intervention power, with an ability for the Minister to direct a local authority to undertake a specific action relating to the local authority's functions under the RMA.
183. Local authority failure to comply with directions would invoke the Minister's existing powers under section 25 of the Act – to appoint a commissioner to undertake a function of a local authority.

What are the risks, benefits and costs?

184. The initiatives proposed will have a longer term impact in addressing concerns with resource management practice within local government and other resource management participants.

Part H – Other matters and recommendations

Minor, technical and mechanical amendments to the RMA

185. There are a number of minor, technical and mechanical amendments necessary to fix errors in the statute or hiccups in procedures (some result from the 2003 Amendment Act) – see **Attachment 2**.

Consultation

186. Since the beginning of May, the Ministry for the Environment has led a whole of government process for the development of these proposals. A core group of senior officials from government departments has met weekly since the beginning of May to discuss the proposals: Ministry for the Environment, Department of Prime Minister and Cabinet, The Treasury, Ministry of Economic Development, Ministry of Transport, Ministry of Agriculture and Forestry, Te Puni Kokiri, Department of Conservation and Department of Internal Affairs. This group has also involved Local Government New Zealand. Chief Executives from these agencies have met 7 times to develop the proposals.

187. Other departments and agencies were involved in working groups (at their request) or consulted directly: Ministry of Health, Land Information New Zealand, Ministry of Justice (including the Environment Court), Ministry for Culture and Heritage, Ministry of Fisheries and Housing New Zealand Corporation.
188. The Ministry for the Environment has also met people on request and has held in conjunction with the Department of Conservation and the Ministry of Economic Development meetings in Wellington and Auckland for business and environmental/community groups to discuss the proposal in late June (attended by 150 people). Officials were also involved in the Local Government New Zealand workshop attended by 120 local authority delegates held in late June.
189. Te Puni Kokiri organised input from a group of experienced Māori RMA practitioners, who provided practical advice and solutions in relation to Māori engagement in resource management processes.
190. I have also met three times with a reference group established to provide independent feedback. The group brought practical real world experience, and enabled me to connect areas of agreement and isolate areas of contention. The members of the group were Graham Pinnell (Waikato sheep and cattle farmer), Shane Jones (Chairman of Sealord Group Ltd), Kate Mitcalfe (environmental lawyer with the Royal Forest and Bird Protection Society), Basil Chamberlain (Chief Executive of the Taranaki Regional Council), and David Hill (Director of Hill Young Cooper Ltd consultancy).
191. Formal submissions have not been sought, but there have been opportunities for input. The Ministry for the Environment and I have received over 200 written comments directly or via a website (www.rma.govt.nz) established for the purposes of the review. Some excellent thoughts and suggestions have come through and a summary of the main points is available on the website.

Financial Implications

192. If implemented, the proposals outlined would have financial implications.
193. [Information from the paper has been withheld under s 9(2)(f)(iv) of the Official Information Act (1982).]
194. The Ministry for the Environment is working on a more detailed and costed report back on natural resource implementation and capacity building – due with Cabinet by 1 November 2004. Funding issues will be included for consideration as part of budget 2005/06.

Human Rights

195. The proposals contained in this Cabinet paper do not appear to be inconsistent with the New Zealand Bill of Rights Act 1990, or the Human Rights Act 1993. A final view as to whether the proposals will be consistent with these Acts will be possible once the legislation has been drafted. Officials from the Ministry of Justice and the Ministry for the Environment will work together to ensure that the legislation is consistent with the Bill of Rights and Human Rights Acts.

Legislative implications

196. There will be legislative implications resulting from this work. They will be detailed in subsequent legislation cabinet papers. On that basis, it is proposed that the Resource Management Amendment Bill No3 receive priority 4 (to proceed to select committee) on the government's legislative programme for 2004.

Regulatory impact and compliance cost statements

197. Any increase or decrease in compliance costs will depend on how councils and the Environment Court exercise their new powers. It is therefore not possible to estimate the level of impact that the amendments will have. The only sources of compliance costs identified are use of professional advice and the time spent by businesses to understand the regulatory changes. Increased compliance costs will be mitigated by a user education programme in relation to amendments to the RMA.
198. Based on the information provided in the attached RIS/BCCS, the Regulatory Impact Analysis Unit considers that the disclosure of information is adequate, and the level of analysis is appropriate given the likely impacts of the proposal.

Publicity

199. There will be significant interest in the package of proposals. The Ministry for the Environment is preparing an information pack for media and other interested parties to support the Government's announcement of how we intend to improve the RMA. This will include a set of short, simple information sheets about the key proposals. Similar information will be provided through the Ministry's website.
200. I also plan to conduct a series of meetings in Auckland, Hamilton, Wellington, Christchurch and Dunedin to outline the proposals beginning 20 September 2004 and to invite feedback on the proposals via the Ministry's RMA review website (www.rma.govt.nz). The outcome of these meetings and the feedback will inform the final package of reforms to the RMA.

201. It is intended that this cabinet paper and the relevant cabinet minute will be publicly available on the Ministry for the Environment's website.

Recommendations

I recommend that you:

Background

1. **Note** that on 10 May 2004 Cabinet agreed to the development of a straightforward and understandable package of improvements (both legislative and non-legislative) for the Resource Management Act 1991 that focus on quality of decisions and processes (more specifically increasing certainty and reducing delays, costs and abuse of processes), while not compromising good environmental outcomes or sacrificing public participation [Cab Min (04) 15/12];
2. **Note** that the following principles have guided the review of the Act:
 - 2.1. Achieving good environmental outcomes - there should be a proper assessment of environmental effects so that adverse effects can be avoided or mitigated;
 - 2.2. Certainty of process but not outcome - applicants should have reasonable certainty about how long it will take to obtain a final decision, but the outcome must be determined by a proper assessment of environmental effects;
 - 2.3. Certainty of cost - applicants should have reasonable certainty about how much it will cost to obtain a consent;
 - 2.4. Local decision-making - communities are well placed to make environmental decisions in their areas and should have an appropriate opportunity to plan and make decisions;
 - 2.5. Public participation - those affected by applications are best placed to identify the adverse effects on them, and should have the opportunity to bring these before decision-makers and seek avoidance or mitigation of them; and
 - 2.6. Central government leadership – central government should show leadership and provide guidance to those involved in resource management;
3. **Note** that the process for review of the RMA included:
 - 3.1. Calling for ideas (over 200 submissions received) and sector meetings with business, local government and environmental groups;
 - 3.2. Establishing a Ministerial reference group;

- 3.3. Establishing six working groups of officials to develop issues papers, and a core officials group and a chief executives group of core departments identifying proposals, all of which included representatives from Local Government New Zealand;
- 3.4. The following Ministers meeting to consider draft proposals: Associate Minister for the Environment, Minister of Finance, Minister for Economic Development, Minister of Transport, Minister of Energy, Minister of Local Government, Minister of Conservation, Minister for the Environment, Minister of Agriculture and Forestry and Minister of Māori Affairs;

Improve expression of the national interest through national policy statements

4. **Note** that the likely candidates for the development of national policy statements are:
 - 4.1. Various types of network infrastructure (eg. electricity transmission, roads, telecommunications);
 - 4.2. Water management issues (eg. allocation or use, quality, waters of national importance subject to the outcome of the Water Programme of Action);
 - 4.3. Other allocation or nationally important resource issues (eg. renewable energy, geothermal);
 - 4.4. Current s6 matters (eg. landscape, biodiversity, historic heritage, public access, relationship of Māori with natural resources); and
 - 4.5. Matters determined by topical issues under consideration (eg. urban design)
5. **Invite** the Minister for the Environment and the Minister of Economic Development to report back to the Cabinet Policy Committee (POL) by 3 November 2004 on the proposed course of action for developing national policy statements on various types of network infrastructure;
6. **Invite** the Minister for the Environment to report back to POL by early December 2004 on the proposed course of action for developing national policy statements for other matters identified in paragraph 4;
7. **Note** that the timeframe for development of a national policy statement could be reduced by making a full board of inquiry optional.
8. **Agree** to make a full Board of Inquiry process for national policy statements optional; with the alternative process being one that involves:
 - 8.1. a “duty to consult” similar to that currently specified in s44 for national environmental standards;
 - 8.2. the national policy statement being treated as a regulation for the purposes of the Regulations (Disallowance) Act 1989;

- 8.3. the possibility of a draft of the national policy statement being referred to the Regulations Review Committee for consideration;
9. **Agree** to allow a national policy statement to specify the provisions that a local authority shall include in regional policy statements and regional/district plans without the need for normal local authority notification and hearing processes (first schedule processes), but only where local discretion in implementation is not required or very limited;

Improve expression of the national interest through national environment standards

10. **Note** that the use of more national environmental standards can increase consistency across New Zealand for applicants undertaking activities in more than one district/region; reduce the time taken to develop plans (eg. reduce the contents of plans); and also potentially reduce the number of resource consent applications;
11. **Agree in principle**, subject to the report in paragraph 12, to a programme of developing more national environmental standards;
12. **Invite** the Minister for the Environment to report back to POL by early December 2004 with a programme for developing national environmental standards;
13. **Agree** to amend s43 of the Act to include subdivision (s11) in the matters that national environment standards can be prepared for;
14. **Agree** to allow national environmental standards to:
- 14.1. Set standards 'absolutely' throughout the country;
 - 14.2. Where allowed for in the national environment standard, allow for district or regional variation to set a more stringent standard;
15. **Agree** to amend s32 of the Act (consideration of alternatives, benefits and costs), with an extra test requiring local authorities to take into account the necessity of being more stringent than a national environmental standard, where the standard allows;

Improve expression of the national interest through central government advocacy

16. **Note** that on 8 September 2004 POL noted the proposals in the earlier paper under POL (04) 234 (recommendations 16 and 17) about providing for a whole of government approach in respect of consideration of applications under the Act [POL Min (04) 21/15];
17. 17.1 **agreed** that any proposals would need to be consistent with the mandate held by the Department of Conservation and would need to

distinguish between applications of local significance and those of national significance;

- 17.2 **invited** the Associate Minister for the Environment, in consultation with the Prime Minister, Minister for the Environment, Minister of Conservation and other Ministers as appropriate, to give consideration to how a whole of government approach might be implemented and to criteria for determining whether central government intervention would be required and provide further advice for POL by 3 November 2004;

Improve consent decision making at the local authority level

- 18.18.1 **Agree** to clarify that local authorities in consent processing should be encouraging applicants to consult with all affected parties; and
- 18.2 **Confirm** that there is no specific requirement on local authorities (as consent authorities) to consult otherwise in the process of preparing officers' reports (s42A) or making decisions, because this consultation occurs during plan preparation;
19. **Agree** to reduce the number of further information requests resource consent applications by amending section 92 to:
 - 19.1. Explicitly require consent authorities to give specific written reasons for the further information request;
 - 19.2. Allow the applicant, upon receipt of a further information request, to require the consent authority to proceed with the application on the basis of information already provided; and
 - 19.3. Allow local authorities to reject applications if they believe there is insufficient information to process the application;
20. **Agree** that submissions can be neutral in effect (ie. not just in support or opposition);
21. **Agree** that at the pre-hearing stage of a consent application consent authorities will have powers to:
 - 21.1. Require attendance at pre-hearing meetings;
 - 21.2. Sanction non-attendance at pre-hearing meetings;
 - 21.3. Establish lists of issues that are agreed and outstanding, the evidence to be called, its order and a timetable for hearing; or
 - 21.4. Use independent mediators to mediate conflicts before or during a hearing;
22. **Agree** that the role of a consent authority hearing is to inquire into and decide upon applications for consents and private plan changes and make recommendations on designations and heritage orders;

23. **Agree** that, from 12 months after the commencement of amendments, the chair person of the hearing body be required to be 'accredited' with an appropriate qualification approved by the Minister for the Environment to hear notified consents, designations and heritage orders and private plan changes;
24. **Agree** that, from 24 months after the commencement of amendments, the majority of the members of a hearings body (including the chair persons) be required to be 'accredited' with an appropriate qualification approved by the Minister for the Environment to hear notified consents, designations, heritage orders and private plan changes;
25. **Invite** the Minister for the Environment, in consultation with the Minister of Local Government, to report back to POL 12 months after the commencement of the requirement in paragraph 24 on the effectiveness of the hearings accreditation system, including whether all persons on any hearings body for notified consents, designations, heritage orders and private plan changes should be required to be 'accredited' with an appropriate qualification approved by the Minister for the Environment;
26. **Direct** the Ministry for the Environment to establish a credible 'accreditation' scheme for training and regular assessment of councillors and independent commissioners that will support the mandatory requirements of paragraphs 23 and 24;
27. **Agree** to explicitly empower hearings panels to use the following powers in a manner that corresponds with the scale and significance of the hearing:
 - 27.1. Require the applicant to circulate written briefs of evidence including attachments, before hearings, to the consent authority;
 - 27.2. Require that evidence and attachments to evidence of all submitters who intend to call experts be provided in advance of hearings to the consent authority;
 - 27.3. Organise the order of hearings according to subject-matter of the submissions, or otherwise;
 - 27.4. Direct that some issues be considered or reported on before others;
 - 27.5. Limit the nature of the hearing, such as setting time limits on presentations by parties and limiting ability for parties to present submissions in full where matters are incongruous with the matters under dispute;
 - 27.6. Make explicit that some or all evidence can be taken as read or limited to matters in conflict;
 - 27.7. Require evidence to be recorded;
 - 27.8. Seek evidence during the hearing; or
 - 27.9. Strike out a submission (similar to the Environment Court's power under s279(4)) on the grounds that it is vexatious or frivolous, or that it

discloses no reasonable or relevant case in respect of the proceedings, or that it would be an abuse of process to allow the submission to proceed further;

28. **Agree** to provide the ability to make regulations under section 360 of the Act that prescribe local authority use of the powers for hearings identified in paragraph 27 and for the Minister for the Environment to prepare such regulations prior to the commencement of amendments to the Act;

Improve consent decision making at the Environment Court

29. **Agree** to clarify that the role of the Environment Court is an appeal authority with powers to inquire into and decide upon applications for consents, designations, heritage orders and private plan changes;
30. **Agree** that the Environment Court shall have regard to the consent authority's decision and conduct a 'rehearing', rather than a hearing *de novo*. *De novo* could be adopted only if the Environment Court determined that:
- 30.1. Evidence relied upon at the consent authority hearing was unsafe;
 - 30.2. Evidence relied upon was insufficiently tested by the panel at the consent authority hearing;
 - 30.3. Principles of natural justice were not observed at the consent authority hearing; or
 - 30.4. Important new information has become available;
31. **Note** that a 'rehearing' approach will require the Environment Court to:
- 31.1. Determine the legal rights and obligations of the parties as at the date of the rehearing;
 - 31.2. Consider new circumstances or changes in the law;
 - 31.3. Admit further evidence, though it does not hear all the witnesses again; and
 - 31.4. Not hear the matter afresh but have specific regard to the consent authority's decision as a starting point;
32. **Agree** that the Environment Court can order the preparation of an independent expert report;
33. **Agree** that the Environment Court should be required to define the issues that are to be resolved at an early stage;
34. 34.1 **Agree** that, following an order in council as to the commencement, that a declaration by the Environment Court can be sought for whether an application for resource consent should be notified or not notified either before or after the notification decision;

- 34.2. **Note** that the commencement would occur when the Environment Court's workload was at a sustainable level, with the Court consistently meeting its deadlines;
35. **Note** that the Environment Court is proposing 'practice notes' on use of commissioners sitting alone and consistent application of alternative dispute resolution processes (mediation and arbitration);

Improve non-local (call-in) decision making

36. **Agree** that there is sound justification for government to intervene in resource management decisions, that would otherwise be taken locally, when one of the following circumstances exists:
- 36.1. There is insufficient capacity, preparedness and information at the local government level to make decisions;
 - 36.2. The community of interest is larger than the local level or where will there be significant inter-jurisdictional externalities from the decision;
 - 36.3. Where the costs of the project are being faced at the local level but the benefits are national;
 - 36.4. There is some over-riding need to avoid inconsistency in the application of the Act that is unrelated to the need to recognise different environments or communities; or
 - 36.5. The values at stake or the effects of the activity are the same everywhere in the country meaning that individual devolved decisions are an unnecessary cost;
37. **Agree** that applicants or local government can request the Minister of the Environment to undertake an assessment as to the government's involvement in the local decision making for resource consents, designations, heritage orders or private plan changes;
38. **Agree** that the outcome of the assessment undertaken by the Minister for the Environment would instigate a decision that:
- 38.1. The local (standard) process is appropriate;
 - 38.2. The local (standard) process with assistance should be adopted; or
 - 38.3. The decision-making process should be at a national level.
39. **Agree** that if a local (standard) process with assistance is adopted the government would be able to:
- 39.1. Provide a government funded independent project coordinator to provide extra capacity through the Ministry for the Environment;

- 39.2. Direct that applications be heard jointly where more than one local authority is involved in a project (such as may be the case with a network utility);
 - 39.3. Appoint a person on the locally led hearing panel; or
 - 39.4. Issue a government submission developed under a “whole-of-government” process as an input into the decision-making process alongside submissions and applications;
40. **Note** that the role of independent project coordinator is likely to involve working with the community, local authorities, and the applicant to:
- 40.1. Avoid, where possible, project errors such as underestimating the scale of environmental effects or levels of community interest;
 - 40.2. Promote early and complete exchange of information (between the applicant, local authorities, community and iwi groups) and encourage awareness of all relevant issues, so that those issues do not arise at later stages;
 - 40.3. Facilitate liaison between consent authorities and where necessary determine a lead consent authority (eg, to run a pre-hearing meeting);
 - 40.4. Advise participants, local authorities, and applicants on the skills needed to assess the proposal and to assist in identifying and, if necessary, procuring those skills; or
 - 40.5. Assist the applicant, local authorities, and participants with process issues including advice on issues associated with the hearings process (including the composition of the hearings panel);
41. **Agree** that the Minister for the Environment will use the call-in provisions of the Act (as amended by these decisions) should the assessment of an applicant or local government’s request for government’s involvement in decision making on the project require a national level approach;
42. **Agree** to the Minister for the Environment appointing, subject to consideration by the Cabinet Appointments and Honours Committee, a standing body of commissioners from which members of a board of inquiry will be appointed to hear a called-in application.
43. **Agree** that in appointing members to a board of inquiry to hear a called-in application the Minister for the Environment must have members on the board of inquiry with knowledge, skill and experience in relation to the Resource Management Act, matters likely to come before the board, tikanga Māori and in the case of the chairperson of the Board, judicial processes;
44. **Agree** to make the decision of the board of inquiry following a call-in, final, with appeals only on points of law (to the High Court);
45. **Agree** that the board of inquiry will be required to issue an interim decision so as to allow parties to comment before a final decision is issued;

46. **Agree** to amend s140 to apply it to notices of requirement for designations and private plan changes as well as resource consents;
47. **Agree** that the board of inquiry will make decisions on notices of requirement for designations, rather than recommendations to the requiring authority;
48. **Agree** to amend the criteria for call-in within the Act to include cross-district issues as well as cross-regional issues (s140 (2)(d));

Improve local policy and plan making

49. **Agree** to provide a clear mandate for government to require individual local authorities to develop plans to address specific resource management issues (through the functions of the Minister for the Environment);
50. **Agree** that district and regional plans “give effect to” regional policy statements, as opposed to being “not inconsistent with” ;
51. **Agree** that regional councils in addressing the significant resource management issues of the region in regional policy statements may state policies about one or more of the following areas: promoting sustainable urban form; timely and effective provision of infrastructure and its integration with land use policies; and allocation of natural resources;
52. **Agree** to limit the contents of plans by requiring plans to only include policies and rules and that other matters can be included at the local authority’s discretion or contained in ‘s32 documentation’ (consideration of alternatives, benefits and costs);
53. **Agree** to streamline the regional policy statement and regional/district plan making process by amending the Act as follows:
 - 53.1. Clarify that the consultation principles in the Local Government Act 2002 apply to the development of RMA policy statements and plans, to the extent that these principles are consistent with the requirements of clause 3 of the first schedule of the RMA;
 - 53.2. Clarify that where consultation has occurred in the course of the preparation of other local authority planning documents on the same matter, with the people or groups required in clause 3 of the first schedule of the RMA then the consultation requirements of the RMA may be considered fulfilled;
 - 53.3. Clarify that a local authority is only required to undertake ‘reasonable endeavours’ to consult with persons identified under clause 3 of the first schedule;
 - 53.4. Allow submissions to be neutral (ie. not just in support or opposition);
 - 53.5. Extend powers used for resource consents to convene pre-hearing meetings to the development of a policy statement or plan (ie. s99);
 - 53.6. Limit further submissions to submissions of opposition and only from those persons directly affected by the original submission who are not already a party to the matter;

- 53.7. The role of a local authority hearing is to inquire into the proposed policy statement or plan (including changes or variations);
- 53.8. Adopt powers for more inquisitorial hearing approaches as identified for consent hearings (as outlined above in paragraph 27) that promote a more robust first hearing;
- 53.9. Define the role of the Environment Court as an appeal authority with powers to inquire into and decide upon policy statements and plans prepared under the Act (including powers under paragraphs 32 and 33);
- 53.10. Limit the Environment Court's jurisdiction over the merits of policy decisions and value judgements of local authorities by specifying on appeal that the Environment Court's power is limited to referring the matter back to the local authority for reconsideration, with directions as appropriate. Failure to comply with directions will see the Environment Court making appropriate steps necessary to achieve the desired outcome; and
- 53.11. Require the Environment Court to have regard to the local authority's decision and conduct a 'rehearing', rather than a hearing *de novo*. *De novo* could be adopted only if the Environment Court determined that in accordance with the matters in paragraph 30;
- 54. **Direct** the Ministry for the Environment, in consultation with other agencies as appropriate, to report back to POL by early December 2005 on how the RMA could be improved to provide:
 - 54.1. Greater recognition of other government statements and strategies in resource management decision making; and
 - 54.2. Linkages to long term council community plans under the Local Government Act 2002 and regional land transport strategies under the Land Transport Act 1998;

Improve certainty for iwi consultation and iwi resource planning

- 55. **Note** that there are practical problems with the administration of the iwi related provisions of the RMA and uncertainty about the consultation requirements;
- 56. **Agree** to amend s35 of the Act to require local authorities to keep a register of iwi authorities and their rohe for their regions/district, with contact details, and a catalogue of current iwi authority planning documents;
- 57. **Direct** Te Puni Kokiri to provide material to local authorities on rohe of iwi authorities;
- 58. **Agree** to explicitly allow for co-management options in the RMA;
- 59. **Agree** to provide a clear process for iwi authority consultation in the development of national policy statements and national environmental standards;
- 60. **Agree** to amend the first schedule of the Act to require local authorities to:

- 60.1. Establish a consultative procedure with iwi authorities (similar to the requirements under the Local Government Act);
- 60.2. Identify matters that have bearing on resource management issues (including s6(e)) and how the issues have been dealt with; and
- 60.3. Identify and take into account any iwi authority planning documents recognised by an iwi authority (as is already required by the Act);
- 61. **Agree** to clarify that in relation to preparation of resource consent applications (including designations and heritage orders) and decision making on such applications, that Māori will have the same status as any other person adversely affected by the activity;
- 62. **Agree** that, until such time that plans and policy statements address iwi resource management issues (in the manner outlined in paragraph 61), the current status of Māori as identified in the Act and in case law will remain unchanged;
- 63. **Agree** to clarify that the Crown as an applicant under the RMA has the same obligations as any other applicant when dealing with iwi authorities/Māori who are regarded as a person adversely affected by the activity (subject to particular statutory requirements);
- 64. **Note** that the above provisions seek to clarify that it is the consent authority's responsibility to notify affected parties including iwi authorities, and to report on any assessment of adverse effects;
- 65. 65.1 **Note** paragraph 18 that seeks to amend the Act to clarify that local authorities in consent processing should be encouraging applicants to consult with all affected parties; and
 - 65.2 **Confirm** that there is no obligation on local authorities (as consent authorities) to consult in the process of assessing and deciding on resource consent applications;

Improve natural resource allocation

- 66. **Agree** to explicitly recognise natural resource allocation as a role and responsibility of regional councils;
- 67. **Note** that paragraph 49 that provides a clear mandate for government to require individual local authorities to develop plans to address specific resource management issues (through the functions of the Minister for the Environment) and that this would include directing a regional council to prepare a natural resource allocation plan;
- 68. **Agree** to require consent authorities, when considering applications to allocate resource following expiry of consents for the use of resources, to recognise existing investment as a factor to be considered;
- 69. **Agree** to allow regional plans to specify that discharge permits can be transferred in a similar manner to that currently used for water and coastal permits and that discharge and water permits can be transferred temporarily or in part within a catchment or airshed (subject to limitations in national environmental standards);

70. 70.1 **Agree** to establish a default rule (as per the aquaculture reform), except where a plan or policy statement provides otherwise, that where a consent for use and take of a resource is about to expire, the current consent holder shall have the opportunity to have an application for a new consent considered before a competing application, based on the following criteria (in addition to meeting the requirements of the Act):

70.1.1. Compliance with any plan

70.1.2 Compliance with consent conditions (including consideration of track record for enforcement action); and

70.1.3 Whether the applicant operates under current industry good practice; and

70.1.4 Consideration of national interest criteria.

70.2 **Agree** that if these criteria are met, other applications will not be considered. If the incumbent fails to meet the criteria, then the next application in the queue will be considered.

71. **Invite** the Minister of Energy and the Minister for the Environment to report back to POL by 30 June 2005 on work programmes to address geothermal energy allocation and air shed allocation, to complement the Water Programme of Action;

Improve practice and build capacity

72. **Agree** to amend the Act to provide the Minister for the Environment with abilities to:

72.1. Request information relating to the Minister's functions from a local authority without being charged for that information;

72.2. Direct a local authority to undertake a specific action relating to the local authority's functions under the RMA; and

72.3. Link the failure of a local authority to comply with directions of the Minister for the Environment (under (72.2)) with invoking the Minister's existing powers under s25 of the Act;

73. **Invite** the Associate Minister for the Environment to report back to POL by 3 November 2004 on ways to better coordinate the RMA roles of the Office of the Ombudsman, Office of the Auditor General and the Parliamentary Commissioner for the Environment, with work of the Minister and Ministry for the Environment on best practice, in line with current practice as follows:

73.1. Office of the Ombudsman: complaints about local authority practices;

73.2. Office of the Auditor General: review of local authority performance; and

73.3. Parliamentary Commissioner for the Environment: environmental outcomes

74. **Agree in principle**, subject to the further report in paragraph 75, to a package of best practice and capacity building initiatives that includes:

- 74.1. Commissioner and councillor training to support mandatory accreditation of consent decision makers;
- 74.2. Providing the Ministry for the Environment with an enhanced ability to take a stronger leadership role in implementing and monitoring the RMA;
- 74.3. Targeted one-on-one assistance to local authorities in need of support;
- 74.4. National guidance through the delivery and sharing of good practice between resource management practitioners;
- 74.5. Resource management user awareness/education, targeted to particular sectors including business; and
- 74.6. Guidance on iwi engagement and iwi capacity building;

75. **Direct** officials from the Ministry for the Environment to report back to POL by 3 November 2004 on implementation, best practice and capacity for a natural resource implementation and capacity building;

Minor, technical and mechanical amendments

76. **Agree** to the minor, technical and mechanical amendments listed in **Attachment 2** of this paper;

Financial implications

77. **Note** that the improvements to the RMA are estimated to cost:

[Information from the paper has been withheld under s 9(2)(f)(iv) of the Official Information Act (1982).]

78. **Direct** officials from the Ministry for the Environment to report back to POL by 3 November 2004 on estimates in paragraph 77 as part of 2004/05 budget bid for natural resource implementation and capacity building;

79. **Agree** that the funding issues referred to in paragraph 77 for 2005/06 and beyond be included for consideration as part of budget 2005/06.

Related Issues

80. **Note** that the Minister of Energy may recommend to POL that amendments be made to sections 24 (construction or maintenance of works on roads) and 31 (rights of entry in respect of level crossings) of the Electricity Act, to be

implemented via the Resource Management Amendment Bill, once officials have consulted on proposals;

81. **Direct** officials to undertake further work on additions to network utility operators under section 166 of the RMA and report to POL by 31 October 2004;

Communications

82. **Note** that the Associate Minister for the Environment intends to discuss the proposed RMA improvements with key stakeholders and seek written feedback before consideration of the draft legislation by the Cabinet Legislation Committee, in a series of public meetings in Auckland, Hamilton, Wellington, Christchurch and Dunedin beginning 20 September 2004;
83. **Note** that the Associate Minister for the Environment proposes to publicly release:
 - 83.1. the Cabinet paper and minute that initiated the review of the Act [CAB (04) 203 and CAB Min (04) 15/12];
 - 83.2. the paper under CAB (04) 444 (including the regulatory impact statement and business compliance cost statement) after the Cabinet minute is released;

Legislation

84. **Note** that the Resource Management Amendment Bill No 3 has priority 3 on the 2004 Legislative Programme;
85. **Note** that as consideration is given to the implementation of and legal drafting for the decisions set out above, some refining of the wording of the decisions may be required;
86. **Invite** the Minister for the Environment, following discussions noted in paragraph 82, to issue drafting instructions for the Parliamentary Counsel Office to give effect to the above decisions;

Hon David Benson-Pope

Associate Minister for the Environment

Attachment 1 – Initiatives for improving practice and building capacity

Initiative A - Commissioner and councillor training to support mandatory accreditation of consent hearings bodies

Associated with the requirement for mandatory accreditation of consent hearings bodies a programme will be established by the Ministry for the Environment for appropriate accreditation. The Ministry for the Environment has done preparation work on a voluntary accreditation scheme stemming from the recommendations of the Ministerial Panel on Business Compliance Costs. This voluntary scheme will need to be reviewed in light of the legislative changes proposed. Specific consideration will be required of the new inquisitorial powers.

Initiative B - Stronger leadership role for the Ministry for the Environment in implementing the RMA

Ministers have indicated that government needs to take a more hands-on approach to overseeing the implementation of the RMA (as it has done with the Building Act). This approach would build on the Ministry for the Environment's role in monitoring the effect and implementation of the RMA. The government is often on the back foot when faced with concerns about the RMA. Enhancing the Ministry for the Environment's capacity to take a stronger leadership and partnership role would provide the ability for it to make the RMA work.

Enhanced capacity would allow the Ministry for the Environment to improve implementation by:

- taking a leadership role in responding to concerns about the RMA and pro-actively addressing issues (eg. Transpower concerns, foreign investments, negative media representation)
- working more collaboratively and partnering with local authorities, professional institutes and other resource management participants to address concerns and encourage improved performance
- being more informed about how the RMA is achieving its purpose, and the need for additional best practice guidance and potential changes,
- celebrating good performance through a new award scheme, or current linkages with the Performance Excellence Study Award

Initiative C - Targeted one-on-one local authority assistance

The targeted one-on-one local authority assistance scheme is a partnership approach between individual local authorities and Ministry for the Environment. The scheme assists local authorities to improve their processes and practices. The initial

two pilots of this scheme carried out over the last year involved a management consultant and an experienced planner assessing the local authority's resource consent processes, and reporting on potential solutions. This scheme could be extended in the future to include a contestable fund providing assistance to under-resourced local authorities, assisting local authorities to achieve national objectives (such as improving drinking water quality), and to support innovative ideas.

Initiative D - National guidance

National guidance (in addition to NPS and NES) is currently being provided through the Quality Planning website and Ministry for the Environment publications. Current guidance covers the processes for plan-making, consent processing, and monitoring and reporting. Further guidance on plan policy development, such as how to address infrastructure development or residential growth within a district plan, would assist in achieving greater certainty and consistency. Additional guidance could also extend to looking at innovative ways to improve access to information for all RMA participants, such as a web-based portal.

Providing guidance and support to resource management participants (through the Quality Planning website, workshops and training) would assist with the successful implementation of any legislative amendments arising from this review, as well as the aquaculture reform and foreshore and seabed legislation.

Initiative E - RMA user education and awareness

An effective RMA education and awareness programme aimed at the general public, business and other stakeholder groups would assist in both demystifying and addressing some of the negativity about the RMA. This initiative would expand the already successful Ministry for the Environment funded RMA Education and Advisory Services work. This fund has supported the development and operation of several community centres and websites who deliver public information on the RMA. In particular, the Ministry for the Environment will pro-actively look at partnering business to provide advice and support to businesses and investors in the economy who may be facing compliance costs - thus improving their passage through RMA processes.

Initiative F - Guidance on iwi engagement and iwi capacity building

There is a need to provide guidance around the engagement of iwi in resource management processes and build iwi capacity for involvement, especially with the changes proposed as part of this review combined with those coming out of the aquaculture reforms and the foreshore and seabed legislation. Guidance on iwi and the resource consent process has already been developed through the Business Cost Compliance Programme (aimed at applicants, local authorities and iwi). This has yet to be rolled out, and could be expanded to include other plan processes.

New guidance could be developed for iwi on preparing robust planning documents and consultation processes, including charging.

As part of the development of the foreshore and seabed legislation a group was tasked with looking at improving the effectiveness of local authority/Māori activities under existing legislation. The aim was to develop practical initiatives that improve practice, participation and relationships. The foreshore and seabed legislative work complements the changes that have emerged out of this review of the RMA.

Attachment 2 – Minor, technical and mechanical amendments to the RMA

Duties and Restrictions

1. Clarify the error from the Resource Management Amendment Act 2003 for the local authorities powers to delegate, which is inconsistent with the Local Government Act 2002 (s33)
2. Clarify that consent authorities can recover the costs of consent condition reviews (s36), unless the review is instigated by a plan change
3. Specifically recognise as a regional local authority function the control of the use of land for the purpose of remediation of contaminated land (and define meaning of contaminated land) (s30)

Policy statements and plans

4. Clarify that external documents (ie. NZ standards and codes of practice) can be incorporated into plans by reference if done so through the first schedule

Resource consents

5. Clarify that the 'processing clock' stops while awaiting further information on notices of requirement for designations and heritage orders (s92)
6. Clarify that consent authorities can disregard effects on persons who give their written approval when deciding whether effects are more than minor for both the purposes of notification (s94A) and substantive decisions (s104(3)(b))
7. Clarify that where a plan states non notification is allowed this also applies to service of notice for the purpose of limited notification (s94D)
8. Enable the receipt of electronic submissions (s96)
9. Clarify that the time limit for submissions on applications under limited notification is 20 working days (s97)
10. Clarify that a certificate of compliance can be issued for an activity that relies on existing use rights for its lawfulness (s139)
11. Provide an ability for consent authorities to cancel 'stalled' resource consents
12. Allow local authorities to correct any minor or technical error, or clerical slip to resource consent decisions within 15 days of issue

Subdivision

13. Require consent authorities to publicly notify affected third parties, if appropriate, when varying or cancelling subdivision consent conditions (s221)

14. Provide consistency with the Reserves Act 1977 for the administration of Crown-owned esplanade reserves (s237D(1))

Environment Court

15. Clarify that the registrar means the registrar of the Environment Court and includes the deputy registrars (s2 - Interpretation)
16. Provide a formal mechanism for those instances where the Principal Environment Judge is unable, temporarily, to carry out his/her functions (s251)
17. Clarify that the role of the Ministry of Justice is to provide the Environment Court with administrative support and that there shall be a Chief Registrar and other such Registrars as required (260)
18. Enable the Environment Court registrar to waive fees (ie. to allow the fee scales to apply) (s260A)
19. Allow commissioners, deputy commissioners, and the registrar to issue summonses requiring witness attendance, take a declaration or have an affidavit or affirmation sworn before them, undertake call-overs, conferences and other similar functions (s260A)
20. Clarify that orders from the commissioners, deputy commissioners and registrar are orders from the Court (s260A)
21. Provide the ability for the Principal Environment Judge to confer powers on the registrar as he/she thinks fit without need for additional legislative change (260A)
22. Reflect drafting and terminology changes eg “additional dispute resolution” (s268) should be “alternative dispute resolution”
23. Clarify the matters that can be raised by persons joining an Environment Court proceeding (s274)
24. Enable appeals to the High Court to be lodged in other registries apart from Wellington (s300)

Declarations, enforcement and ancillary powers

25. Remove the need for the Minister for the Environment to be served with notice in respect of every application for a declaration (s312)
26. Clarify that an appeal on a decision to confirm or cancel an abatement notice does not act as a stay of that notice (s325A)
27. Clarify and better define when, and what action can be taken during an emergency (s340)

28. Allow an applicant whose application was dealt with on a limited notification basis, to object to the consent authority about its decisions not to grant a resource consent or on the conditions of consent (s357)
29. Specify time limits for consent authorities to process objections lodged under s357

Transitional and miscellaneous provisions

30. Delete references to repealed sections (eg clause 4 of the first schedule refers to s168(3) and s117(1) refers to s90 – both are repealed)

First Schedule

31. Require only one copy of a proposed policy statement, plan or change to the Wellington office of the Ministry for the Environment (clause 5)
32. Enable electronic submissions (clause 16)
33. Allow local authorities to correct any minor or technical error, or clerical slip to operative plans (clause 16)
34. Provide for proposed policy statement and plans to become operative despite any variations. Variation should then continue to be proposed as if it were a change to the operative policy statement or plan (clause 16A)
35. Allow local authorities to approve parts of their plans once appeals are resolved (clause 17)

RM (Forms, Fees and Procedure) Regulations

36. Enable local authorities to require signs for publicly notified resource consents and for notices of requirement for designation (reg 10)
37. Provide the correct fax number for the Environment Court
38. Reword the phrase in Form 6 to clearly reflect the wording from the First Schedule about further submissions
39. Change the title of Form 13 to include limited notification
40. Require more contact details on abatement notices
41. Amend regulation 19 to correct the Registry in which proceedings should be lodged
42. Amend Regulation 25(2) to require parties to indicate whether they wish to be heard on an application for interlocutory orders before a hearing is arranged

43. Amend Form 24 to remove the reference to a timeframe for lodging these applications.

RM (Infringement Offences) Regulations

44. Reword form to reflect wording of the defence provisions (Schedule 2)
45. Include more contact details on the form