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Submission

To the Local Government and Environment Select Committee on the

Resource Legislation Amendment Bill 2015

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1 General comments

The focus of the provisions in the Amendment Bill is on saving time, and saving some people money and not on making robust decisions that promote the sustainable management of natural and physical resources.

There is also a focus on correcting the Act, when in fact it is poor practise in implementing the Act that needs to be addressed and remedied. The Act as it stands could work well if correctly implemented and if the engagement undertaken by council's was more timely and meaningful. The Act does not need to be amended to remedy this, and amending the Act will not address the underlying problem.

The Amendment Bill as proposed contains too much cross referencing, to the point where it is sometimes impossible to understanding the meaning of a section without cross referencing multiple different sections. A significant rewrite is required to ensure that any changes are easy to use, follow and understand. One example of this is the proposed Section 80A:

> ***80A Use of collaborative planning process***
> *(1) This subpart and **Part 4** of Schedule 1 apply if a local authority gives public notice in accordance with **clause 38** of Schedule 1 of its intention to use the collaborative planning process—*
> *(a) to prepare a proposed policy statement or plan, or change a policy statement or plan:*
> *(b) to prepare or change a combined regional and district document under section 80.*
>
> *(2) If this subpart applies,—*
> *(a) clauses 1, **1A(1), 1B**, 20, and 20A of Schedule 1 apply; but*
> *(b) the rest of Part 1 of Schedule 1 does not apply, except to the extent that it is expressly applied by this subpart or **Part 4** of Schedule 1.*

2 Collaborative Planning Approach

Proposed Amendment

The Amendment Bill introduces a "collaborative planning process" as an alternative to the existing First Schedule process for undertaking plan changes.

Our Analysis

The proposed Collaborative Planning Process is not collaborative. A collaborative process is "…where one or more public agencies directly engage non-state stakeholders in a collective decision-making process that is formal, consensus orientated, and deliberative and that aims to make or implement public policy…[1]". Instead, the proposal in the Amendment Bill does not require stakeholders to be involved in collaborative groups, it allows councils to hand-pick a select group to 'represent' the interests, values and investments of the community. The collaborative process as proposed does not enable all individuals and interest groups in the community to meaningfully participate in the planning decisions that affect them and as a result, the "… deliberations of a collaborative forum will be brought into question if relevant parties do not believe they have been effectively represented[2]".

The purpose of the Local Government Act (2002) is "to provide for democratic and effective local government that recognises the diversity of New Zealand communities". Further, the purpose of local government is outlined in s.10 of this Act as being to "…enable democratic local decision-making and action, by and on behalf of, communities…" The public have no right to choose, or input into who will represents them on collaborative groups. Appeal rights are severely curtailed. There are simply not enough safeguards in the proposed collaborative process to ensure local decision-making and public participation on matters, which affect whole communities for generations.

The collaborative group, as proposed, cannot include employees or officers of any local authority within the relevant area. What this restriction means, is that people who are employed by the council are excluded from being part of the collaborative group simply because of who they are employed by. If potential conflicts of interest can be declared and avoided, we do not think there is any need to exclude whole groups of people from participating, simply based on who employs them.

There is no requirement for the collaborative group to ensure its recommendations to council achieve the purpose of the Act, or give effect to higher level planning documents. Instead the minimum requirements for the terms of reference simply refer to the group giving consideration of "how to" give effect to, rather

[1] Page 1 - Review of Collaborative Governance: Factors crucial to the internal workings of the collaborative process for Ministry for the Environment by Marg O'Brien, April 2010.

[2] Page 5 - Review of Collaborative Governance: Factors crucial to the internal workings of the collaborative process for Ministry for the Environment by Marg O'Brien, April 2010.

than actually giving effect to these important national documents.

There is also no ability for the council when preparing the plan change, the review panel when hearing submissions, or the council when making final decisions, to alter or amend the results of the collaborative groups consensus position in order to achieve the purpose of the Act. There is no mention of the purpose of the Act in this report at all. This has the potential to result in the process failing to achieve the sustainable management of natural and physical resources.

The proposed amendment does little to address perceived drivers for change for the Amendment Bill, which, as stated in the Regulatory Impact Statement is the "lack of front-end engagement by councils …". The collaborative group are required to establish a process for seeking the views of the community and to report on how those views were obtained. There is no requirement to report on what the views of the community were, and no requirement to give those views any particular weight or consideration.

This lack of meaningful public participation is of particular concern in how Māori are involved and consulted with during the collaborative plan making process. There appears to be no requirement for the collaborative group to consult specifically with Māori, outside of that required by the iwi participation agreement. The Amendment Bill requires amendment to ensure that all Māori participation in the process is clearly outlined and all advice received is appropriately incorporated into the process.

If the goal of the amendments is to improve engagement, particularly with Māori, then more needs to be done to ensure that public participation and consultation processes chosen by each individual collaborative group results in robust and meaningful public participation.

The report required by the collaborative group again raises concerns with a lack of public participation in the process. The focus of the collaborative group's report is to provide council with the consensus position of the group. There are no requirements for the group to consider alternative options or to complete an analysis of whether the consensus position is the most appropriate way to achieve the purpose of the Act. Despite these failings there is very little opportunity for a council, or the review panel to move away from this consensus position.

Ultimately, the decision making process of the collaborative group lacks public transparency. This, together with the fact there is no opportunity for public challenge of the consensus view, means that there is a high likelihood that the public will feel misrepresented and unheard in the plan change process.

The Amendment Bill should be amended to ensure the collaborative group is required to consider alternative options and to give consideration to achieving the purpose of the Act and giving effect to higher level planning documents. Without this, the plan change and the accompanying s.32 evaluation report required by the council will be near impossible to complete with any confidence or rigour.

A review panel, selected and established by the council, is responsible for hearing submissions. This group must include a member who has an understanding of tikanga Māori and the perspectives of tangata whenua and is appointed after consultation with tangata whenua. This is a critical requirement to ensuring the role of Māori as kaitiaki is appropriately represented in a decision-making capacity.

Appeal rights are severely curtailed in the collaborative plan making process. Appeals on matters of substance can only be made if the council changes the plan in a way that is inconsistent with the recommendation of the review panel. This means that if the council accepts all the recommendations of the review panel there is no substantive right of appeal. Appeals can then only be made on points of law to the High Court. The structure of the decision making process and the huge emphasis placed on the consensus views of the collaborative group means that any person not involved in the collaborative group, whose concerns or interests were not provided for in the collaborative groups consensus report, has no ability to question or seek independent review of those consensus views. This represents a major weakening of meaningful public participation compared to the current regime. This risks outcomes being less durable as people feel disempowered and excluded from decision-making that affects them.

Recommendations

We recommend the proposed amendments be amended to achieve the following:

- Ensure process is focussed on achieving the purpose of the Act, and relevant higher-level documents and not solely on implementing a consensus position of the collaborative group.
- Enable public involvement in the selection of a collaborative group that appropriately represents all stakeholders.
- Enable fair involvement of any member of the public regardless of their employment i.e. enabling participation by council employees where conflicts of interest are declared and can be avoided.
- Removal of the focus on "investments" in the collaborative group. These views are just one aspect of the community and should not be given any additional weight of representation.
- Enable rights of appeal to the Environment Court on all matters that were raised through submissions and further submissions.
- Greater guidance in the Act around the required terms of reference for the collaborative group and requirement to publically notify these terms of reference including greater specificity around "seeking views of the community".
- Clarification over how key stakeholders, particularly those with a legally mandated role, will be represented in the collaborative group i.e. Department of Conservation, Fish and Game, NZTA, Energy companies.
- Clarification over a council's role in addressing matters where the collaborative group have not reached consensus.
- Remove all references to cost benefit analysis, instead referring to the s.32 process.
- Ensure it is the views of affected parties that are sought rather than those within the "relevant area".

- Ensure that the Terms of Reference appropriately consider and are not inconsistent with the contents of any iwi participation arrangement.

3 Streamlined process

Proposed Amendment

The Amendment Bill introduces a new streamlined planning process, as an alternative to the existing First Schedule process, that aims to reduce the time involved in plan development.

The process requires a council to apply to the Minister to use the streamlined planning process and the Minister decides what process will be followed. The Minister is then responsible for approving the policy statement or plan, including through the recommendation of changes. The council must then notify their decision on the plan change and there is no right of appeal under this process.

Our Analysis

Again the driver for this change to the RMA appears to be reducing the time it takes to complete a policy statement or plan. It is not seeking to achieving a robust process where the community is engaged in the process and their views incorporated in decision making, and in our view these important elements may be lost from the plan making process entirely using this streamlined process.

In fact, this process is so 'streamlined' that there is no requirement for an evaluation of options or requirement to ensure that the plan change is the most appropriate way to achieve the purpose of the Act. This becomes an optional "as may be relevant" requirement under the proposed amendment. It is difficult to understand how the community can be assured that a robust and considered approach has been followed, where there is no requirement for any of the decision making by the local authority to be documented.

An opportunity for public submissions is required by the proposed process, however, there is no requirement for a summary of submissions to be published nor is there an opportunity for a further submission process. This means that people who may be materially affected by another persons submission, should it be adopted, may not have the right to be involved in the process.

Overall, the actual process that will be followed under the streamlined approach is very unclear, This ambiguity is acknowledged in Para. 169 of the regulatory impact statement, which outlines the potential uncertainty associated with the process given that it will be determined on a case-by-case basis by the Minister.

Our concerns with this approach are that this process could be used to make changes to plans and policy statements without robust and thorough public participation opportunities.

The absence of public participation is compounded by the fact that there is no guarantee that the council will hold a hearing and that there are no rights of appeal on the final decision. The Minister has the power to determine their expectations for the policy statement or plan change and in effect, define the outcome as well as the process. We have significant concern that this process goes against the purpose of local government to "…enable democratic local decision-making and action, by and on behalf of, communities…" and that democratic decision-making is significantly undermined.

The qualifying criteria to use the streamlined process are so broad that virtually any plan or policy statement process will qualify to be considered under the streamlined process.

Any planning instrument that combines multiple policy statements and plans would meet the qualifying criteria. Not only do these documents address a broad range of planning matters, they can affect people at both a regional and district scale. The use of a streamlined process when addressing matters of widespread importance and affecting large numbers of people is disrespectful to the views of the community and is likely to result in distrust and scepticism of both the council and the process.

Recommendations

We recommend the proposed amendments be amended to achieve the following:

- Ensure the focus of the process is on public participation and robust decision-making rather than speed.
- Strengthening the criteria for qualifying for the streamlined process.
- Require public notification of submissions and enable a further submission process.
- Require public hearings on submissions.
- Remove references to cost benefit analysis and ensure s.32 analysis is completed including by the Minister in his/her final decision.
- Ensure notice of decision is served on all submitters not solely to landowners and occupiers.
- Enable appeal rights on matters raised through submissions and further submissions.
- Provide greater certainty of the streamlined process – it is currently left to the Minister to decide the majority of the process on a case-by-case basis.

4 Iwi Participation

Proposed Amendment

The Amendment Bill introduces a requirement for councils to invite iwi to form an iwi participation arrangement. The arrangement will detail how the council and iwi authorities will work together through the planning process and also the way in which the parties will give effect to Treaty settlement legislation.

Amendments are also proposed to s.32 analysis requirements and the appointment of commissioners for hearings.

Our Analysis

Promises vs. Reality

According to the Regulatory Impact Statement, the introduction of iwi participation arrangements promises greater legislative weight on councils' collaborative processes with iwi. It purports to encourage high value participation and iwi engagement in resource management processes, leading to more robust and durable planning decisions. However, the reality appears to be quite different.

Clause 3B of the First Schedule already makes specific provision for consultation with iwi authorities. What the amendment requires is that the consultation approach will be agreed between the parties, which is to be commended, but because of the existing provisions, the real gains offered by the new iwi participation agreement process are very minor. In fact the iwi participation agreement does not have to address all of the requirements of the existing provisions.

The Amendment Bill focuses Māori participation at iwi authorities. While this engages with Māori at a regional level, it overlooks greater participation by Māori generally. While the proposed changes enable some iwi extra ability to comment on plans, other organisations representing the interests of Māori, such as marae or hapu organisations have their ability to participate in and comment on planning processes severely curtailed in some of the 'alternative' plan making processes. In both the proposed new collaborative plan making process and the streamlined plan making process Māori have the same rights as the general public, which, as discussed in earlier sections of this submission, is severely curtailed by the proposed new processes, and rights of appeal are limited or removed entirely. The changes proposed through the Amendment Bill need to ensure that all Māori views can be represented in decision-making processes – not just those of iwi authorities.

The processes prescribed in the amendment Bill for preparing iwi participation arrangements need considerable amendment. There is no requirement for councils to wait for an iwi participation agreement to be prepared before carrying on their plan making processes – a council can simply carry on preparing or changing a policy statement or plan. This 'carry on' approach potentially sees iwi shut out of the process before it has even begun. It is recommended that the Amendment Bill be altered to require that where an iwi participation arrangement cannot be finalised between the parties, any new plan making process must be put on hold and that the process outlined in s58O (which outlines ministerial input), must be followed before the council can pursue its policy statement or plan development or change.

The content of an iwi participation arrangement restricts iwi to the identification of resource management issues of concern to them. Iwi have much more to offer in a resource management space than the identification of resource management issues and the Amendment Bill should be amended to reflect this.

There is no requirement in an iwi participation arrangement to recognise matters of national importance under s.6. In particular, there is no reference to the relationship of Māori and their culture and

traditions with their ancestral lands, water, sites and wāhi tapu and how this will be recognised and provided for.

New Clause 58N of the Amendment Bill details "concluding" an iwi participation arrangement within 6 months of the date of acceptance of the invitation or another period agreed by the parties. The use of the terms "concluding" and "conclude" are unclear and could be interpreted as being the cessation of the negotiation. It is therefore recommended that the word "finalising" and "finalise" be used instead in 58N and 58O to clarify that these provisions relate to finalising an arrangement and not ceasing the arrangement.

The Amendment Bill proposes to amend s.32 by including a new section 4(A)) which requires that councils must summarise in their evaluation reports the advice received from iwi authorities, a response to the advice, and any provisions that are intended to give effect to the advice. What the Amendment Bill should be requiring is that the advice from iwi be considered in a meaningful way, and incorporated in the s.32 report along with any other reasonably practicable options alternatives and given a full and complete assessment.

The Amendment Bill proposed to amend s.34A and require that if a local authority is considering appointing 1 or more hearings commissioners to exercise delegated power to conduct a hearing under Part 1, Schedule 1 the council is required to consult with tangata whenua through iwi authorities to determine whether it is appropriate to appoint a commissioner with an understanding of tikanga Māori AND of the perspectives of local iwi or hapū.

Appointing a commissioner with an understanding of tikanga Māori and of the perspectives of local iwi or hapū has significant benefits to Māori in achieving their role as kaitiaki. However, the potential shortcoming with this approach is that it is up to the discretion of the council whether or not to appoint such a commissioner. There needs to be some guidance about when a Māori commissioner is appropriate, and when it would be appropriate to go against the recommendation of iwi. It would also be useful for local government if they could do this consultation once for a cluster of plan changes, and come up with an agreement on when it is appropriate and when it is not for a group of plan changes.

Recommendations

We recommend the proposed amendments be amended to achieve the following:

- Consultation with Māori is not limited to engagement with iwi authorities.
- Councils need more than 30 working days post election to initiate invitations for iwi participation arrangements.
- Reconsideration of the ability for councils to a carry on with the policy statement or plan development, review or change while it awaiting response to an iwi participation arrangement invitation or in negotiation on the contents of the iwi participation arrangement.
- Ensure the content of an iwi participation arrangement addresses the matter of national importance identified in s.6(e) i.e. how the relationship of Māori and their culture and traditions

with their ancestral lands, water, sites and waahi tapu will be recognised and provided for in the iwi participation arrangement.

- Clarify how the iwi participation arrangement applies to private plan change requests.
- Ensure that the terms of reference for the collaborative planning process appropriately consider and are not inconsistent with the contents of any iwi participation arrangement.
- Clarify the requirement under Schedule 1, Clause 4A where the council is required to have particular regard to any advice received from iwi authorities. At what point(s) in the process is this intended to cover? Iwi advice should be considered and given effect to throughout the process.
- Greater certainty for iwi around the resolution of disputes in finalising an iwi participation arrangement.

5 Strike-out of submissions

Proposed Amendment

The Amendment Bill requires a council to strike-out certain submissions. This applies to all, resource consent hearings and the strikeout could occur before, at or after the hearing.

In addition to the current ability of council to strike out submissions which are frivolous or vexatious, no reasonable or relevant case or would be an abuse of the hearing process to allow the submission or the part to be taken further, the Amendment Bill requires a council to strike-out submissions on resources consents, where at least one of the following applies:

> "(i) it does not have a sufficient factual basis:
>
> (ii) it is not supported by any evidence:
>
> (iii) it is supported only by evidence that purports to be independent expert evidence on a matter but that is prepared by a person who is not independent or who does not have sufficient specialised knowledge or skill to give expert evidence on the matter:
>
> (iv) it is unrelated to an activity's actual or likely adverse effects, if those effects were the reason for notifying the application or review; and
>
> (c) the authority considers that the direction would not materially compromise the authority's ability to fulfil its obligations under Part 2."

Our Analysis

The provisions that require councils to strikeout submissions has significant implications for public participation in resource management decisions. The changes will mean an end to submissions by lay people and an end to the ability for the general public to either support or oppose an application that affects them, unless they can afford to hire experts to provide expert evidence on

their behalf. This means that an important element of public access to decision-making that affects them will be lost.

A particular example comes to mind when considering the implications of the proposed amendment. A new wind farm resource consent application that we have been involved with proposed a construction spanning a 5-10 year period. Local residents are concerned with the effects identified in the application, particularly those in relation to traffic movements. The proposed route for construction of the wind farm goes straight through their village, and past the local school.

A group of locals got together and made a submission to the Council on the proposal. Their concern was based on the effects identified in the application by the applicant's experts. Their submission was hugely influential in persuading both the applicant and the hearing commissioners that alternatives needed to be considered.

Under the proposal in the Amendment Bill, this group's submission would be struck out because the community group could not afford to spend tens of thousands of dollars on noise and traffic experts to raise the very matters at the hearing.

It is not clear what the problem is that the striking out of submissions is actually trying to fix. The most recently available statistics on the MfE website[3] indicate that of the 34,055 resource consents processed in 2012/13, 3% of these consents were fully notified and 2% were limited notified. This is a total of only 1700 applications that received some form of public notification.

Clarification is also required around the terminology used in the Amendment Bill in relation to the striking out of submissions. It is not clear what is intended by "sufficient factual basis". This term is ambiguous and again there is the possibility of applicants using this ambiguity to pressure the council into striking out submissions.

The changes proposed through the Amendment Bill, to s.95A-D relating to the notification of applications, requires that any publically notified application contain detail in the public notice of the adverse effects that the consent authority consider to be more than minor (under s.95D).

Submissions are limited, under 41D(iv), to the extent of adverse effects the consent authority identifies as more than minor. This will prevent any submission on effects of a proposal that are not more than minor, or any effects that the consent authority have not considered, raising significant concerns for the robustness of the submission process.

The decision to strikeout a submission can occur before, during or after a hearing. If a submission is struck out prior to the hearing and a challenge is mounted, the process needs to enable any challenge to be resolved prior to a hearing taking place. Without this, there is a risk that a strikeout decision could be overturned, but that the submitter misses the opportunity to participate in the hearing based on the earlier strikeout decision.

[3] http://www.mfe.govt.nz/sites/default/files/media/RMA/rma-survey-2012-2013.pdf

Recommendations

We recommend that the requirement to strike out submissions on resource consents as proposed in the Amendment Bill be deleted.

Alternatively, if the requirement to strike out submissions is to remain, then we recommend the proposed amendments be amended to achieve the following:

- Clarification of the statement "sufficient factual basis" is required to ensure that councils have better guidance on when a submission must be struck out.
- Reconsideration of the limitations on submissions under 41D(iv) to those matters that are considered by the local authority to be more than minor given the implications.
- The ability to appeal a decision to strike out a submission is reinstated.

6 Natural Hazards

Proposed Amendment

The Amendment Bill proposes to include "the management of significant risks from natural hazards" as an additional matter of national importance under s.6. It also proposes to amend s.65 by replacing "any threat from natural hazards" with "any risks from natural hazards".

Our Analysis

At present, sections 30 and 31 of the Act direct regional and territorial authorities to manage activities and their effects in order to avoid or mitigate natural hazards. The purpose of the Act includes reference to enabling people to provide for their health and safety, as well as the protection of physical resources. The approach most councils take to fulfilling these obligations to avoid or mitigate natural hazards is to firstly evaluate the risk of respective hazards and then determine the appropriate management response. Generally speaking, the higher the risk, the more likely councils are to adopt an avoidance approach. Conversely, where the risk is lower, a mitigation response is often adopted.

In practice, risk is a 'gauge' to guide a management response. The management response is to avoid or mitigate a natural hazard, with the degree of mitigation reducing as the risk reduces.

The proposal to introduce the concept of 'management' of 'significant risk' into s.6 of the Act changes the focus of councils response to natural hazards from one of managing activities and their effects, to managing significant risks from the natural hazards. While this may seem subtle, it is an important shift, from controlling our activities in order to avoid or mitigate any risk, to a focus on controlling the natural hazard risk. It may mean a move away from simply 'keeping people out of the way of hazards' to also 'keeping hazards away from people'.

Keeping people away from natural hazards risk is an important role of local government and should be continued, encouraged and supported. However we believe this role is adequately set out and provided for in the Act without amendment. The main barrier councils face in managing risk is actually identifying where it is. Making more hazard information available and facilitating research in this area will make it easier for local government to do their job more effectively.

Natural hazards include drought, flood and earthquakes (amongst other things). 'Keeping hazards away from people' can have some important implications when we consider flood and drought in particular. One way to 'manage the significant risk from' drought, is to build large scale water storage dams. One way to 'manage the significant risk from' flooding is to change the course of a river. These types of proposal would be considered in the context of being a matter of national importance, which must be recognised and provided for. These examples also put this new matter of national importance in direct conflict with other matters of national importance, such as the natural character of rivers, the protection of habitat of native species and the relationship of maori with their ancestral waters.

This conflict between matters of national importance rarely occurs with the current wording of the Act. The proposed amendment introduces a 'pro-development' aspect into s.6 that is not currently present. Management of natural hazard risk can involve significant modification to natural systems and processes in order to avoid or mitigate effects on existing and new development.

In our opinion, if it is considered necessary to elevate the matter of natural hazards into Part 2 of the Act, it would be more appropriate to do this using the wording currently used in the Act about managing effects of activities to avoid or mitigate natural hazards. It would also be more appropriate to place it in Section 7, along side effects of climate change.

Recommendation

We recommend the proposed amendments be rejected, in particular:

- Do not amend s.6 to include reference to natural hazards.
- If the management of natural hazards is to be elevated by specific reference into Part 2, it should sit in s.7 as an 'other matter' and should use the current terminology in the Act: 'the avoidance and mitigation of natural hazards'.
- Do not amend s.65 to replace the term 'threat' with the term 'risk'.

7 Hazardous substances

Proposed Amendment

The RMA Amendment Bill intends to remove the explicit function of regional councils and territorial authorities to manage hazardous substances, provided under section 30 and 31 of the Act. The changes are intended to remove duplication between the RMA and the Hazardous Substances and New Organisms Act 1996.

Our Analysis

The proposed amendments will significantly undermine a council's ability to meet its other obligations under sections 30 and 31 of the Act, and under Part 2 of the Act. A community's ability to determine how land uses manage the storage, use, disposal, or transportation of hazardous substances, to ensure the purpose of the Act is achieved, will be significantly eroded.

Councils already need to consider the role of the HSNO Act when examining how hazards relating to land use and hazardous substances are to be dealt with in district plans. This consideration is

triggered by Section 142 of the HSNO Act, which provides that RMA instruments can only include more stringent requirements than HSNO when they are considered 'necessary' for the purposes of the RMA. Where the HSNO requirements are sufficient to meet the purposes of the RMA that test will not be met. In the event that councils do consider it necessary for the purposes of the RMA to include more stringent controls in Plans, those controls must be justified in terms of an evaluation under s32 of the Act. The current process provides a robust, publically accountable means of assessing the appropriateness of additional controls, which is open to the Ministry for the Environment, the Environmental Protection Agency (EPA) and WorkSafe New Zealand as well as industry and communities.

The removal of s30 & 31 will lead to a legislative vacuum in the control of land use for the storage, disposal, use and transportation of hazardous substances, greater uncertainty for industry, communities and councils, and an increased risk of adverse environmental effects arising from hazardous substances.

The HSNO Act is not designed to control land use for the storage, use, disposal, or transportation of hazardous substances. The EPA and WorkSafe New Zealand do not have responsibility for controlling land use relating to hazardous substances. Therefore, the amendments will result in considerable confusion and uncertainty regarding which authority is responsible for the control of land use in respect of hazardous substances, and how this will be achieved.

Amending s30 and 31 as suggested will have the effect of removing councils' ability to manage a range of potentially adverse effects associated with the use and development of land for storage, use, disposal, or transportation of hazardous substances that are not adequately managed by the HSNO Act. These include:

- Managing potential effects on sensitive activities. Sensitive activities can include residential activities, education or health facilities, assisted living facilities, and community facilities. The inappropriate location or design of a hazardous facility in proximity to sensitive activities can undermine a councils ability to discharge its other responsibilities under the Act, namely to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district, and the provisions of Part 2 of the Act.

- Reverse sensitivity issues. Reverse sensitivity can occur where more sensitive receiving activities (such as those described above) are allowed to locate next to hazardous facilities. We acknowledge that HSNO regulations seek to ensure that adverse environmental effects associated with the use, storage or transportation of hazardous substances in a facility are contained within the site. However, where there are residual off-site risks of hazardous facilities, councils need to be able to determine whether these

are significant enough to raise doubt about the appropriateness of more sensitive land use activities being located in the vicinity.

- Managing potential effects on sensitive natural environments. HSNO is generic, with the controls imposed under this regime regarding clearance distances, for example, applying regardless of where that substance is stored and used. Whilst we accept that this provides an acceptable level of safety in most circumstances, for particularly sensitive land-uses, council may consider it appropriate to include additional controls through the district plan. This approach could be warranted in areas located over an unconfined aquifer or in close proximity to a particularly sensitive wetland, or setback requirements from open rivers and streams. The erosion of the council's ability in this regard would seriously undermine its ability to discharge its other responsibilities under Part 2 of the Act or other aspects of s31.

- Managing potential effects of substances that are not controlled by HSNO. The definition of hazardous substance includes, but is not limited to, any substance defined in the HSNO Act as a hazardous substance. Therefore, under the RMA hazardous substances can include a wider range of hazardous substances and properties than under the HSNO Act. For example, a local authority could define environmentally damaging substances, which are not classified as toxic or eco-toxic under HSNO as hazardous substances under the RMA, provided they had justification for this. The proposed amendments to the RMA appear to erode a council's ability to implement this measure, where it is deemed appropriate, and therefore undermines a council's ability to discharge its wider responsibilities under the Act.

- The risk to public safety from natural hazards that could affect hazardous facilities. Under s.31(1)(b)(i), territorial authorities are charged with the responsibility of controlling any actual or potential effects of the use, development, or protection of land, for the purpose of the avoidance or mitigation of natural hazards, such as flooding or earthquakes. Removing a councils ability to scrutinize and control the location and design of facilities storing, using, disposing or transporting hazardous substance in areas actually or potentially affected by natural hazards could lead to considerable adverse consequences for human health and the environment.

- Managing cumulative effects from multiple facilities. Cumulative effects could include cumulative ecological effects or wastewater or stormwater effects, or the interference between effects generated by two or more facilities using, disposing, transporting or storing hazardous substances. The proposed amendments could result in territorial authorities being unable to assess the potential and actual cumulative environment effects of facilities storing, disposing, using or transporting hazardous substances, or considering them within the wider land use context.

Recommendations

We recommend the proposed amendments be rejected and the following alternative approach be considered:

- That sections 30 and 31 of the Act, which give councils the authority to control the actual and potential effects of the use of development of land for the storage, use, disposal or transportation of hazardous substances, be retained for instances where it can be demonstrated there are no overlaps with the HSNO regulations.
- That best practice examples of where councils can effectively manage hazardous substances under the RMA are developed and shared with planning practitioners.
- The roles and responsibilities of the EPA, WorkSafe New Zealand and local authorities in the administration of the HSNO Act are clarified, including how it is to be monitored and enforced and by which agency.

8 Minor Rule Breaches

Proposed Amendment

The Amendment Bill proposes to introduce new sections 87BA and 87BB that provide that activities that the district or regional plan states requires resource consent for are actually permitted activities where:

- the activity is an encroachment on boundary setbacks and approval is received from affected neighbours; or
- Activities with marginal or temporary non-compliance; and
- Adverse effects of the activity are no different in character, intensity or scale than they would be in absence of marginal or temporary non-compliance; and
- Adverse effects on a person that are less than minor

Our Analysis

Regional and district plans provide specific guidance to council officers on the level of development that triggers the need for assessment through the resource consent process. There is significant public participation in the process for developing these Plans through the current First Schedule process. Options considered are well documented and the decisions and final documents are readily publically available.

The apparent need for this amendment, outlined in the Regulatory Impact Statement, is due to applications that would be "very nearly permitted", situations where effects are considered to be very minor in nature or where an affected neighbour has provided written approval to a boundary infringement. The Regulatory Impact Statement suggests that the costs faced by the applicant are "not proportionate to the proposal".

There are two classes of activity proposed in the amendment as permitted activities, those relating to boundary activities, and those relating to marginal or temporary non-compliances.

While on the face of it, a boundary infringement may appear to be a simple non-compliance, it overlooks the fact that district plans can utilise tools such as boundary setbacks to ensure that other adverse effects are appropriately managed.

One example that highlights the difficulties with this approach is where an applicant proposes to extend an existing deck that encroaches the boundary setback to more than one boundary. An applicant may obtain neighbour's approval for multiple boundary non-compliances and under the amendment, be considered as a permitted activity. What this fails to consider however, is that the increase in deck size also results in the impermeable surfaces on the site being increased. The additional minor increase in impermeable surfaces may have important cumulative effects on stormwater management, when considered alongside other similar proposals in the same catchment. The implications on the stormwater network of these seemingly 'minor' activities on the council's capacity to manage stormwater runoff could be significant.

Clarification is needed over what will be captured as "marginal or temporary" non-compliance. There is no guidance provided to qualify a marginal non-compliance and there is no certainty for applicants, the general public or the council over what is anticipated. This will undermine the integrity of the regional or district plan and has no regard to the potential for cumulative effects to arise from multiple "marginal" non-compliances. There is a possibility that as a result of this amendment, councils will be over cautious in their plan making to allow for the fact that a level of non-compliance is anticipated in the Act through this introduction of this amendment.

'Effect' is defined in s.3 of the Act to include any temporary effect. The proposed amendment implies that temporary effects are effects that can be disregarded. This brings into question how the purpose of the Act and in particular, the requirement to avoid, remedy or mitigate adverse effects of activities on the environment, will be achieved.

There is also no guidance on when an effect is indeed temporary and the Amendment Bill overlooks the fact that cumulative effects can arise from temporary effects occurring over time.

It is also difficult to understand a situation where a new activity would qualify as a permitted activity under proposed 87BB(b) where "any adverse environmental effects of the activity are no different in character, intensity or scale than they would be in the absence of the marginal or temporary non-compliance…" How could a building be considered to have the same scale, with or without the "marginal" height non-compliance? How can a water take be considered to be the same intensity or scale, when they are taking a "marginal" 1000l per day over their allocation? And how can this be disregarded without any consideration of the cumulative effects of multiple "marginal" non-compliances.

In order for a council to determine whether an application can qualify as a permitted activity requires a significant level of assessment. The level of information an applicant would need to submit to the council in order for the council to make this determination is the same level of information that would be required with a resource consent application. It is therefore unlikely that this process would result in any less work for applicants than applying for a resource consent itself. To ensure a robust process is followed, an officer will still be required, under 87BB(3) to create a written record that documented the permitted activity decision, and an applicant is likely to require confirmation, in writing, from the council of this decision. It is difficult to identify how this process is any different to the current requirements for considering an application for a controlled activity, which a council must grant.

The documentation of the decision making process will be particularly critical in future in the determining existing use rights under s.10.

Para. 229 of the Regulatory Impact Statement identifies that there are likely to be concerns from councils around charging and cost recovery if an exemption is granted, with the risk being that the cost needs to be subsidised by ratepayers.

> ***The Regulatory Impact Statement suggests that consent authorities increase fees for other consents to cover their costs for assessing minor rule breaches that are considered to be permitted activities. This means the people who do need consent will pay even more for the privilege.***

Para. 231 of the Regulatory Impact Statement (RIS) identifies a concern with the integrity of this amendment being undermined by councils who choose not to exercise the powers under it. The significant liability for councils by adopting this approach and the potential for challenge seems to have been overlooked in the RIS. In addition, there seems to be no mention of the potential for the integrity of the relevant planning document i.e. the district plan or regional plan to be questioned and the robustness of the plans themselves being undermined.

Para. 230 of the Regulatory Impact Statement acknowledges the risks associated with permitting technical or minor breaches and the potential for this to lead to a creep of effects and also the potential for cumulative effects and impacts on the permitted baseline. These are very real concerns with this proposed amendment and have the potential to have serious implications on the integrity of the guiding planning document.

There are other options available to councils rather than simply exempting an application from the resource consent process. These include the council initiating a fast-tracked process where reduced processing fees are charged, given the reduced work required. This allows for the minor nature of the application to be address while ensuring the integrity of the Plan. This option is likely to require no extra work from a council than the proposed permitted activity method would.

Recommendations

We recommend that the proposed amendment be rejected.

9 Limited notification of proposals/plans

Proposed Amendment

The Amendment Bill introduces the opportunity for limited notification of a proposed change to a policy statement or plan.

Our Analysis

We acknowledge there may be instances where a district council undertakes a relatively confined change to its district plan, such as the zoning change to a piece of land, where the scope of effects can be limited. This means the identification of affected parties will be relatively straightforward. However, we consider it is highly unlikely that any matters of a regional nature, including those in a regional policy statement or regional plan, can be notified in a limited basis given their region-wide significance.

We consider that the most appropriate use for these provisions is privately initiated plan change. These are usually refined in their physical extent and scope (such as a spot re-zoning of an urban site) where directly affected parties could be most easily identified. However it is not clear how the proposed provisions would apply to those types of plan changes and clarification is required.

Limited notification means that only those parties considered affected are able to make submissions. This also limits the ability of the community to make further submissions.

The further submission process is limited to those identified by the council, originally, as directly affected by the proposal. This does not take into account a situation where an original submission widens the scope or effect of the plan change, to the extent where it may affect parties not already identified.

An example of where limited notification of a plan change could result in issues through this approach is where rezoning is proposed for a site in a rural area to allow for industrial activities. The industrial activity will involve a significant increase in heavy traffic 24hrs a day. The transport route identified within the proposal leads to the limited notification of parties along that proposed route. Some of those residents made submissions, requesting that an alternative route should instead be taken. The residents of this proposed new route are not already identified under the limited notification process as potentially affected, and therefore have no ability to become party to the proposal, even by way of further submission.

It would therefore be more appropriate to allow for a fully public further submission process to enable all parties who may be affected by submissions on the proposal to be involved in the process.

Recommendation

We recommend that the proposed amendment be rejected until the concerns identified in our analysis can be addressed.

10 Right to appeal

Proposed Amendment

The Amendment Bill proposes to limit the right to appeal decision on resource consents.

Our Analysis

The Amendment Bill again proposes to limit public participation in the planning process. Not only are the matters on which submissions can be made on a resource consent limited (as discussed above), but the appeal rights on decisions made by the consent authority are also limited.

The Amendment Bill prevents appeals being lodged in certain situations including:

- a decision relating to an activity which only requires a resource consent because of rules relating to the location or dimensions of a structure in relation to a boundary
- a decision on a subdivision processed as any activity status except non-complying
- a residential activity i.e. associated with the constriction, alteration, or use of a dwellinghouse on land for residential use that occurs on a single allotment and is any activity status except non-complying.

It is not clear why the limitations on rights of appeal have been introduced. They imply that the decisions of the consent authority on these matters are more robust than decisions on other matters. Those wishing to challenge these decisions would be required to undertake a judicial review.

Recommendation

We recommend that the proposed amendment be rejected until the concerns identified in our analysis can be addressed.

11 Perception Planning – About Us

Perception Planning Limited is a dynamic firm of planning professionals providing specialist resource management and planning consultancy services. We combine high level planning skills, knowledge and expertise with commercial know-how and strategic thinking to deliver focused advice and practical solutions for government organisations, businesses and individuals.

Perception Planning Limited is not just interested in delivering solutions to today's planning issues. As planning professionals in a rapidly changing world, we are constantly engaged in evaluating and contributing to best practice, exploring developments in planning practice in New Zealand and internationally, and contributing to the key debates in planning and related disciplines.

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