

Integrating sustainability into water and soil conservation – the New Zealand model*

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1. Abstract

Over the last three decades ‘sustainability’ and the ‘precautionary principle’ have become internationally accepted “grundnorms”, or guiding principles, in human interaction with the natural environment.

In 1991 New Zealand incorporated the principle of “sustainable management” as the statutory purpose of the Resource Management Act 1991 (“RMA”). The precautionary approach is arguably implicit in this regime.

The RMA provides for an “ecological bottom line” within the “sustainable management” purpose, addressing the issues of inter-generational equity, environmental protection, and ecological integrity.

It also provides a comprehensive policy-making and planning regime, and an integrated consenting and enforcement regime incorporating a specialist “Environment Court”. All policy-making, planning and decision-making functions are required to be undertaken in a manner that promotes the central purpose of sustainability.

In terms of water and soil conservation, these principles are taken into account in the preparation of formal policy documents and planning instruments governing land and water use, and in decision-making on consent applications for specific water and soil uses.

2. Introduction

Geologically New Zealand is a relatively young country born of active tectonic movement in the subduction zone where the Pacific plate is forced beneath the Indo-Australian plate. Along with faulting and folding, glacial scouring and volcanic activity, this process has created a physically diverse country of high mountains, swiftly flowing rivers, heavily indented coastal topography, and highly mixed geology: Statistics New Zealand (2008). Add to this a relatively high rainfall, a reduction of natural vegetation cover from 80% pre-human settlement to less than 25% today, intensive agricultural development, and pockets of intensive industrial development, and you have a number of water and soil problem areas such as:

A brief summary of the main issues in New Zealand is useful to put the legal and policy responses in context. The following particular problem areas have been identified:

- Erosion, including surface, mass movement, fluvial and stream bank erosion;
- Loss of carbon and organic matter;
- Compaction and loss of soil structure;
- Nutrient depletion;
- Soil acidification; and
- Chemical contamination from industry and agriculture.

See: Ministry for the Environment (1996, 2007); Memon & Perkins (2000).

Early regulatory responses included forest management legislation (eg, the Forests Acts of 1874, 1885, 1908, 1921 & 1949), water and soil conservation legislation (eg, the Soil Conservation and Rivers Control Act 1941; Water and Soil Conservation Act 1967), land and reserves legislation (eg, Public Reserves Act 1881; Land Acts of 1877, 1885, 1924 & 1948; National Parks Act 1980; Reserves Act 1977), and town planning legislation (eg, Town and Country Planning Acts of 1953 and 1977).

In recent years New Zealand has attempted to create a policy and regulatory structure that reflects the complexity of environmental interactions in the broader context of land, air and water use. This has included reform of:

- administrative structures,

* A fuller version of this paper is available from the principal author (above).

- policy-making and planning,
- legislation and regulation,
- processes of participation and decision-making, and
- operational implementation including environmental monitoring, impact assessment and enforcement of actions and responsibilities.

3. 'Integrated Environmental Management' in New Zealand and the RMA

a. *Administrative governance reforms 1986-89*

The management of water and soil has long been regarded as a matter of national importance to central government, and the operational management of such resources the province of regional and local government. The following administrative reforms took place in the late 1980s – early 1990s:

- Establishment of a "Ministry for the Environment" under the Environment Act 1986;
- Creation of the Office of the Parliamentary Commissioner for the Environment (or "Environmental Ombudsman") under the same Act;
- Establishment of a Department of Conservation under the Conservation Act 1987 to manage New Zealand's 'conservation estate' (approximately 33% of New Zealand's total area); and
- Local government reform with the rationalisation and restructuring of regional government and municipal authorities.

b. *Environmental management law and policy reforms 1988-91*

In the late 1980s and early 1990s the government, through the newly created Ministry for the Environment, proceeded to develop and implement a range of new policies and legislation. Underlying these environmental reforms was the desire to incorporate the normative principle of "sustainability" under a single integrated system of resource management: see Grinlinton (2002), and Nolan et al (2004).

The Resource Management Act 1991 ("RMA") was central to the reforms. It attempted to integrate into one statute the law relating to the management of land, air and water and replaced over 50 other Acts dealing with these matters. The overriding thrust of the legislation is to provide for integrated resource management, to ensure that decisions made in respect of particular environmental issues are not made without regard to consequences in respect of other issues.

4. The Resource Management Act 1991

a. *The purpose and core principles of the RMA*

The RMA has as its central purpose " ... the sustainable management of natural and physical resources" (s 5(1)). "Sustainable management" is defined in section 5(2) as:

"managing 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 wellbeing and for their health and safety;

while—

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

All functions and decision-making carried out under the Act must be guided by this purpose, and must actively promote it. The "sustainable management" purpose is possibly unique in domestic legislation, and has given rise to some difficulties in interpretation. The balance between the "management purpose" of providing for the wellbeing of communities appears to be qualified by so-called ecological "bottom lines" in s 5(2)(a)-(c). However, the courts have taken the view that the words should be given a wide meaning of purpose and principles, rather than strictly subjugating the "management purpose" to the ecological "bottom lines": see *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 at 86, per Grieg J .

The RMA also includes a number of other “supplementary” purposes to guide policy and decision-makers. Many of these have direct relevance to water and soil conservation. For example, matters in s 6, RMA, include preservation of the coastal environment, wetlands lakes and rivers, and their margins, outstanding landscapes, and indigenous flora and fauna. Matters in s 7, RMA, include the efficient use and development of natural and physical resources, the intrinsic values of ecosystems, and maintenance and enhancement of environmental quality.

b. The policy and planning structure under the RMA

The RMA creates a vertically and horizontally integrated structure for environmental management. It provides for central government policies, regional government policies and planning instruments, and territorial (city/municipal) level planning instruments. Each level of government has differing, but sometimes overlapping resource management responsibilities. Vertical integration is achieved by the requirement that lower level plans and policies must “give effect to” higher level policies and plans (RMA, ss s 67(2), (3), 75(3)).

Lateral integration by the requirement to consult with neighbouring councils, central government agencies, some NGOs and other interest groups when preparing such instruments.

c. National level policies, standards and orders

Under the Act central government may promulgate “National Policy Statements” (NPSs) and “National Environmental Standards” (NESs) pertaining to various aspects of environmental protection and natural resource management. There are as yet no NPSs or NESs specifically on water or soil conservation produced under the RMA. This is something of a failing of the RMA system. There are, however, a number of other statements and documents that provide guidance to regional councils and others.

“Water Conservation Orders” (WCOs) may also be made under the RMA (RMA, s 214). The purpose of a WCO is to provide for the preservation as far as possible in its natural state of any water body that is considered to be outstanding, and to protect habitat. Very few WCOs have been made, with opposition mainly coming from public bodies responsible for electric power generation, which prefer the waters remain available for dams, or other utilization.

d. Regional and territorial (municipal) level policy and planning

Strategic planning and operational management of land air and water resources is largely devolved to regional councils and “territorial” authorities (city & district/municipal councils): see Palmer (1993). In particular, regional councils now have primary responsibility for managing water use and discharges into water, and uses of land that have regional significance. This includes soil conservation and erosion control measures. Under s 30(1)(a) of the RMA, Regional Councils are required to establish and implement measures to achieve “integrated management of the natural and physical resources” of their region. Section 30(1)(c) specifically mandates them to “control ... the use of land for the purpose of ... soil conservation”.

Before preparing a proposed plan or any rules in a change or review of a plan, the Regional Council must consider alternatives, benefits and costs. Specifically it must carry out an evaluation which takes into account the “risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods” (RMA, s 32(4)(b)). This procedural step endorses a precautionary approach in dealing with land management issues.

Quite specific soil conservation measures are possible at the regional level, including rules on the cultivation of soil for commercial crop production, associated management of surface water and discharge of sediments and contaminants onto land or into water from agricultural or industrial activities: see, eg, Auckland Regional Council (1994) and (2001).

Another function of regional councils is to prepare “Water Allocation Plans” in relation to the taking or use or other allocation of water in significant waterways (RMA, s 30). In practice, however, these powers have not been significantly implemented. Partly this is due to the continuation of existing irrigation schemes, and authorised activities preceding the 1991 Act. For example, many of the major hydro power stations on rivers were established at earlier dates. These existing use rights are protected under the RMA and recognised by the Courts: see, eg, *See Aoraki Water Trust v Meridian Energy Ltd* [2005] NZRMA 251.

Where a Regional Council fails to prepare a Water Allocation Plan, the Minister has a recently acquired power of direction to require this planning to be undertaken (RMA, s 25A).

Where climatic conditions create a serious temporary shortage of water, a regional council also has the power to issue a “Water Shortage Direction”. The Direction can restrict or suspend for periods of up to 14 days the taking, use, damming or diversion of water, or the discharge of any contaminant into water (RMA, s 329).

e. *Territorial (municipal) authorities*

District and city councils have primary responsibility for land use and subdivision, air use and discharges of localised significance.

f. *Coastal management*

Coastal management policy is primarily the responsibility of central government through the Department of Conservation although some management of the coastal area is delegated to regional councils. Coastal erosion is managed through this Department of Conservation/Regional Council management structure.

g. *The "resource consent" permitting system*

People wishing to undertake activities with environmental effects are required to apply for "resource consents". The generic term "resource consents" include land use consents, subdivision consents, water permits, coastal permits and discharge permits (RMA, ss 2, 87). Often a number of different resource consents may be required for a particular activity. For example, a factory may require a range of land use permits, water use permits and discharge permits to operate.

The integrated nature of the system is illustrated by the resource consent application procedure. Applications for resource consents may be made on a publicly notified or non-notified basis in accordance with statutory notification criteria. The responsible Council hears the application and, where notified, "any person" may make submissions. The decision must be made in accordance with the statutory purpose of "promoting sustainable management" and in accordance with the objectives and criteria in the Plan. The Plan, in turn, must not be inconsistent with any higher level regional or Government Policy statements, and is also subject to the sustainable management purpose.

Further integration of decision-making is providing for by "joint hearing committees" made up of representatives of the various consent authorities, and which can conduct hearings and grant all resource consents required in one hearing and decision-making process.

When publicly notified, hearings for applications are open to objections and submissions by any person without the need to have *locus standi* ('standing'). Under the common law, traditionally "standing" requires the litigant to have a property interest or some special interest greater than the general community. Unfortunately approximately 95% of applications are not publicly notified, and there is no right of objection or submission for the general public in such cases. All that can be done is to challenge, through an action in judicial review, the decision not to publicly notify an application. However, an application for judicial review requires "standing" so the applicant requires some property or other "special interest" that is affected to be able to bring such a challenge. Thus the "open access" intention of the drafters of the legislation has not been fulfilled in practice.

In considering an application, the consent authority must have regard to the purposes and objectives of the RMA under sections 5, 6 and 7, as outlined earlier. It must also have regard to the actual and potential effects on the environment of allowing the activity, and be guided by the relevant policy statements and plans which have been put in place. In the evaluation, these individual matters are not determinative, and an overall broad assessment of all relevant issues will be considered. Where a consent is granted, conditions may be imposed to remedy and mitigate adverse effects.

Decisions at the council level can be appealed to the specialist Environment Court by both the applicant and any objectors. This appeal can be on both law and merits issues. The Environment Court is also bound by the sustainable management purpose of the Act. Further appeals to the High Court and Court of Appeal can only be on matters of law, including judicial review.

h. *Enforcement under the RMA regime*

Failure to comply with the RMA, plans and rules made under it, or the conditions of resource consents may constitute offences under the Act. Penalties include the possibility of heavy fines of up to \$NZ200,000, or even imprisonment for up to 2 years. Liability for the most serious offences is strict, and the Act also provides for vicarious corporate liability: Grinlinton (1997), Campbell (2005).

Most of the prosecutions under the Act relate to pollution of waterways and groundwater, or removal of protected indigenous vegetation. Examples of such prosecutions that have ended in imprisonment for the offender include *Franklin District Council v McCollum* (unreported, District Court, CRN 3057005960, 14 February 1994), and *R v Conway* [2005] NZRMA 274. In *McCollum* a pig farmer was convicted for polluting a waterway, fined \$5,000 and sentenced to 6 months imprisonment, although the sentence was suspended. In

Conway the Court of Appeal upheld a sentence of 3 months for pollution of waterways with oil and fuel. In both cases the offences were at the serious end of the spectrum and involved almost complete disregard for the law.

i. *Land administered by the Department of Conservation*

The RMA has only limited application to the 30% of New Zealand land comprised in National Parks, Reserves and other public lands. The Conservation Act 1987 sets out a very similar system of land management policy-making and planning as under the RMA. People wishing to undertake activities on DoC land are required to comply with these policies and plans, and to apply for licences or “concessions”. These applications are rigorously assessed for compliance with the conservation principles in the legislation, and any relevant policies and plans.

5. Other measures promoting water and soil conservation

In the global context, New Zealand is a signatory to a number of international statements of policy and agreements which include references to the prevention and management of soil degradation. These instruments in turn guide government policy, and are sometimes referred to by the courts when interpreting ambiguous legislation related to the subject matter of those instruments.

In 1995 the Government produced the “Environment 2010 Strategy” which contained a number of environmental goals, including – “maintain[ing] and enhanc[ing] the quality, productivity and life-supporting capacity of our soils”: Ministry for the Environment (1995).

In 1996 a more detailed “Sustainable Land Management Strategy for New Zealand” was implemented by the Government to provide guidance to councils: Ministry for the Environment (1996).

This was followed in 1997 by *The State of New Zealand’s Environment* which has now been superseded by the report *Environment New Zealand 2007*: Ministry for the Environment (2007). Chapter 9 covers New Zealand’s land environment, and includes a comprehensive section on soils.

A “Water Programme in Action” is currently being developed jointly between the Ministry of Agriculture and Forestry and the Ministry for the Environment: see website www.maf.govt.nz

There are also a number of quasi-governmental initiatives and non-governmental organizations involved in promoting soil conservation awareness and implementing practical measures.

6. Conclusion

There is no universal model to address the challenge of managing and conserving the world’s soil and water resources sustainably. While international agreements, conventions and strategies such as the *Rio Declaration* and *Agenda 21* provide States with some normative guidance, the difficulty is to effectively implement these global themes at the national level in a way that recognizes the complexity of the problem, and in particular, the geophysical, ecological and sociological interactions and influences that contribute to it.

Such a complex problem requires an “integrated” solution. Integration must occur at a number of levels. First, any system for the management and conservation of soils must have strong normative guiding principles. “Sustainability” and the “precautionary approach” provide these. Secondly, these principles must be fully integrated into every level of administration, policy-making, regulation and implementation of the system. Thirdly, the system itself must be part of an integrated environmental management structure reflecting the interrelatedness of soil health with other aspects of the biosphere.

New Zealand has implemented such a system. The pre-existing regime required significant reforms, including the integration of administrative structures at central and local government levels, and integration of environmental and resource legislation. The RMA, while not without some flaws, provides an effective example of integrated environmental and natural resource management based on a central principle of sustainability.

The main advantages of the system in New Zealand may be summarised as follows.

- (a) The “sustainable management” objective is relatively clear, and is supported by other environmental priorities.
- (b) The integrated governance structures are relatively specific, involving defined functions for central, regional and district governance.

¹ See website <www.maf.govt.nz>

² PCE, *Creating our Future – Sustainable Development in New Zealand* (2002), (maximising human capital and dealing with social, environmental and economic dimensions); PCE, *Growing for Good: Intensive Farming, Sustainability and New Zealand’s Environment* (2004). See website <www.pce.govt.nz>

- (c) The requirement for regional and district policies and plans provides for efficiency and clarity in administration, and active steps are taken to minimise regulation and paper overload, and compliance costs.
- (d) The systems of preparing policies and plans, and to a more limited extent the resource consent procedures allow for reasonable public participation. Excessive public participation could be inefficient and prevent implementation of necessary development and activities.
- (e) The competence of decision makers at the local authority level has been assisted by programmes for education and accreditation of decision-makers.
- (f) The Environment Court provides for a unifying quality of direction amongst the many local authorities, and may provide guidance on critical resource management issues.
- (g) The communities are generally prepared to accept and support the outcomes of the regulatory process.
- (h) Where problems have arisen, the RMA has been amended to ensure correction of the failings and to improve the efficiency of the system.

7. References

- Auckland Regional Council, 1994. Auckland Regional Policy Statement. Auckland Regional Council, Auckland, New Zealand. Accessible at www.arc.govt.nz
- Auckland Regional Council, 2001. Air, Land, Water Plan. Auckland Regional Council, Auckland, New Zealand. Accessible at www.arc.govt.nz. See especially paras 5.5.31, 5.5.33-5.5.40.
- Campbell, J., 2005. Statutory Remedies: The Enforcement Provisions of the RMA, in Nolan, D. (editor), 2005. Environmental and Resource Management Law, 3rd ed. LexisNexis, Wellington, chapter 18.
- Grinlinton, D. P., 1997. Liability for Environmental Harm in New Zealand. Environmental Liability, 5: 106.
- Grinlinton, D. P., 2002. Contemporary Environmental Law in New Zealand, in Bosselmann, K., Grinlinton, D. P. (eds), 2002. Environmental Law for a Sustainable Society. NZCEL Monograph Series, Vol 1. NZCEL, Auckland, New Zealand, pp 19-46.
- Memon, P. A., Perkins, H., 2000. Environmental Planning and Management in New Zealand. Dunmore Press Ltd, Palmerston North, New Zealand, pp 148-149, and 152.
- Ministry for the Environment, 1995. Environment 2010 Strategy: A Statement on the Government's Strategy on the Environment. New Zealand Government, Wellington, New Zealand.
- Ministry for the Environment, 1996. Sustainable Land Management Strategy. New Zealand Government, Wellington, NZ. Available at <http://www.mfe.govt.nz/issues/land/soil/strategy.html>.
- Ministry for the Environment, 2007. Environment New Zealand 2007. New Zealand Government, Wellington, NZ, chapter 9 "Land". Available at <http://www.mfe.govt.nz/publications/ser/enz07-dec07/index.html>.
- Nolan, D. (editor), 2005. Environmental and Resource Management Law, 3rd ed. LexisNexis, Wellington, chapters 2 and 3.
- Palmer, K. A., 1993. Local Government Law in New Zealand, 2d ed. Law Book Co, Sydney, pp 564-568.
- Statistics New Zealand, 2008. "Quick Facts". New Zealand Government, Wellington, NZ. Available at <http://www.stats.govt.nz/quick-facts/land-envmt/geology-and-soils.htm>