

3 February 2020

Submission on *Transforming the resource management system*
Resource Management Review Panel
Submitted by email to rmreview@mfe.govt.nz

PEPANZ Submission: Transforming the resource management system

Introduction

1. The Petroleum Exploration and Production Association of New Zealand ("PEPANZ") represents private sector companies holding petroleum exploration and mining permits, service companies and individuals working in the upstream petroleum industry.
2. This document constitutes PEPANZ's submission to Resource Management Review Panel on its *Issues and Options Paper*¹, for which submissions are due on 3 February 2020.

Submission

The aim of the review and lack of clarity about 'environmental limits.'

3. The review aims "to improve environmental outcomes and enable better and timely urban and other development within environmental limits". We agree with the need to "enable... development".
4. The paper does not adequately explain what the review panel means by "environmental limits" despite it apparently being a key concept in the review. Nor does it discuss the implications of such a change. This means that submitters cannot meaningfully engage with a key premise of the review. At best this is a significant oversight, and at worst presumptuous as it assumes all readers have a clear and consistent interpretation of this term.

Part 2 and the general but non-specific focus on environmental protection

5. We agree with Paragraph 34 of the review which states "The RMA's focus on environmental effects can also mean the positive benefits of development and a long-

¹ <https://www.mfe.govt.nz/sites/default/files/media/RMA/comprehensive-review-of-the-resource-management-system-opportunities-for-change-issues-and-options-paper.pdf>

term perspective are under-emphasised, despite these being core aspects of “sustainable management”.

6. We consider that Part 2 of the Resource Management Act (“RMA”) currently has an unreasonable presumption in favour of environmental protection but without a clear framework to constrain what this management should relate to. The status quo is general protection but this lacks an economic framework which would focus efforts on addressing genuine market failures (e.g. negative externalities that cannot be managed through voluntary arrangements or material information asymmetry which leads to poor outcomes).
7. We acknowledge that Part 2 outlines that 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”. However, we maintain that this framing means the environmental protection aspect outweighs, and renders subservient, the economic and social well-being arising from development.
8. Unless the concern about environmental effects is focusses on addressing externalities and market failure, it may be appropriate to counterbalance the “sustainable management” with greater (and equally weighted) statutory consideration of the benefits of development.
9. We consider that until the *King Salmon* decision from the Supreme Court, a more favourable “overall broad judgement” was applied but a strict interpretation of “avoid” directives has shaped the approach towards one favouring protection. Greater policy-level recognition of the importance of development (while of course managing negative externalities that cannot be managed through private arrangements) would be beneficial.
10. Trade-offs are inevitable, which in our view means policy should stay from absolutes and instead focus on processes to discover the best and most efficient decisions.

Allocation of resources

11. The review considers whether the RMA should have a greater role in allocating resources. In line with our view that the RMA should narrow its focus to managing genuine market failures in the environmental domain (except in relation to climate change due to the role of the Emissions Trading Scheme (“ETS”)), we oppose expanding the RMA to include a greater allocative role.
12. As a general principle, we consider that tradable property rights (such as market-based instruments) are superior at efficiently allocating resources compared to bureaucratic decision-making. Bureaucratic decision-making is not informed by prices, and it is prices that serve as a ‘simple signal’ to distil complex, disperse and dynamic information.
13. We note that the Ministry of Business, Innovation and Employment is conducting a significant review of the Crown Minerals Act 1991 (“CMA”). The CMA was brought into force concurrently with the RMA in 1991, and these statutes deliberately separated out the management of Crown-owned minerals into a regime to allocate rights (the CMA)

and another regime to manage environmental effects (the RMA). We consider it crucial that the respective roles of these statutes be maintained, and that neither be extended to stray into the domain of the other.

14. With scope creep and duplication comes the significant risk that responsibility and accountability is diminished rather than enhanced, whereby different regulators feel less need to focus on areas where another regulator also has responsibility. In addition, if multiple regulators (e.g. the Ministry for the Environment administering the ETS, the Climate Change Commission, and then local councils) are considering the same matter and imposing requirements or conditions, the risk arises that contradictions in policy and inconsistent requirements are imposed.
15. Given the petroleum sector's strong interest in the Crown minerals policy, we consider it appropriate to make a few remarks on *why* we consider the CMA is the appropriate tool to allocate mineral rights. The fundamental role of the CMA is to provide the institutional framework to efficiently allocate permits to competent commercial operators, and to manage the Crown's rightful interest in its resource being developed efficiently. Because the resource is nationalised there are no pure markets for allocating rights and no capital market to signal whether markets consider government is managing its resource efficiently, so a permit regime that promotes competition and efficient allocation is important if the efficiency of market allocation is to be mimicked. To achieve a market-led allocation, the Crown should leave acreage open to nominations for offers or direct applications from the commercial operators and this contrasts to a government-directed planning model whereby the Crown decides what areas can be available for applications.
16. Contestability of access to permit acreage (and ability to acquire permits through transfers to ensure resources sit with the person most valuing it) is appropriate as this encourages innovation and competition between potential operators. To be attractive to investors and to expedite development of the Crown's resource, the institutional framework should seek to minimise transaction costs in the permit allocation and management framework. This will also maximise the return to the Crown.

Climate change mitigation in the RMA

17. We are concerned about the Government's consideration to amend the RMA "so that decision-makers are able to fully consider both the effects of climate change on development (adaptation), and the effects of development on climate change (mitigation)."
18. We support economically efficient reductions in greenhouse gas emissions, and strongly advise that the Emissions Trading Scheme be used as the mechanism to deliver this.
19. Nationally-set demand-side policies like the ETS are considered more effective and efficient policy tools because they directly apply to emissions and are market-based instruments that let actors dynamically respond to price signals. Prices provide signals and flexibility for the market to determine the most efficient ways to operate. It also

encourages forestry planting and new technologies to reduce net emissions, even from emissions-intensive sectors.

20. Using the RMA to manage greenhouse gas emissions from petroleum exploration and production is also problematic and difficult because at the point of production, the ultimate use of the hydrocarbon is uncertain, i.e. it may or may not result in emissions depending on the end use, and to automatically assume combustion and release of emissions is unreasonable given the petrochemical use of hydrocarbons and possibilities for emissions reductions or capture. Also, at the exploration stage, the economic viability of resource has not been established, which means there is no guarantee any petroleum will in fact be produced.
21. Carbon leakage (whereby emissions policies in one jurisdiction simply push production to another less-restrictive jurisdiction) is a key concern of PEPANZ. Carbon leakage is typically considered at an international, intra-country level but this concern may be relevant domestically if one local authority prevents an emitting operation (especially fairly mobile ones such as petrol stations) only to see business move to the jurisdiction of a less restrictive council.

Carbon Capture and Storage

22. One aspect of the RMA that should be considered in relation to climate change is regulatory barriers to carbon capture and storage (“CCS”)². Although carbon capture and storage is not specifically prohibited in New Zealand, there is no legislation that sets out a CCS regime or specific consenting process. This uncertain and ill-defined framework means that CCS operators could theoretically apply for consents, but detailed reports advise that the RMA is not equipped to deal with the nuances of CCS (even if “called-in” by the Minister for the Environment). The two key reports are listed below and reach the stated conclusions.
23. In Carbon Capture and Storage: Designing the Legal and Regulatory Framework for New Zealand³ Barry Barton of Waikato University states CCS “is probably not actually possible at all under the existing law”.
24. The Productivity Commission’s Low Emissions Economy⁴ report considers that the current law “is not set up to deal with the complexities of CCS, and acts as a barrier to the uptake of these technologies” (page 449).
25. **Appendix One** expands on the regulatory issues identified in these reports.

² Carbon capture and storage (CCS) is the process of capturing carbon dioxide emissions from large sources such as power plants and storing them where they cannot escape into the atmosphere, usually deep underground in geological formations (often in former oil and gas reservoirs). Large scale CCS is a reality today and can remove as much as 90% of carbon dioxide from major projects.

³ https://www.waikato.ac.nz/_data/assets/pdf_file/0011/179570/University-of-Waikato-CCS-Report-2013-web.pdf

⁴ https://www.productivity.govt.nz/sites/default/files/Productivity%20Commission_Low-emissions%20economy_Final%20Report_FINAL_2.pdf

Planning complexity

26. Paragraph 47 of the Review refers to "The proliferation of planning documents under the RMA has added complexity and cost, as both applicants and administrators must trawl through a multitude of policies to discern relevant direction. There is also a lack of integration and alignment of RMA policies and plans."
27. We agree with this assessment. There is unnecessary variation across plans which leads to complexity and cost to understand. We appreciate that the RMA is intended to ensure local communities can set their own rules and this may warrant differences, but many matters suit standardisation, and different rules should only be employed when there is a good case for having them.
28. The plan-making process is prolonged, costly and now highly litigious. Sensible and workable rules are frequently appealed by motivated groups, which means that commercial interests must also participate in appeals as the local councils typically do not want to spend the money on defending rules in relation to a particular sector. These appeals require significant effort in terms of time and cost.

Appendix One: Regulatory barriers for carbon capture and storage

The Productivity Commission's *Low Emissions Economy* report and the Waikato University paper both recommend a bespoke CCS Act.

The Waikato University paper states "*A close analysis of the RMA, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act), and the Crown Minerals Act 1991 produces the conclusion that none of those Acts is capable, either in its detail or its general architecture, of delivering the legal framework that is required for CCS*".

The main comments of the Commission and University include the following.

- i. CCS is a 'removal activity' under the Climate Change Response Act ("ETS Act"). That means the removing entity (i.e. an operator of a suitable geological formation) could receive 1 ETS credit for every tonne of CO₂ removed and stored (s64(1), CCRA).
- ii. However, that only applies where the capture and storage is related to a given operator's activities. So, if an operator were to store carbon on behalf of a third party, then that operator could not currently claim ETS credits.
- iii. One of the Commission's recommendations (R14.7) is to change the ETS Act so that an entity performing CCS (including capture) can receive ETS credits, regardless of whether or not that entity was the source of the CO₂.
- iv. Like the Commission's R14.7 recommendation, the University paper recommends that the definition of 'removal activity' be wider than currently stated for CCS, i.e. that CCS be a removal activity "*whether or not the CO₂ is from an activity that is required to surrender units*".
- v. The Commission considers that the combined effect of the RMA, EEZ Act and Crown Minerals Act is not capable of delivering the legal framework required for CCS. In particular, the RMA was singled out for not being fit-for-purpose for CCS. For example, the RMA is not equipped to deal with the long-term liability required for CCS operations.
- vi. The University paper aligns with the Commission's findings on the RMA, stating "*The overall consequence appears to be that the positive effect of CCS on climate change cannot be taken into account (it is not a renewable energy project), but its possible negative effects on the environment more broadly can be. This could make it practically impossible to get consent for a CCS project...*"
- vii. To deal with this issue, the Commission recommends (R14.6) that a whole new piece of legislation, a CCS Act, be drafted to regulate CCS.
- viii. The University paper also considers that a new CCS Act is the preferred option. To clarify the interplay between any new CCS Act and current regimes like the RMA and EEZ Acts, the paper states (emphasis added) "*We conclude that new legislation should be enacted that specifically regulates the injection of CO₂ for permanent sequestration, any subsequent leakage or migration, and exploration for storage formations. We propose that those matters will be removed from control under the RMA and EEZ Act, and will not require permits under them*" (Executive summary, page vii)
- ix. The University paper (page 57) recommends any new CCS Act apply only to the injection and storage aspects of CCS operations, but other CCS activities will likely still be covered by the RMA.

- x. The University paper (page 49) concludes that permits for CCS cannot be issued under the Crown Minerals Act, as CCS is outside the definition of 'mining'. The University notes that the CMA does not prohibit CCS.