Resource Management (Simplifying and Streamlining) Amendment Bill 2009
Submission on behalf of BayWatch HB. Written by Angela Hair, 238 Craggy Range Rd, RD 12 on behalf of BayWatch members Chris Ryan, Jenny Baker, June Graham, Diane Charteris

BayWatch Hawkes Bay is a collective of interested people who care about our local environment and the impact of development on the quality of our water, air and soils. Over the past 4 years we have been party to and observed Council decision-making on important local issues. We agree with the comments by writer Bruce Bissett in HB Today regarding the RMA . "The RMA is in essence a good law. Its basic premise is robust, its intent extremely laudable and (again, barring the odd exception) it have been proved both resilient and flexible when tested in court."

This submission illustrates from recent examples the impact that proposed Clauses in the Bill could have had on outcomes in Hawkes Bay.

1.0 REMOVING THE ABILITY OF A PERSON REPRESENTING A RELEVANT ASPECT OF THE PUBLIC INTEREST TO JOIN PROCEEDINGS UNDER S 274

The Bill removes the ability of a person 'representing a relevant aspect of the public interest' to become a party to appeals. This would eliminate community groups who did not submit in the first instance from joining an appeal.

The Bill also shortens the timeframe for joining an appeal from 30 days to 15 working days.

Refer to Clause 131 of the Bill and Section 274 of the Act.

1.1 Discussion :

An relevant example of the implications of this amendment in Hawkes Bay is the Hastings District Council vs Julian Robertson appeal to the Environment Court 2004.

When HDC granted resource consent for Cape Kidnappers Golf course owner, Julian Robertson, to build his luxury lodge on cliffs at the eastern end of Cape Kidnappers they overturned their own District Plan which prevented developments on areas deemed as an 'outstanding natural feature'. There were three appellants against this decision. The community outraged at this disregard for its beautiful cliffs, wanted to get behind the appeal. A group called Cape Kidnappers Protection Society was formed and joined the appeal of Gannet Beach Adventures Ltd, under s274. This enabled the group to raise public awareness and gain public support for the appeal while also raising $40,000 to pay legal fees. The outcome was that the appeal was successful and the developer was unable to build on this significant and beautiful protected land.

In this case neither the developer nor the District Council had the best interests of the environment in mind nor could be relied upon to protect an 'outstanding natural feature' that has great community significance.

It is worth noting that often members of the public dont find out what is happening until the submissions have closed and its then too late for them to participate.

The timeframe allowed (i.e. 15 working days reduced from 30 working days) also reduces the ability for community groups to have an input.

1.2 <u>BayWatch oppose and seek the removal of Clause 131.</u>

2.0 SECURITY FOR COSTS

The Bill removes a prohibition on security of costs so that the Court can impose security of costs on parties to an appeal. This means that if the Court sees fit, it may require a party to an appeal to pay a certain amount of money first, as security for any future award of costs against that party.

The Bill increases filing fees from $50 to $500.

Refer to Clause 133 of the Bill and Section 284A of the Act.

2.1 Discussion:

In the case described above (HDC vs Julian Robertson) a security of costs provision imposed upon the Cape Kidnappers Protection Society and Gannet Adventures Ltd may have impeded the ability of the groups involved to raise an appeal.

The increased filing fees will have little or no impact on wealthy interests but may further diminish the likelihood of community groups having a say. It is a basic democratic right for people to have a say and be appropriately heard. These punitive costs make this less likely.

The story of David and Goliath is a salient reminder of the hurdles that community groups already need to overcome to be heard. The proposed amendments makes Goliath even more montrous!

2.2. BayWatch oppose and seek removal of Clause 133 which repeals section 284A of the Act

3.0 REVERSING THE PRESUMPTION ON NOTIFICATION

The Bill reverses the presumption on notification so that instead of there being a presumption in favour of notification, there is now a presumption in favour of non notification.

Refer to Clauses 93, 93A, 94, 94AA, 94AAB, 94AAC, 94AAD, 94AAE, 94A and 95 of the Bill and Sections 93 and 94 of the Act.

3.1 Discussion:

There is already insufficient notification occurring regarding resource consents resulting in interested parties being unable to have a say about the impact of particular developments in their area. The clauses in the Bill further reduce the ability for affected parties to be heard.

An example of the impact of this non-notification can be seen in the small community of Whakatu, Hastings. When a local wool scouring plant extended its activities a resource consent was granted without the community having a say on possible impacts. Local residents have expressed extreme frustration and anger at their inability to do anything about the smell of wet wool and dags that permeates their properties when the wind is blowing their way. They feel neither the owner of the industrial plant nor the Council have any regard for how it affects them either physically or mentally. The wool fibres affects their physical health with sore throats and skin itching.

3.2 BayWatch seek review of Clauses 93, 93A, 94, 94AA, 94AAB, 94AAC, 94AAD, 94AAE, 94A and 95 of the Bill <u>to strengthen the need for notification rather than diminish it</u>, especially when the mental well-being and physical health of the local community is threatened by a proposed development.

4.0 REMOVING THE ABILITY TO LODGE FURTHER SUBMISSION IN THE PLANNING PROCESS

The Bill removes the further submissions stage in the planning process. This stage enables comment on submissions that have been lodged on a plan or policy. Without further submissions, there is no opportunity to respond to anything new that has been sought by other submitters, which may significantly change or even reverse the provisions in the plan. Instead of further submissions, the Bill allows local authorities to seek the views of anyone that it considers might be adversely affected by matters raised in a submission. While those views must be taken into account in the decision, there is no right to appear at the hearing or lodge an appeal on that part of the policy statement or plan. This means that under the Bill a submitter could request that rules be removed or altered to allow for more intensive development (for example a reduction in minimum lot sizes in the rural zone) and there would be no opportunity to oppose that relief or participate in the process (except, to a limited extent, at the discretion of the local authority). This change will result in weaker plans and more litigation in the High Court, as people resort to judicially reviewing the decision of the local authority.

Refer Clause 148

4.1 Discussion:

When local developer Andy Lowe proposed to develop housing at Ocean Beach the Hawkes Bay community responded with a megaphone shouting "NO!". HDC Plan Change proposed 268 houses then settled on 386. Meantime Andy Lowe submitted his own Plan Change with initially 540 houses proposed then later settled on 1000 houses. With each collective gasp of horror as the numbers rose the community fought back through submissions and submissions on submissions.

In our experience plans continue to develop through the submission and hearings processes and it is only when the appeal to the Environment Court is finally lodged that the full story emerges.

4.2 <u>BayWatch oppose and seek the removal of Clause 148</u>

5.0 SUPPORT OF ECO SUBMISSION "KEY OBJECTIONABLE ELEMENTS"

BayWatch HB supports the submission from Environment and Conservations of NZ Inc (ECO) with regard the following points :

2. The removal of the decision role of the Minister of Conservation in restricted coastal activities. The Minister of Conservation acts on behalf of the Crown as the "owner" in the coastal marine area. Currently the Minister is the final decision-maker for large projects or complex applications that are restricted coastal activities. Removal of this power will also prejudice any future iwi or hapu rights to protect the seabed and foreshore in coastal areas. The Bill removes this power and passes it to the regional council. To improve the current process applicants should be asked to seek consent from the Minister of Conservation prior to having that matter resolved through the RMA processes. **Clause 20 should be deleted**.

3. **Limitation of appeals on policy statements and plans and the removal of cross-submissions**. This severely undermines public participation and the development of robust policies and plans. This is an important avenue for people to work through policy statements and plans. Even councils are known to appeal their own decisions or support other appeals as a means of fixing mistakes in their decisions. The proposed amendments are short-sighted as most plan and policy appeals are resolved through mediation without going to a full hearing – this is a cost effective outcome. Full appeals have assisted resolving controversial issues, eg minimum river flows or subdivision controls. **Amendment clauses 132 and 136 should be deleted.**

6. Removing the non-complying category of resource consents.
This will lead to greater uncertainty for the environment as more activities get put in the lower "default" discretionary category. The non-complying category of resource consent fits between discretionary and prohibited in a hierarchy from permitted to prohibited. The purpose of the sequence of types was designed to provide potential applicants for consents with a set of signals that would indicate the likely acceptability of their proposals, and so save investment in projects that would be unlikely to get approval. The proposed removal of the non-complying category will reduce this signalling and will likely lead to less ability for councils to reject proposals and reduce the environmental constraints on an activity as councils rarely put activities in the prohibited category. It will also just add to the workload of council and the community with lots of cost and doubtful benefits of sorting out this change and amending plans. **Amendment clauses 147 and 152 and the first schedule of the Bill should be deleted.**

7. Delaying the legal effect of proposed plan changes until a final decision is made thus placing the environment at risk. This change could make changes to vegetation control or coastal control rules in plans irrelevant as developers move quickly to get consents under the old rules and thus defeat the purpose of the change. It will induce other such pre-emptive behaviour. **Amendment clauses 59 should be deleted.**

9. The requirement that only effects beyond the immediate environment have to be considered when councils decide whether to notify resource consent applications. The test is for the notification requirements in proposed section 94AA (Clause 68 of the Bill) to not consider effects within the immediate environment of the activity. In paragraph a) notification is only compulsory if there are effects "beyond the immediate environment" of the activity. Not only is this vague, it also puts at risk any biodiversity or historic values on the site itself. Thus if a subdivision or mine, say, were only to destroy rare species in the immediate environment of the subdivision or mine, the council, by this test, would not be required to publicly notify the resource consent. Similarly, loud noise in the "immediate environment" would not be a basis for notification. **Clause 68 should be amended so that in proposed section 94AA(a) the words "beyond the immediate environment" are deleted.**

10. Removal of any generic urban tree protection rules.
This provision does not just affect single urban trees on private or public land but also rules to protect trees on private land in gullies, riparian areas, and coastal areas in the urban environment. The urban environment is not defined and could be widely interpreted. If this clause was retained, councils would be buried in individual applications to protect each tree. **Amendment clauses 52 and 151 should be deleted.**

11. Removing the requirement to review district plans every 10 years. The argument put forward for this is that developing plans has taken a long time. In our view this is true but a spurious argument, since future plan reviews have existing plans to build on and will not be nearly as laborious as developing the first rounds. With changing conditions and pressures, and the increasing number of private plan change applications, plans need regular reviews and it is important for Councils to review their plan every 10 years especially as second or third generation plan are developed. **Amendment clauses 54 should be deleted.**

12.Allowing the applicant to veto Councils seeking further information.
An essential part of the RMA resource consent process is obtaining sufficient information to make good decisions, rather than making a fast decision which is a bad decision. While there is a requirement for an environmental assessment to be prepared, there is now to be no audit of that report which was previously required. The current provisions in the Act (section 92A(3)) allows councils to reject a proposal if *"it has insufficient information to enable it to determine an application*". This provision is proposed to be deleted. This is another example of tilting decision making in favour of applicants and of increasing risk to the environment and community. **Amendment clause 66 should be deleted.**

13. Applicant is the "process maker".
If you have a project which you consider is a proposal of national significance (echoes of the repugnant National Development Act here) and want a fast process and can pay, then you can ask the Environmental Protection Agency to recommend to the Minister to take the project direct to a Board of Inquiry. This skips the council process and the Environment Court. For a smaller project you can ask the Council to agree to go direct to the Environment Court (new sections 87C and 87D) or you can get the Environment Court to over-rule the Council's opposition (new section 87E). The Bill encourages cheque book planning. This is not in the interests of the community or the environment. ***Delete amendment clause 93.***

14. Making National Environmental Standards (NES) the maximum standard rather than a national minimum
There are a range of changes which position the NESs as maximum standards rather than minimum standard that allow councils to set more stringent standards based on their individual circumstances. The Bill will make no improvement to the process by which these standards are made. This is weak compared to the development of National Policy Statements or rules under a plan in the First Schedule. **Amendment clauses 39 and 40 (new section 44A) should be changed so that NESs are minimum standards.**

6.0 SUPPORT OF ECO SUBMISSION "GOOD THINGS"

BayWatch HB support the submission from Environment and Conservations of NZ Inc in particular the inclusion of the following clauses :

1. Increase in the penalties to $300,000 for individuals and $600,000 for corporate bodies – but the increase still leaves fines at low levels when compared to the maximum penalties under the Commerce Act. Those are $5 million for bodies corporate and $500,000 for natural persons. (Support Clause 141 but call for stronger penalties).

2. Providing power of the Environment Court to require a review of an offender's resource consent by a council. (Support Clause 141).

3. Allowing enforcement action to be taken against the Crown. This action is limited to only local councils and cannot be taken by other parties. That limitation should be removed (Support Clause 5).

4. Removing a Requiring Authority that is an applicant from the role of the final decision-maker. This is a major step forward and will stop roading, transmission and other companies from being both the applicant and the decision-maker. (Support Clauses 110-112).

7.0 SUPPORT OF ECO SUBMISSION "OTHER MATTERS"

Other matters:

1. The Bill includes reference to the Environmental Protection Agency but it is really only a name and in the first instance will be the head of the Ministry for the Environment, a position subject to direction of the Minister. The EPA should have no political direction in making decisions on whether a project is of national significance and in then establishing a Board of Inquiry to hear the application. These provisions should have been left to the phase II process to allow wider considerations of the role of the EPA. Clause 35 and associated provisions should be tabled by the Committee for further consideration and not for passage in this Bill.

2 There are a number of changes in the Bill which down-weigh the role of the Environment Court as a specialist body. Instead of a standing Court, hearing and assessing environmental issues from scratch hear by a judge and two expert commissioners, it will often be replaced by an *ad hoc* Board of Inquiry. This will generate a confusing two-track jurisprudence – one in the Environment Court and one in the Board of Inquiry process. It is unclear how conflicts will be resolved. This will leave a more tangled legal process and unclear precedence for the future.

3 The direct referral of matters to the Environment Court (clause 59 - new sections 87C to 87E) or to a Board of Inquiry (clauses 91 and 93 new sections 140 to 150AA), designed to save time, will create clogging in the Environment Court as the problem solving and resolving role of Council hearings will be lost. These provisions should be deleted.

4 The bulk of "appeals" to the Environment Court at present are really only designed as credible threats as a precondition to successful court-ordered mediation. Most such appeals never in fact reach the Environment Court at all. The mediation process is only available via the appeals process and it is in mediation that most appeals are resolved. The direct referral of cases to the Environment Court or Board of Inquiry will not only clog those bodies and "burn off" community participation, they will also deprive the parties of mediated outcomes which often deliver much lower cost and better crafted outcomes than court hearings. The role of the Environment Court as a successful mediator will be blocked by direct referral and also by limitations on appeals on plans and policies.

More detailed comments:

A. Time taken is overstated

The Minister for the Environment, Nick Smith, has made a great claim about delays for large projects under the RMA but it he right.

All the projects that the Minister mentions were controversial and all controversial projects are likely to take more time than run of the mill projects.

Among the projects the Minister has highlighted was the Wellington inner-city bypass. The Minister claimed the RMA process took 15 years but the information on the Transit NZ website tells a different story. A designation under the Resource Management Act was applied for in April 1996. The Resource Consent process, including appeals, was completed by May 1999. The RMA process (including appeals to the Environment Court) took 3 years and not the 15 years claimed by the Minister.

Claims are made that the Young-Cooper study for the Ministry for the Environment shows that roading projects take on average 5 years. This is a product of sloppy research. Young-Cooper makes that claim but the body of her research paper does not support that statistic which apparently came from a developer with no evidence cited to back it. The average time taken for roading projects undertaken in 2003 (see Young- Cooper 2003, table 1) showed that all the projects took less than 3 years to pass through the RMA resource consent processes:

- ALPURT B2 (Albany to Puhoi Realignment): 20 months (including appeal)
- Auckland Grafton Gully 3 months
- Project PJK Northern Arterial - Tauranga - 11 months (including appeal)
- Wellington Inner City Bypass - 15 months plus appeal

It is clear that the Minister has been badly advised on delays which are more urban myth than fact.

B. Crown gives up on coastal management

Coastal management is different from land management. The Minister of Conservation acts on behalf of the Crown interest in the coastal marine area as the defacto landowner.

Unlike land management there is no requirement land owner consent to mineral activity under the Crown Minerals Act, that consent is incorporated in to the resource consent under the RMA.

The Minister makes the final decision on a limited number of major activities which meet the test of restricted coastal activities under the New Zealand Coastal Policy Statement. This provision has enabled the Minister to reduce the term of untreated sewage discharges into the sea.

The Government's proposal is to remove the Minister's approval requirement and to pass that to the Regional Council without adding any other landowner consent provision (eg to the Crown Minerals Act) for coastal matters. This is anti-conservation but also will prejudice any future iwi rights to refuse consent in the coastal area. Regional Councils also do not have the Crown's obligation to sort out Treaty of Waitangi claims which are important issue to consider in the coastal marine area.

The Government should not proceed with this provision while there is a review of the Foreshore and Seabed Act.

C. Urban Trees protection to get the axe

The ability of councils to protect urban trees and habitats in urban areas is proposed to be severely curtailed by the provisions of the Bill.

The Government has followed through on the Technical Advisory Group recommendations to stop councils making generic rules on trees.

These general tree provisions protect not only individual trees but also safeguards groups of trees (ie forests, bush or shrublands) in an urban environment. This could include trees protecting riparian areas, coastal areas and other remnant vegetation of what is left of an ecological area. This proposal then undermines Part II of the Act to protect significant indigenous vegetation and outstanding natural features and landscapes, both of which can exist in urban areas.

Imagine trying to schedule every tree that is found in a gully or coastal area under a district plan. Councils have generally found it easier to have generic rules in a plan rather than a bureaucratic nightmare of identifying every tree.

The Bill also fails to recognise the amenity values and values associated with urban trees. ECO doubts New Zealanders want to see urban areas turned into concrete jungles.

D. Increase in RMA charges

In addition to the changes to the RMA, the Government is proposing to drastically increase the charges to taking an appeal under the Act. The Minister has indicated that appeal lodgement charges will be increased to $500. This is an increase of nearly 1000 percent over the current costs for appeals on plan, policies or resource consents which now cost $55. The Minister can implement this increase with a change in regulations without changing the Act.

These court fee increases are another barrier to public participation and good policy and plan making.

E. Draconian Trade Competitor rules

The proposed rules to deal with Trade Competitors are lop-sided and could result in community groups being prosecuted for innocent mistakes, for instance if they happen to have a member who is a trade competitor of the applicant for a resource consent.

The provisions (clause 139) allow action to be taken up to 10 years after the contravention. This is much wider than the 6 months allowed after an offence is known under section 338 of the Act.

This action can not only be taken against a competing business but any organisations or person supported by that competing business. Proceedings can be taken for damages which are much greater than the penalties that can be imposed under the Act for polluters and destroyers of the environment.

The provision requires any group to before a case, disclose whether they *"have received, is receiving or may receive direct or indirect help from"* a trade competitor. This provision is so broad that it may require groups to advise the Court of any donation or potential future donation from any possible trade competitor now or for at least ten years in the future. This is unworkable and absurd, particularly since community groups often have membership turnovers over a decade, and because of the massive load it places on community groups.

It also prevents the trade competitor from directly or indirectly helping another group or person. So in cases when the trade competitor has the experts or information that may prove the environmental effects of a project, then you cannot use them.

Notice that the provision does not apply to the applicant – they can use as many inducements and other resources as they like to get supporting submissions on their application. There are no provisions in the Bill to stamp out the outrageous and increasingly prevalent practice of councils paying applicants for resource consents.

These provisions need to be rethought or deleted from the Bill because they are unworkable and breach normal justice requirements of fairness and balance.