Resource Management for the 21st Century

Philip McDermott, 31 March 2015

From Dictating Uses to Managing the Environment

The 1991 Resource Management Act (RMA) was a bold and progressive replacement for the 1977 Town and Country Planning Act (TCPA). Today it's a shambles.

The TCPA was a modified version of the 1953 TCPA. The 1953 Act in turn reflected practices and values long-associated with town planning in the United Kingdom, relying on mapping zones within which certain activities were permitted or excluded, largely on the basis of perceived nuisance value. The lists of what could and could not take place were based as often as not on dated precepts about industrial processes and their compatibility or otherwise with less intrusive or more benign land uses such as light manufacturing, retailing, office-based services, and housing. Separation to isolate adverse effects and regulating how sites might be occupied was dominant regulatory tools.

The RMA instead required that councils and resource users focus more directly on the *environmental effects* of activities, to manage *the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety* (Section 5). It sets out broad approaches (avoiding, remedying or mitigating). It lists environmental attributes to be provided for (Section 6) or considered (Section 7) by councils when preparing resource management plans.

With this fundamental change planning needed to rely no longer on guessing what people and communities might be doing in the future (based all too often on what they had been doing in the past) or how goods and services might be produced and distributed. In some ways the RMA could be considered a post-industrial act, with the emphasis no longer on what we can do where, but on how we might best sustain natural and physical resources as we get on with production, distribution and consumption in a dynamic and unpredictable world.

The RMA didn't work as planned

Simply changing the law was never going to be enough. A shift from regulation based on a long-standing town planning tradition to decision making informed by environmental values, scientifi8c progress, especially in the natural sciences, and the needs and ambitions of increasingly diverse communities required significant changes in institutionalised practices. They were not forthcoming.

The planning community reverted to the tried, tested, and usually blunt tool of exclusionary zoning of land uses as the favoured means of avoiding, mitigating, or remedying

environmental effects. The potential for more measured development in sensitive areas or for new approaches to managing the environment yielded to the old practice of writing rules about what might be done, and where. New provisions for community participation fostered obstruction by partisan interests and promoted NIMBYism without necessarily delivering environmental gains.

The costs of environmental regulation

The costs of this imbroglio are far-reaching, well beyond recent speculative analyses, one by Motu for the Minister for the Environment and the other by NZIER for Auckland Council. Certainly estimating the costs of the RMA – and then separating justifiable from non-justifiable costs – is a big ask. But let's least acknowledge first what those costs entail.

They include the substantial overheads associated with preparing and reviewing plans within councils, approving resource consents, addressing plan changes, and monitoring and enforcing the standards set. In the case of Auckland, the projected capital and operating budget for Environmental Management and Regulation in the Council's 2015-2025 draft budget is $5.3billion. This is around $80/household/year, although the Council would recover just over half of this through charges and fees.

Not all councils will face the same complexities, carry the same overheads, or adopt the same sorts of planning rules, but it is reasonable to suggest that nationally council costs would be at least double those of Auckland and perhaps three times as much. A more straightforward planning act should reduce them substantially.

Then there are the private costs of applying for and responding to resource consents under the RMA, and further costs incurred by resource users, interest groups, and the public generally in responding to proposed plans and plan changes by way of submission and appeal. A significant share of these costs will be attributable to regulatory failings arising from trying to adopt an environmental act to social and economic goals, and from the application of principles rather than relying on well-founded environmental objectives and an understanding of local circumstance.

Add to that financial and economic costs from delays to projects and development foregone when the uncertainty and expense of planning processes become too great. And the costs and consequences of complying with inappropriate or ineffective conditions imposed by a plan or as a requirement of consent. These include the impact of policies that effectively ration land for housing and business investment.

Certainly some costs can be justified by the need to maintain environmental standards. They are the price society pays to manage natural resources wisely. But what is the marginal impact on these costs of a planning law that tries to be all things to all people, yet which can be used to pursue a particular view of how society should work almost irrespective of the

environmental consequences? And what if the societal costs of such a view are high and the environmental benefits modest?

Why are costs so high?

Procedural issues, attitudinal differences, debates about scope, and an adversarial approach all-to-often prevail in dealings between resource users and councils. This is a fractured and fraught process, often based on cursory or partial evaluation, advocacy as much as analysis, and rulings on legal arguments as much as on environmental outcomes. It carries with it considerable costs leading to often unknown outcomes.

High costs also result when matters not obviously related to the impact of activities on the natural environment are written into plans and weighed into decisions on resource consents.

While the original intent of the Act was to sustain the physical attributes of the natural environment, its scope today has been extended to include the built environment. Consider the definition of environment within the definition RMA as it stands. It includes:

(a) ecosystems and their constituent parts, including people and communities; and
(b) all natural and physical resources; and
(c) amenity values; and
(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

The current definition of amenity values is also all-encompassing and vague: "*those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes*.

And the scope of natural and physical resources is virtually unlimited, covering *land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures.*

The result?

A diffuse statute and complex originally designed to manage the effects of development on the natural environment is now being used to manage – if not distort - social and economic affairs.

And it appears to be lined up for further complication. Hence, the Minister's Technical Advisory Group in 2012 suggested further reducing emphasis on the natural environment and adopting a perspective informed simply by "general principles".

And now the Minister for the Environment wants to introduce urban and housing outcomes into the Act, adding to what has already become a confused mandate for councils and consent authorities. [1]

The statute was simply not designed for these expansions, and practitioners are poorly equipped to implement them. If this all goes ahead we can look forward to more litigation, more debates about interpretation, more delays, and more costs.

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How much tinkering the RMA and the community can handle? Has the departure from principles of environmental management reached the point that the Act is today best done away with?

Time to move on

It is telling that the Government truncated RMA processes for the preparation of Auckland's unitary plan and is circumventing the Act altogether through the Housing Accords it is introducing in various council jurisdictions to advance residential development.

If nothing else, this tells us that the RMA is not working. It is time to move beyond statutory incrementalism.

Having worked extensively under both the TCPA and the RMA, I believe that we need to start over, to disentangle gamekeeper and poacher, and separate environmental guardianship from responsibilities for development.

Given New Zealand's small population and its broad, diverse, and often challenging landscape let's set up an act once more focused on environmental matters and in doing so recognise the international imperatives today for sound environmental stewardship.

Under a new act we could locate the onus for setting and applying standards within a scientifically strong central agency which operates through regional offices. It would focus on measures that manage, preserve, and enhance biodiversity, soils, air and water quality, and coastal environments. The principles of avoiding, remedying or mitigating the effects of settlement, production, distribution, and consumption could be maintained. However, the grounds for intervention would be based on a combination of international protocols and nationally agreed standards, mediated by local physical conditions and subject to rigorous evaluation.

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[1] This initiative may well have hit a road block with as a result of the Northland By-election which appears to have eliminated the National Government's majority in support of the proposed amendment.

Through it environmental envelopes – the bottom lines justified by well-founded or well-argued science-- would be established. Within these envelopes local communities can pursue development, moderated only by the Local Government Act 2002 (LGA).

Under this arrangement a clear line is maintained between protecting environmental assets and advancing local development.

Form follows function

Changing the way things are done requires breaking down institutional inertia. A reorientation of statutes and practices cannot be imposed easily on existing organisations, as we learned in the transition from the TCPA to the RMA.

One option would be for the national environmental agency to absorb the Ministry for the Environment and the current Environmental Protection Authority. It could also absorb the consenting responsibilities of the Department of Conservation which would become more clearly the manager of and advocate for conservation values and the conservation estate.

Given that today's regional councils are generally effective in environmental management, it makes sense to transform them into the regional offices of such an agency. They would develop *regional environmental plans* to implement environmental policies and have delegated authority for implementing them. The knowledge and skills base of regional offices should ensure plan rules consistent with desired national outcomes as well as sensitive to local capacity and conditions. Plan preparation would include local consultation.

Proposed regional environmental plans could be challenged, perhaps before panels comprising independent commissioners and local council representatives. The Environment Court would continue as the final arbiter on matters of substance.

The Office of the Parliamentary Commissioner of the Environment could assume an Ombudsman role. This would counter any potential for any partisan political agenda to over-ride the primary focus of a national agency on the quality of the natural environment.

Managing development

Many matters that councils try to deal with through the RMA may be better dealt with under the Local Government Act. Separating environmental regulation from planning for the built environment could pave the way for significant institutional changes in local government. Territorial boundaries may be modified to reflect communities of interest and not simply physical boundaries. The shape and composition of local boards could be aligned more clearly with the circumstances, values, and needs of local communities.

The LGA already requires councils to provide for the social, economic, cultural, and environmental well-being of communities when they prioritise, plan, and budget their

expenditure. The changes proposed here would exclude councils from controlling matters to do with the natural environment. Instead they would be required to comply with regional environmental plans. However, the local regulation of development may be through *spatial development plans* which map the commitments councils make in long-term community plans.

Changes would also be required of Council Controlled Organisations. Currently, CCO business plans can influence development independently of plans prepared under the RMA. CCOs effectively act as de facto consent authorities when their corporate plans do not provide support for the land uses a council seeks under its district plan.

CCOs would be required to comply with regional environmental plans and a greater onus would be placed on them to implement infrastructure plans agreed with local councils to achieve integrated development planning and achieve efficiencies in development.

In summary

The changes proposed raise issues and opportunities beyond those discussed here. In summary, though, they suggest:

- Consolidated responsibility for environmental regulation in a national agency operating through regional offices, facilitating compliance with international environmental commitments and central policy settings, while accommodating the state of the local environments;
- National policies and standards founded on robust scientific evidence and informing regional environmental plans subject to rigorous evaluation and local consultation;
- Territorial councils bound by regional environmental plans but responsible for community well-being within the development envelope established by them. Councils would focus on ensuring adequate land and infrastructure is available for development in an economically viable and fiscally prudent manner, public services and amenities, and maintaining the quality of the built environment (particularly with reference to efficiency and safety);
- Local boards could influence the built environment in the interests of local communities;
- CCOs accountable for the delivery of the infrastructure required to support spatial development plans.

While these arrangements will reduce local autonomy over environmental matters, the capacity of spatial development plans to provide for social, cultural, and economic needs should be enhanced.

At the same time, the transparency of council plans and council accountability will be raised as their mandate is clarified, conflicts around the environment are externalised, the consistency and quality of environmental regulations are increased, and costs lowered.