

NEW ZEALAND'S RESOURCE MANAGEMENT ACT 1991: PROCESS WITH PURPOSE?

JANET McLEAN*

I INTRODUCTION

The Resource Management Act 1991 was passed after a massive and widely publicised law reform effort. The Minister for the Environment set for his Department and a "core group" of consultants the large task of comprehensively reviewing the major laws governing natural and physical resources. The reviewed legislation covered town and country planning, water and soil, minerals, and environmental assessment procedures.¹ Discussion papers were circulated, consultants were engaged, hundreds of submissions including freephone calls were solicited, and regional discussion meetings and hui were held.²

The Bill was originally introduced to Parliament by the Labour Government in late 1989 and was considered by a select committee for eight months before it was reported back. The newly elected National Government referred it to a review group in November 1990. The group was asked to make recommendations to secure greater certainty of the Act's effect while retaining a commitment to wide participation and to the principle of "sustainable management". After further consultation, the group reported back with proposed amendments in February 1991. These included changes to the principles and purpose sections and the addition of a requirement that decision makers consider the costs and benefits of alternative methods of environmental management. The Bill, which largely adopted those proposals, was finally passed into law in July 1991. Many things were promised during the process of reform. One early discussion paper, for example, included among the objectives of the legislation "to distribute rights to resources in a just manner" and "to ensure that resources provide the greatest benefit to society".³ The Act was acclaimed in Parliament as an example of integrated and decentralised resource management.⁴

This article evaluates the statute, its processes and purposes. Given the size of the Act and range of issues with which it deals, it has been neces-

* LLB(Hons)(VUW), LLM(Mich), Lecturer in law, University of Auckland. Thanks to Michael Taggart, David Grinlinton and Grant Huscroft for comments on an earlier draft of this paper and to James Krier for his Environmental Law and Policy class at the University of Michigan, Winter 1990.

1 Environmental assessment procedures were not included in the Resource Management Act.
2 There were at least 32 working papers and numerous published reports by consultants.
3 Ministry for the Environment, *Resource Management Law Reform, Directions for Change, A Discussion Paper* (August 1988) 10.
4 John Blincoe, Labour MP, congratulating the National Government on the amended Bill's introduction, said "It was a true model of consultation and of how government ought to work." 514 NZ Parliamentary Debates 1874 (1991).

sary to select a single but complex environmental problem — the problem of contaminants. I make no attempt to argue that this problem is representative of others with which the Act deals. It may be. Even if it is not, there are wider lessons to be learnt about the dangers of omnibus legislation which subjects different problems to the same process.

The Resource Management Act can be seen as part of a legislative trend to state broad principles rather than to prescribe rules of conduct.⁵ I argue that the purpose and principles sections in Part II fail to provide clear legislative goals against which to measure the success or otherwise of the Act's processes. Both goal setting (ie what environmental outcomes or standards are sought to be achieved by the Act) and rule making (how those standards are to be achieved) take place largely through two decentralised processes. The first involves the delegation of broad powers to locally elected representatives. The second, which we would not in New Zealand usually recognise as a rule making or policy making process, is the case by case allocation of resource consents. It relies on the identification and representation of interests in a quasi-judicial setting to inform rule making and goal setting.⁶ The latter process is likely to dominate in practice. These processes, without clearly legislated goals, I argue, are incompatible with the Act's requirement to be efficient and cost effective. They are not, by themselves, appropriate for resolving the kinds of issues which are raised by contaminants. And they also have the effect of obscuring political accountability. Finally I raise questions about where the people responsible for the practical application of the Act should be directing their energies and resources.

The article also hopes to draw attention to what has been somewhat grandiosely titled "The New Public Law".⁷ Under its various guises, the "new public law" asks lawyers to focus more broadly on institutional design, how policy should be translated into law, how best to enforce it, and on how to manage risk. These are subjects about which we know surprisingly little. Yet the starting point should be familiar. It is to identify the problems which arise in a particular fact situation.⁸

1 The Problem

First we should identify elements which are likely to recur in disputes which the Act is meant to resolve. What kinds of uncertainties are decision makers forced to make decisions about? Consider the example of a new factory wanting to set up in the district. It emits a pollutant which by itself is at a safe level but which has the potential to combine lethally with the other pollutants in the area. There may be technology available to the

5 Another recent example is the Building Act 1991.

6 For a general discussion of the interest representation model see R Stewart, "The Reformation of American Administrative Law" (1975) 88 Harv L Rev 1669.

7 See for example *Symposium Proceedings on the New Public Law* in (1991) 89 Mich L Rev; C Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press 1990).

8 See in particular E Rubin, "The Concept of Law and the New Public Law Scholarship" (1991) Mich L Rev 792.

factory which would reduce the emissions to a safe level (at least according to what is presently regarded as safe; latent effects may be unknown) or which would alter what is emitted. The technology may be so expensive that if it were required to be used the factory would be forced to move to another area. There may be another factory contributing to the lethal effect which can reduce its emissions more cheaply. The new plant may be of greater social and economic benefit than the existing one or vice versa. Maybe there is no technology available to anyone. Perhaps the emissions would have no harmful effect if everyone were to close their windows at a certain time of the day. From time to time the scientific assessments of what is harmful are revised.⁹

One of the problems is growth: how should existing resource uses be treated as compared to new uses? Another is economic: how explicit are we going to be about cost and who will bear it? A related question is one of value: how will we decide the comparative benefits or risks of activities? And finally, we have the problem of science: how do we find and assess scientific and technical solutions; what do we do if science does not provide an answer; and what should we be doing to encourage science to address certain questions?

What is required in an "integrated approach". That was the approach promised in the resource management reform process by its emphasis on "sustainability". Sustainable management and development were prominent concepts in the discussion papers preceding the legislation. Those papers make explicit reference to the work of the World Commission on Environment and Development (the Brundtland Commission 1987).¹⁰ The Brundtland Commission discusses "sustainability" with reference to the complete physical, economic, political and international contexts. Sustainable development is described as¹¹

a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs. We do not pretend that the process is easy or straightforward. Painful choices have to be made. Thus, in the final analysis, sustainable development must rest on the political will.

What is meant by sustainable management in the Resource Management Act? Does it deliver the promised integrated approach? How and by whom will those "painful" choices be made?

9 The example is adapted from R Coase, "The Problem of Social Cost" (1960) 3 J Law & Economics 1. For other examples and discussion see L Tribe, *Channelling Technology Through Law* (Bracton Press Ltd 1973).

10 World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987) referred to in Ministry for the Environment, *People Environment and Decision-making the Government's Proposals for Resource Management Law Reform Te Iwi me te Taiao Te Whakataua Hou a te Kawanatanga* (December 1988) 19.

11 *Our Common Future*, n 10 supra, 9.

II OVERVIEW OF ACT

The Act begins with general statements of purpose and principle which I will discuss in some detail shortly. The sections which follow list a series of activities (the discharge of contaminants among them, s 15) which are prohibited unless allowed by a rule in a regional plan, a resource consent, or regulations. Section 70 restricts a regional council's power to permit contamination when listed effects result from the discharge of the contaminant. The council may include a requirement in the plan that the best available option be adopted to prevent or minimise the adverse effects of the discharge.¹² Anyone can initiate a change to a regional plan.¹³

Provided the discharge is permitted, an application for a "resource consent" can be made. The burden is on the applicant to provide information on the effects of the activity on the environment. Other affected and interested people must be notified of the application.¹⁴ Anyone can make a submission. The consent authority considers submissions, any regulations or national policy statements, and alternative methods of disposal (among other matters) and makes a decision. The consent may be subject to conditions. The Minister for the Environment can intervene in situations where a proposal has national or international significance and may give written directions to the consent authority.¹⁵ The consent authority can initiate its own review of a consent at a later date in certain circumstances (eg if the information provided was inaccurate, or if there have been adverse effects on the environment).¹⁶ The applicant and anyone who made a submission can appeal to the Planning Tribunal, which hears the matter *de novo*.¹⁷ Once a resource consent has been granted, compliance may be enforced by the Planning Tribunal through a declaration (available only to Ministers, regional councils or territorial authorities) that any condition or rule (including a rule requiring the adoption of the best practicable option) has been breached. As well, any person can apply for an enforcement order both to enforce compliance with the Act and, even if the Act has been complied with, to order someone to avoid, remedy or mitigate any actual or likely adverse effect on the environment. The process explicitly allows a re-evaluation of whether the activity (permitted or not) has an adverse effect on the environment.¹⁸ The Tribunal also hears appeals on abatement notices and there is a general appeal on matters of law to the High Court. Criminal sanctions are available for breach of the orders.

In addition, the Act empowers the Minister for the Environment after notice and comment to make national policy statements and the Governor-General in Council to promulgate regulations. It establishes a Hazards Control Commission which (under policy direction from the Minister) is

12 S 70(2).

13 Schedule 1 outlines the process.

14 S 93 requires the application to be publicly notified and served on people directly affected.

15 S 141.

16 S 128.

17 S 290.

18 Unless the effect was expressly recognised in the plan (s 319). The Tribunal can cancel a resource consent if it was based on inaccurate information (s 314(e)).

required to advise the Minister on the content of regulations which identify, track, and control hazardous substances.

At all the policy and rule making stages, decision makers must consider alternative methods, likely implementation and compliance costs and the efficiency and effectiveness of the means chosen.¹⁹ There is no explicit requirement to consider these factors at the enforcement stage (a matter to which I will return when considering adverse environmental effects).

1 Rule Making

The Act is not prescriptive. It lists in broad language activities which are prohibited unless somebody makes a rule allowing them.²⁰ Section 70 requires a regional council to consider a number of matters before it makes such a rule about discharges. Within this broad guideline, regional authorities may follow a "legislative" model of rule making. That is, they make rules in advance of particular cases on the basis of facts, options and advice proffered them by bureaucrats.²¹

These kinds of rules can be unmade in various ways. The environmental effects of a rule may be reassessed. Anyone may initiate a change to a regional plan at any time. The Planning Tribunal may remedy defects in plans and order changes to or grant dispensations from policy statements or plans.²² A consent authority may grant a consent to a non-complying activity if the effect on the environment is minor.²³ The Governor-General in Council can also make rules prescribing technical standards relating to contaminants and methods of implementing them.²⁴

Consent authorities and the Planning Tribunal also make rules about contaminants, but on a case by case basis when considering applications for resource consents. That process focuses even more on discrete activities and their effects. It is a "quasi-judicial" example of rule making which relies on all the interests being identified, notified and able to present arguments to a tribunal. Given the variety of ways the "legislative" rules can be unmade, it is the latter kind of rule making which is likely to predominate.

Rule making (or policy making by adjudication) takes place within an interest representation model of administrative law. The emphasis throughout the Act is (as it was in the law reform exercise itself) on consultation and participation. The Act attempts to identify the interests (or considerations) potentially in conflict, shifts the information burden to the people representing those interests, provides a forum for argument about those interests in the context of individual cases and requires local government or the Planning Tribunal to weigh them. Interest groups have various

19 S 32.

20 A regional council in a regional plan, the Governor-General in Council in regulations, a consent authority or planning tribunal in a resource consent.

21 They do not, of course, fully replicate Parliamentary processes.

22 Ss 292, 293, 314 (1)(f)(i) and (iii).

23 S 105 (2)(b).

24 S 43.

opportunities to have the matter heard again, particularly as information changes. Judicial review provides a forum for further argument that the weighting was wrong or unreasonable.²⁵ Environmental effects can be reassessed at the initiative of interest groups. The impact of activities can thereby be evaluated on a trial and error basis. Although the legislative scheme allows for the establishment of minimum standards and the allocation of rights within that overall framework, the Act does not focus on overall environmental standards, but on discrete “resource uses”.²⁶

The interest representation model raises a number of questions of access. For example, how are we to ensure that all the interests are represented and that they are truly representative? But the prior question is how important participation or interest representation is for achieving the purposes of the Act. It could be argued that participation saves the otherwise vague and general delegations of power in the Act from illegitimacy and that the process can become a purpose. This rationalisation depends also on a belief that the identified interests are best able to inform decision making, have the right incentives to do so, and can do so efficiently. The process is said to ensure that the advice is contestable. The effect is to achieve “central planning through litigation”²⁷ or in this case through tribunal decision making. These assumptions need to be tested to see if the interest representation model can manage efficiently (as the Act requires)²⁸ and under what conditions. If that is to be the model, we need to reconsider the institutional legitimacy of the tribunal (what exactly is the nature of its expertise?) and the role of central government (particularly Parliament).

2 Goal Based Statutes

The interest representation model is distinct from the goal based statute model but is not necessarily incompatible with it. The models are linked by a rhetorical appeal to flexible local solutions. Both rely on the “market” or the locality being better informed than central government. Local participation may save broad delegations of power from illegitimacy and so too may centrally legislated goals. The goal based statute model is premised on the notion that government has a central role in setting goals or standards to be attained but does not have sufficient information to prescribe the ways in which they should be achieved; governments should decide ends and not means. For example, legislatures should focus on

25 There will likely be arguments about the hierarchy of principles. According to Cooke P in *EDS v Mangonui County Council* [1989] 3 NZLR 257, 260, if there is no legislative direction about the weight to be given inter se it is for the planning authority or the Tribunal to undertake a balancing exercise on the facts of each particular case. Rights of appeal and references to a Planning Tribunal inquiry must be exercised before review is available (s 296).

26 S 69 refers to water quality standards and s 70 requires the authority to consider the operation of minimal standards (see later discussion).

27 The expression is Richard Stewart’s. For a description of the United States’ experience see R Stewart, “Madison’s Nightmare”, *9th Commonwealth Law Conference* 17 CCH 1990.

28 Note s 32 and the provisions which refer to the “best practicable option”.

establishing allowable pollution levels rather than on prescribing a particular kind of emission control device to achieve those ends. That has been described as an efficient, technology forcing and flexible solution.²⁹

The goal based statute model has its critics.³⁰ It allows the legislature to speak abstractly and to transfer political disputes to lower visibility fora. The body to whom the decision has been delegated is arguably likely to want to avoid controversy and hence to be dilatory. Criticism or acclaim must depend on how the goals are expressed in the statute and on the scheme of the Act in question.

The Resource Management Act purports to be a goal based statute of a kind.³¹ It begins with a broad statement of purpose and has been described as focusing on environmental effects. It goes further explicitly to require local authorities and regional councils to focus on goals (sections 30 and 31) and contains elaborate procedures for the making of national policy statements and national coastal policy statements. Parliament's major contribution to the process has been to provide a large list of matters which must be considered. Central among these is the section 5 statement of purpose and the principles sections which follow it. Can section 5 be characterised as a goal which helps us to weigh those considerations? Can we judge legislative success or failure against it?

III WHAT ARE THE ACT'S GOALS?

1 Section 5

Section 5 is difficult to characterise. It was substantially changed as the Bill progressed through Parliament. Significant changes to what was then clause 4 were introduced by supplementary order paper, thereby avoiding further select committee consideration.³² In his speech introducing the new Bill after it had been considered by the Review Group,³³ Hon. Simon Upton, Minister for the Environment, explained:³⁴

The proposed new clause 4 makes something that was implicit in the Bill as introduced by Sir Geoffrey Palmer quite explicit now — that is, the Bill focuses on environmental effects rather than social and economic activities It ensures that the life-supporting capacity of air, water, soil, and eco-systems is safeguarded, and its ex-

29 Sunstein, *supra* n 7 at 88.

30 For useful discussions of the goals of the United States Clean Air Act and criticisms of them see L J P Dwyer, "The Pathology of Symbolic Legislation" (1990) 17 *Ecology Law Quarterly* 233, and D Schoenbrod, "Goals Statutes or Rules Statutes: The Case of the Clean Air Act" (1983) 30 *UCLA Law Review* 740.

31 I disagree with David Schoenbrod's characterisation of legislated standards as rules rather than goals. The requirement in the US Clean Air Act 1970 for auto manufacturers to reduce emissions of certain pollutants by 90% within a certain time I regard as a legislated goal allowing for flexible solutions. He regards the Environmental Protection Agency's national ambient standard governing the concentration of pollutants in the air as a goal and the emission standard which governs the rate at which a pollutant is emitted as a rule of conduct. I regard both as goals. They need careful examination to assess their effectiveness as such.

32 SOP 22 (1991).

33 *Report of the Review Group on the Resource Management Bill* (February 1991).

34 514 NZ Parliamentary Debates 1874 (1991).

PLICIT statement — that any adverse effects of the activities on the environment are avoided, remedied or mitigated — is much more of an explicit environmental purpose to put at the front of the Bill.

Whether the physical environment takes precedence over social and economic activities is an important question bearing on how other parts of the Act must be read and what weight must be given to various factors. It is particularly significant on the question of how far financial considerations must be taken into account (section 32 and the best practicable option provisions) and how much weight should be given to the principles of the Treaty of Waitangi (section 7).

Section 5 states

- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
- (2) In this Act, “sustainable management” means 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 well-being 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 and mitigating any adverse effects of activities on the environment.

This section attempts to do too many things. It sets out “sustainable management” as the objective or ultimate aim of the Act but includes a definition of sustainable management which puts in doubt its status as that ultimate objective. Parliament seems to be offering a balancing formula but it is not clear whether or not one half of the formula takes precedence over the other.

What is to be “sustainably managed”? Section 5 (1) refers to “natural and physical resources”, which are defined in section 2 as

including land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures.

It is unlikely that people are intended to be included as animals in this context, and thus people are not among the things to be sustainably managed.³⁵ People are, however, explicitly included in the description of how to manage. Management of resources must take place “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”. Moreover, the remainder of section 5(2) would suggest that there is a potential tension between sustaining people socially, economically and culturally and sustaining the natural environment.

The tension between the “social” factors mentioned in the beginning

³⁵ Other uses of the phrase “natural and physical resources” support this contention. See for example schedule 2 and the definition of environment in s 2.

of section 5 (2) and the physical factors mentioned in paragraphs (a) and (b) is not a simple one. What is good for people's health and safety may also be good for the physical environment. That is made more plain in the Bill originally introduced to Parliament.³⁶ Maintaining clean air, at least at some level, for example, would at once achieve both environmental and broadly "social" purposes (in terms of people's health). But maintaining clean air also has an economic dimension (social in another sense) which might well be in conflict with the other considerations. Social and economic factors may themselves conflict. In the situation of conflict, the section becomes increasingly problematic.

Any guidance the word "while" may have offered the proper allocation of priorities is particularly obscured by the inclusion of economic and social factors in the definition of "environment". Adverse effects of "activities" on people must be considered in the context of section 5 (2)(c); "environment" is a defined term which includes people.³⁷ Presumably "activities" refers to the "use, development, and protection" of resources, including regulatory "activities". Are we required to balance the same kinds of factors against each other?

Paragraph (c) probably should not be in the purpose section. It does not define. Rather it offers a choice of avoiding, remedying or mitigating adverse effects on the environment. It imposes a duty, but the choices it offers are very different. Remedy and mitigation presume that someone has acted or intends to act in a way which would not "sustainably manage" the environment. It is a backstop measure. It both imposes a duty to avoid adverse effects on the environment and allows the environment to be adversely affected so long as the effects are mitigated or are cleaned up afterwards (or presumably a combination of these). But even this interpretation is potentially confused by the wide definition of "environment". Adverse effects on the social, economic and cultural dimensions of people's lives must also be avoided, mitigated or remedied. On that reading the Act would tolerate a general deterioration of air and water quality if that were all that we could economically sustain.³⁸ If that is so

36 Clause 4(2) of the Bill as originally introduced said "sustainable management" means "managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people to meet their needs now without compromising the ability of future generations to meet their own needs, and includes the following considerations . . .

(c) The use, development, or protection of natural and physical resources in a way which provides for the social, economic and cultural needs and opportunities of the present and future inhabitants of a community

(d) Where the environment is modified by human action, the adverse effects of irreversible change are fully recognised and avoided or mitigated to the extent practicable."

37 S 2 defines environment as including

(a) Eco-systems 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)

See also the inference made in the second schedule.

38 That is unless we are prepared to take a robust view of s 2 and say that the context requires another reading.

then the Act hardly has the aspirational quality which has been attributed to it.

At the same time, the section purports to give precedence to natural and physical resources over economic and social factors. For example “effect” is defined in section 3 as referring only to the natural and physical environment (both positive and negative effects are referred to in the definition). And the purpose as expressed in section 5 (1) is after all to promote the sustainable management of natural and physical resources. The later references to social, economic and cultural factors are indirect.

Returning to our initial problem then, what guidance does section 5 give in the situation where a factory is polluting, and existing control technology is so expensive that a requirement to use it would force the factory to close down or to relocate? Section 5 (1) says that the Act is to promote the sustainable management of air. Section 5 (2) requires that air be managed in a way which enables people to provide for their social and economic well-being and for their health while sustaining its potential to meet the needs of future generations and safeguarding its life supporting capacity. At what point does the Act require the factory to close down? How bad does air quality have to become? The Act itself never tells us.

Even if we were to ignore competing social and economic factors, our ability to sustain the potential of natural and physical resources and to safeguard the life supporting capacity of air and water depends on the ability of science to make these long-term predictions and on those predictions being represented in the decision making process. Absent those predictions, the section is likely only to be activated in situations of crisis. The effectiveness of the Act is extremely difficult if not impossible to measure against this criterion. How then will the success of the Act be measured?

(a) The effect of conflicting factors

Section 5 also affects the priority to be given to the factors mentioned in sections 6-8 (including the principles of the Treaty of Waitangi). The purpose section is referred to throughout the Act and confines references to and the operation of the other principles in sections 6-8 “when achieving the purposes of the Act”. (Note the use of the plural here.) The factors of national importance in section 6 themselves potentially conflict. The preservation of the natural character of the coastal environment may well be at odds with both the enhancement of public access to coastal areas and with the relationship between Maori and their culture.³⁹ Section 7 lists other matters to which managers “shall have particular regard” which are even more mysterious.⁴⁰ Section 5 is also used to confine various discretions, limit the content of National Policy Statements (section 45) and confine intervention by wording such as “necessary in achieving the pur-

³⁹ Paragraphs (a), (d) and (e) of s 6(1).

⁴⁰ The most perplexing provision reads “must have regard to . . . recognition and protection of the heritage values of sites, buildings, places or areas”.

pose of this Act" (section 32). All depends then on the ability of interested groups to make representations about these various considerations and on the ability of the various decision makers under the Act to weigh them.

And in the end, it is not surprising that the Resource Management Act does not directly confront the questions of whether and when the environment is to be put before social and economic activities. Those are extremely difficult questions. Ironically, it may be more beneficial for the environment if costs are not transparent. If decision makers were to be plain about the short term costs of environmental protection we might not be prepared to pay them. On the other hand, ignoring financial implications and in particular the question of who bears the costs and benefits of environmental protection can lead to injustice. Avoiding these questions in legislation shifts the "costs" of making hard decisions elsewhere.

The United States Clean Air Act 1970 focused on attainment of ambient air quality standards consistent with people's health regardless of the cost to or the utility of pollution generating activities.⁴¹ In passing the Act, Congress was seen to take an 'environmentally pure' view while giving the Environmental Protection Agency the hard task of implementation. The result was agency delay (even in listing pollutants), failure to adhere to the words of the statute and eventually the resort to judicial prodding.⁴² It has been suggested that the 1970 US Act should have been refined by changing the health goal from complete to more relative protection, eg saving a given number of lives from pollution.⁴³ Then the agency could have assessed the relative costs of different environmental measures against the health benefits. The New Zealand Resource Management Act falls somewhere between these two examples of statutory goals. It does not disregard the financial dimension but it is not clear (in the purpose section at least) how important it is. Some of the criticisms of the 1970 Act apply equally to the New Zealand situation. While seeming to appeal to a high minded objective of sustainability, Parliament has avoided setting priorities in situations short of environmental crisis.⁴⁴ It can blame bad decisions on local government or the Planning Tribunal. New Zealand is unlikely to have the same problem of regulatory paralysis as the United States did because consent authorities and the Planning Tribunal must decide individual applications for resource consents as they arise.⁴⁵ It is

41 Clean Air Act Amendments 1970 Pub L No 91-604, 84 Stat 1676.

42 Schoenbrod, *supra* n 30 at 777.

43 B A Ackerman & W T Hassler, "Beyond the New Deal Coal and the Clean Air Act" (1980) 89 Yale LJ 1466, 1566-71.

44 This may also indicate the strategic utility of real or exaggerated environmental crises which the interest representation model may be able to provide. (See later discussion of heuristics and biases).

45 R G Hammond, "Embedding Policy Statements in Statutes a Comparative Perspective on the Genesis of a New Public Law Jurisprudence" (1982) 5 Hastings Int'l and Comparative Law Review 323, 372. Hammond comments that conflicts between legislative goals can have a diluting or paralysing effect on legislative schemes. He says that legislation should itself identify priorities or explicitly require the agency to address them without ad hoc political interference.

possible, however, that regional councils will find the development of rules in regional plans difficult and will prefer to await resource consent decisions.⁴⁶

If the local authority or the Planning Tribunal gets the balance wrong, the executive has several opportunities to change the decision without appearing to be responsible for it. For example, it can apply to the Planning Tribunal for a declaration. If the central questions are not in the end susceptible to legal judgment but are more of a policy weighing kind, then the Act has created the odd position of the democratically accountable representatives seeking the policy decisions of appointed Tribunal members. However much the Tribunal defers to the applicants, the overall effect is to recharacterise the decision as the Tribunal's. Given its wide powers the Tribunal may indeed be a centralising force. The executive may also intervene (though in a more transparent way) by the introduction of regulations and national policy standards. It will not necessarily be clear who is responsible for the environmental effects of these.

In the end section 5 offers too many choices without further guidance. If it tells us little about sustainability, it tells us less about "management". The section implicitly requires that we develop ways to assess risk and adverse effects. What does the remainder of the Act say about standards and goals and environmental management?

2 *Environmental Effects*

The Act has been described as concentrating on environmental effects.⁴⁷ Effects are referred to in section 5 and throughout the Act. A duty is imposed to avoid, mitigate or remedy adverse effects on the environment independently of whether there has been compliance with the Act.⁴⁸ An enforcement order can be obtained from the Planning Tribunal, the breach of which may be prosecuted. Could this duty be characterised as a goal and if so is it appropriate for resolving the problem of contaminants?

(a) Cumulative effects

"Contaminant" is defined in section 2 to include any substance which by itself or in combination with others changes the physical, chemical or biological conditions of the water, land or air in which it is discharged. The adverse (or otherwise) effects of the contaminant are judged in relation to the discrete activity or use rather than in relation to the overall combination of effects. So section 70 prohibits regional councils from making rules allowing discharges into water which either by themselves or in combination with other contaminants having those effects result in the listed effects. Presumably each individual contaminant must therefore be banned. But those effects are themselves cumulative. The prohibited effects include "the production of conspicuous oil or grease films, scums or foams . . ." and any "conspicuous change in the colour or visual clari-

46 Notwithstanding the requirement to avoid unreasonable delay in s 21.

47 See the Minister's introductory speech quoted above.

48 S 17 but subject to s 319.

ty".⁴⁹ Both tests combine questions of degree with an outright prohibition of any discharge. The likely effect of the provision is a bias against new sources of contaminants.⁵⁰ Such a bias brings social and economic costs.

If contaminants are discharged into water, section 69 prescribes minimum standards of water quality according to the purpose for which the water is used. That seems to be a sensible approach especially given that the standards are relatively easy to monitor (eg increases in water temperature and PH balance). In contrast, the Act gives no guidance either about minimum standards or proscribed effects to regional councils wishing to create rules about contaminants discharged into the air.⁵¹

At the resource consent stage the applicant is required to submit information about actual or potential effects of the discharge on the environment and also about the ways those effects could be mitigated. This is an asymmetrical approach to the problem. The consent is for a particular activity but the effect may be the result of a combination of activities (including for example a particular use of water). Although the Planning Tribunal has power to hear matters together (section 270) the effects on trade competitors must not be considered (section 104 (3)).

It is not accurate to say that the Act concentrates on adverse environmental effects when for the most part it ignores their cumulative nature. In this sense at least, its processes are not integrated. The problem of cumulative effect signals the need for regional councils to set maximum discharge rates for all sources or to set standards for overall pollution levels. Which method is chosen should depend on the ability to monitor those different levels and effects.

(b) Extent of the duty

As well as these problems of cumulative effect there is a problem about the extent of the duty. By what criteria does one decide whether the polluter must avoid, remedy or mitigate the adverse effects? This is an issue at the enforcement end of the process. Section 314 contains three separate powers to make enforcement orders. It provides that an order to cease or prohibit an activity is available when a rule, regulation or consent has been contravened or when the activity⁵²

[i]s or is likely to be noxious, dangerous, offensive or objectionable to such an extent that it has or is likely to have an adverse effect on the environment.

On first reading, that might suggest two things: that before an effect is adverse it must be of a significant degree, and that the duty to avoid arises only if the effect is particularly noxious. Such guidance is illusory. Section 314 goes on to give power to make an order to avoid, remedy or

49 S 70(1)(c) and (d)

50 It could also result in a bias against new types of contaminants.

51 See the obscure reference in s 392 to the repealed provisions of the Clean Air Act in the context of considering resource consents.

52 S 314(1)(a)(ii).

mitigate simply if there is “any actual or likely adverse effect on the environment”⁵³ and to make an order to remedy or mitigate “any adverse effect”.⁵⁴ These provisions also obscure the nature of the environmental result envisaged by the Act.

It is not as though the Act explicitly directs the decision maker to choose the most efficient alternative. While it is probably desirable that the statute does not presume that avoidance will always be the cheapest solution when the effects are extreme, there is no requirement to consider the financial impact of the alternatives at the enforcement stage as opposed to the rule making stage. The Act gives decision makers an opportunity to reassess environmental effects but not the financial implications of rule compliance. The same is true for criminal sanctions.

Although section 341(2)(b)(ii) provides a defence to strict liability if the effects of the action were adequately mitigated or remedied by the defendant, financial inability is no defence against prosecution for a breach of an order.

These enforcement provisions indicate that perhaps Parliament intended to put the physical environment before social and economic considerations at the enforcement stage, if not at the earlier rule making stage. These provisions potentially provide an incentive for industry to be accurate in assessing the likelihood of adverse effects and encourage compliance. And they are a self-conscious acknowledgement in the Act of its “trial and error” approach. Their operation is not so clear where the effects are latent or have multiple causes. In those and maybe other situations there is a risk of under-enforcement or bias against new sources. Nevertheless, this is potentially one of the few opportunities provided in the Act for the centralised evaluation of the success of local and Tribunal rule making.

(c) Likelihood of adverse effects

Another issue which will arise in the assessment of adverse effects is the question of how to measure their likelihood. The problem of risk assessment pervades the Act. Section 3 recognises that effects may include “any potential effect of high probability” and “any potential effect of low probability which has a high potential impact”. The latter effects could apply to a nuclear power plant for example. “Likelihood” is not, however, defined. A common perception is that court or tribunal hearings provide a stage for a battle of experts, and that any particular position can be “bought”. What is often ignored is that experts as a group have been shown to assess risks differently from lay people. Research suggests, for example, that experts and lay people treat these two types of risks (high probability risk and low probability risk with high potential impact) differently. Experts tend to discount the low probability risk.⁵⁵ They tend to concen-

53 S 314(1)(b)(ii).

54 S 314(1)(c).

55 C P Gillette and J E Krier, “Risk, Courts and Agencies” (1990) 138 U Pa L Rev 1027. The article is partly in response to P Huber, “Safety and the Second Best: The Hazards of Risk Management in the Courts” (1985) 85 Colum L Rev 277.

trate on how many people will die in an average year. Lay people, on the other hand, tend to discount existing risks in relation to "new" risks and are influenced by factors such as involuntary exposure, delayed effects, scientific uncertainty about the hazard in question, dreaded versus common hazards and irreversible consequences.⁵⁶ This may make the risk assessment of lay people preferable to that of experts. But lay people are also influenced by other factors which can lead to systematic error. For example people often assess probabilities in terms of the ease with which instances come to mind.⁵⁷ These kinds of biases can affect risk judgment in counter-productive ways.

This element, in particular, has implications for the operation of the Act. Its combination of predominantly case-by-case rule making, participational processes and paucity of measurable goals aggravates both the dangers of lay error and the possibility of dominance by experts. Gillette and Krier remark that⁵⁸

there seems to be little reason to suppose that participatory processes provide good means for filtering out cognitive errors, and some reason to suppose they might aggravate them. Hence, there is a danger that fuller participation will either generate undesirable results or, if lay input is routinely ignored, disappoint public expectations.

Too much lay input also carries the risk that some communities will enjoy the benefits while exporting the costs of the risk, and that others will accept risks which will not affect them alone. This is a potential risk under the Act which asks localities routinely to consider the national importance of natural and physical resources. The Minister's power to intervene in resource consent processes is restricted to matters of "national significance".⁵⁹

The interest representation model may ensure that advice is contestable but carries no guarantees of whose advice prevails.⁶⁰ The definition of "effect" goes some way to bolster the lay input and the enforcement process may give an opportunity to evaluate it. Again the evaluation exercise needs to be self-consciously undertaken. The inclusion of measurable standards (developed by experts) combined with strict enforcement of unpredicted adverse effects (initiated by lay people) would help to clarify the different approaches.

The last problem is also partly a problem of how and where to get appropriate information. While the interest representation model ensures better information of a certain kind it needs to be supplemented by other information of a highly centralised nature. If the central government is to delegate these broad powers it should take responsibility for generat-

56 Gillette and Krier, *ibid* at 1073.

57 *Ibid* at 1091-1099 for a discussion of heuristics and biases.

58 *Ibid* at 1105.

59 S 140 allows the Minister to intervene in resource consent processes involving matters of national importance.

60 This part of the discussion has focused on process bias rather than access bias. There remains the question of how to ensure that environmental interests are represented, especially if costs are to be awarded against them.

ing relevant information. That should be a priority for regulations and national policy statements.

3 *Information and Technological Dependency*

The entire process is dependent on the availability of technology and information. The definition of contaminant in section 2 is broad and depends on monitoring and assessment.⁶¹ The US Environmental Protection Agency, a central, well funded, expert agency, took five years even to create a list of contaminants.⁶² The work of the Hazards Control Commission will contribute here as will the Ozone Layer Protection Act, but their roles are distinct. One of the first tasks of central government should be to provide a list of contaminants.

Consider the problem for a regional council deciding whether to make a rule “requiring the adoption of the best practicable option to prevent or minimise any actual or likely effect on the environment of any discharge” (section 70). The section requires a council to work out in advance whether the adoption of the best practicable option is the most effective and efficient result, and it must be satisfied that it is a better alternative than requiring the observance of minimum standards. “Best practicable option” in relation to a discharge of a contaminant is defined in section 2 as

the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to

- (a) The nature of the discharge . . . and the sensitivity of the receiving environment to adverse effects; and
- (b) The financial implications, and the effects on the environment, of that option when compared with other options; and
- (c) The current state of technical knowledge and the likelihood that the option can be successfully applied.

But who has the relevant information to make this decision? Section 35 imposes a duty on a local authority to gather information, monitor and keep records. Section 43 gives the Governor-General in Council power to make regulations prescribing technical standards relating to use, development and protection of natural and physical resources. The first is a blunt instrument which depends very much on resources and expertise. Nor have any regulations yet been promulgated. In either case information about the financial implications of the options will most likely be best known to the polluter. The same may well be said about current technical knowledge. On the other hand, we may not want to depend on polluters’ representations about those matters. Certainly an independent assessment of the effects of a contaminant on the environment would be desirable. So whether it is the regional authority which commands the use of a particular technology to minimise or prevent environmental effects, or it is a polluter who applies for a change to a rule or for a resource consent, neither party will necessarily have access to the range of informa-

61 See the discussion of cumulative effects.

62 See Schoenbrod, *supra* n 30 at 777.

tion required by the Act. The information may not exist. Obtaining the information is a costly exercise.

The Act's "best practicable option" formulation does not attempt to force technology. Once the resource consent arguments have subsided, conceivably the current state of knowledge could be enshrined for ever and with no incentive to find cheaper or better solutions. The Act relies on the consent criteria being constantly revisited. That is unlikely because industry as opposed to other interests will best know the current state of technology and it will have no incentive to contest the standard.⁶³ The report of the Review Group suggests that "the best practicable option" is most appropriate when the effect of the contaminant is difficult to measure or unknown.⁶⁴ The report lists situations when the best practicable option is the most effective alternative. It would have been helpful to have included something to that effect in the Act.

The other option envisaged by the section is to require the observance of standards. This can be read two ways. Either the decision maker can set a maximum level of discharge for each source (perhaps linked to the previous year's discharge and with a requirement to reduce levels year by year) or set an overall maximum level for all discharges of that kind. Either approach has a number of advantages. First it forces the decision maker to concentrate on the cumulative effect of the discharge. It requires the decision maker to self-consciously set a goal. That focuses the decision maker's resources on monitoring levels and effects, and on developing suitable monitoring technology rather than on monitoring developments in the control technology to be used by sources. Constant review would be necessary to ensure that levels have not been set too high or too low. But the sources would be free to develop the most efficient way to achieve those levels and, provided the standard is not set too low, there may be technology forcing effect.

If the maximum level of discharge is set on an industry wide basis, it might also be possible to introduce a system of transferable rights (as the Act envisages in section 32). That could have the added benefit of encouraging sources for which it is cheaper to control discharge to control more and to trade permits with other sources. However, the Act does not appear to allow this. Section 137 prohibits the transfer of permits between sites.

The inclusion of section 32 is apparently not enough on its own. Although the Act contemplates that a regional council may want to set minimum standards, it does not give any guidance on when that method might be appropriate.

63 The United States "best available technology" experiment demonstrates that it is unlikely industries will compete with each other to force technology.

64 *Supra* n 33 at 32.

IV CONCLUSION

The Resource Management Act does not contain rules about contaminants. It gives regional councils power to make rules, requires those rules to be efficient and effective, but otherwise gives little guidance about what kinds of rules are appropriate in what circumstances. In any event, those rules can be unmade in various ways by the Planning Tribunal. The Act's processes focus on making rules about discrete activities on a case-by-case basis through applications for resource consents.

The Act requires the decision making to be efficient. It relies on the participation of interested parties to inform the process about the likelihood of adverse effects on the environment. There are a number of problems with this process. It obscures the cumulative effects of different pollution generating activities and may lead to inefficient results by punishing new sources which have greater utility. It ignores the cost of informing the decision, and imposes information gathering burdens in inefficient ways. It relies on "trial and error". But it contains few mechanisms with which to evaluate the overall effect on the environment of the individual decisions.

The Act would be greatly enhanced by the addition of measurable goals or standards. The section 5 statement of purpose and the principles sections which follow it are not goals in this sense. Neither is the focus on adverse effects. It is not clear how much weight social and economic factors are to be given as against physical factors. This hard decision has been delegated from central to local government and to the Planning Tribunal. Although central government has retained the power to intervene in an ad hoc fashion through regulations, national policy statements, and applications for declarations, the lines of accountability are blurred. Requiring Parliament to decide on measurable outcomes would enhance both efficiency and accountability. It would provide a more transparent instrument for measuring the success of local attempts at control. And it would focus resources on central issues. The executive could use national policy statements and regulations to do this. Indeed, in the end it may be forced to do so by international pressure. Local and regional authorities should also focus their attention on standard setting in the contaminant area. That enhances their accountability and makes participation more meaningful.

The management of contaminants is a complex issue filled with uncertainty. The risks of making bad decisions are high. We have no reason to feel complacent about the prospects for successful and sustainable management of contaminants under the Resource Management Act as it presently stands. Participation by itself is not enough.