Do we need a New Zealand EPA?

Gerard Willis, Enfocus

Introduction

There is, of course, no such thing as a “standard EPA”. While we might like to talk of “an EPA” as though it were a Toyota Corolla - you know what you’re getting when you decide you need one - national level environmental regulators come in all shapes and sizes reflecting the various needs and pressures, constitutional subtleties - and no doubt historical happenstances - of their various jurisdictions. So “do we need an EPA” is, with respect, not he question I’d be asking.

A better question I think is “what, in this business of environmental management, do we need to do nationally and what’s the best way to package and deliver those functions”. Unfortunately that is not, I think, the approach that is being taken in this debate.

No silver bullet

We need to be cautious about focusing on an EPA as “the next best thing” – the kind of silver bullet that, if only we’d thought of earlier would have avoided the environmental issues and challenges we face today. There is a long history of “fixes” that have been advanced from one or other party in the resource management game.

- The RMA itself of course - integrated management, devolved decision-making, economic instruments all steered by an ever-so-cunning, over-arching, values-based purpose clause – policy Nirvana, aren’t we so clever. Problem solved
- Amendments of course – always a favourite – ok we got a few things wrong but hey we can “fix” them.
- The soft options – a particular favourite of some – capacity building, promoting best practice, helping, encouraging, accrediting, holding hands, bear with us – its about people and skills.
- Super funds, new consensus-building models for decision-making.
- Regulatory fiats – national policies, national standards – if it doesn’t work nationalise it. Still popular but off the boil – perhaps because the recipe book is lost.
To be fair all those ideas all have merit but all they have at times been over-hyped with a lack of advance appreciation of the downsides and limitations.

Is the EPA finally the answer – as always it depends on the question …. and on what you mean by an EPA.

Observations

In understanding the debate about an EPA is it useful to understand some of the context. These are presented below as two observations.

Observation #1 – this idea is being backed, on the one hand, by those disgruntled by regional level management, and the perceived failure to secure appropriate environmental outcomes and, on the other, by those seeking swifter, more efficient (dare I say it business-friendlier) processes and, lets face it, substantive decisions that ensure national economic interests prevail over local environmental concerns. This scenario suggests that one of these parties will be regularly disappointed should be move to an EPA.

Observation #2 – There are two very different ways of looking at regulatory responsibilities that have prevailed under the RMA. The first – arguably but by no means exclusively (or always) - is represented by regional councils. It focuses on the “Do the best you can and we’ll live with the consequences” approach. In policy speak its about best practical option, best practice. Its about being hard and demanding improvements but not going to the point of fundamentally affecting viability of a project or the productivity of particular industries or sectors. “We’ll force change but only to the point or at the rate that you can still operate and grow production”. It’s not a cop out but it is, the reason that planning documents seldom define hard and fast environmental outcomes and targets. Proponents want to retain flexibility to make “reasonable” judgements about how far to push.

The second approach, as you might have guessed, is the “here’s the outcome we want – manage your activity to achieve it. We’re not overly concerned at the consequences. If you have to reduce production, set aside your industry growth aspirations, be denied development rights even when all around you have been given and exercised theirs, so be it”. It is the hard-nosed bottom line approach. Not great concern for equity, nor for the economic implications.

Of course this can, as can everything in this game, be traced back to Part 2 (s.5) of the RMA. Which is, I suggest, capable of either interpretation and I think it is fair the say that the Courts have allowed those two interpretations to continue.

We have never really had a national debate about whether, as a matter of principle, we should go one way or the other. We have crafted legislation capable of either route and we have let it be debated on a case by case basis.

The truth is, as observed a moment ago, that one of the key motivators for an EPA is from those who believe that an EPA is more likely to deliver that hard-nosed bottom-line approach.
But is it the way to go. Will it in any event deliver anyway?

I suspect that even in an agency of regulators with kryptonite spines and filing clerks with PhDs in environmental science, regulatory decisions and the public acceptance of those decisions will be tempered by the same range of factors influencing current regional decision-making – namely the confines and requirements of governing legislation, incomplete science, the environmental reality that problems and their solutions present differently in different places, social and economic realities, unresolved Treaty and ownership matters and the difficulty of communicating complex issues to a public fed on sound bites of the popular media.

Other drivers of reform

Does that mean that the whole notion of an EPA for NZ has no merit? No. But I think if there is a justification for an EPA it is grounded in other issues.

The first of these is the apparent trend towards metropolitan regionalism – a fancy name for urban dominated regions becoming unitary authorities – a trend most apparent in the decision that Auckland should no longer be a collection of feuding suburbs but a super-sized city. This is a driver for the simple reason that it is yet another nail in the coffin of the local government structure as originally conceived in the late 1980s where territorial authorities delivered services – including infrastructure - and managed land use; and regions regulated environmental consequences. In an era when local councils controlled activities with significant environmental consequences - water supply, stormwater, wastewater, transport and solid waste disposal – that model of separating service provider from regulator seemed an eminently sensible one. Of course it was almost immediately undermined by the decision to allow unitary authorities in top of the South island and then again by the 2002 Local Government Act that gave both regional and territorial authorities the same broad mandate – with that stroke of the legislative pen the arguments for retaining a two tier system with a clear environment guardian were somewhat undermined – very simply why have two layers if they do the same thing?

Although the nature of local government – particularly in major urban centres like Auckland - has changed significantly in the last two decades (with major utility services generally undertaken at arms length) the fact remains that some of the largest environmental issues in Auckland are caused by, and the resolution in the hands of, territorial councils or their various entities (some of which also happen to be important sources of income). The conflicts of interest this creates are pretty obvious and the question of who monitors the gamekeeper needs to be addressed. Ergo an EPA? Perhaps.

The second rationale relates to Treaty settlements. If, as seems likely, future settlements include significant proposals for co-management of waterways the future regional council becomes an issue. If the nation’s major waterways and contributing catchments are controlled by special purpose joint Crown/iwi entities where does this leave regions? With the potential for insertion of yet another layer in the management framework questions are going to be asked about whether there isn’t a need to look at the overall governance structure.
Certainly, the proposal put forward by the independent review group on the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Bill, has some significant implications for regional councils in the Waikato. This should be watched with great interest by all those with an interest in the future of regional councils.

Thirdly, the Ministry of Environment was always conceived as a small policy agency. More recently it has been staffed like a large policy agency. But it has remained a policy agency none the less. It does not have the structure, systems of skills to carry out operational matters nor, as has been well publicised does it have enough technical grunt to manage regulatory processes. Currently most of these exercises are contracted out. Thus if there is a desire or need for a central government environmental operational capability or to expand its approach to national decision-making through the calling-in of projects under the RMA, as has been well signalled, some form of change is required.

Clearly these are factors motivating the Minister’s consideration of this issue.

What is an EPA?
As discussed earlier, an EPA can take many different forms. However, there are two fundamental characteristics.

First, they are single purpose entities. That is they are about *environmental protection*.

Second, they have a degree of *independence* from political interference.

So what’s proposed here?
As most I’m sure will be well aware, the EPA debate is in two phases. Phase 1 is provided for in the Resource Management (Simplifying and Streamlining) Bill.

We might call it “EPA Lite” but in fact it really isn’t an EPA at all, certainly not by the definition used above. Phase 1 includes no separate governance structure (a true EPA generally has two components (an authority – governance entity – a board or similar) and an agency (the administrating officials). Our EPA is in practice just a processing unit within a department.

So I’d suggest to you as I know some submitters has suggested that the name EPA is a misnomer at least in the context of the entity proposed as phase 1.

But those points aside its hard to disagree that if you’re going to call in lots more projects it pays to have the capacity and expertise to manage it the process appropriately. A dedicated unit the obvious approach.

Phase 2 is far murkier. Put simply, at this point, we simply don’t know where its heading. But let’s look at the options.

Basically I see a spectrum ranging from the simple project assessment/board of Inquiry servicing unit discussed. Through taking the existing MfE functions of NESs. (There is a debate I think about NPSs since there is a generally
accepted principle that policy is not a technical matter and ought to be made by electorally accountable representatives exercising judgement on behalf of their constituencies). It could extend to other existing government environmental regulation and at the far end of the spectrum, as I see it, regional council functions.

In my view, as you move from left to right on this spectrum the difficulty and risk increases and the justification decreases.
### Figure 1 – EPA Options

<table>
<thead>
<tr>
<th>Major projects</th>
<th>National standards</th>
<th>Existing national regulation</th>
<th>Regional functions</th>
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</table>
| Call in          | NES NPS (new combined tool?) | • Hazardous substances  
• New organisms  
• Activities within the EEZ | • Project assessment  
• Local policy/standards  
• Non regulatory programmes  
• Pollution response  
• Compliance & enforcement  
• Research, evaluation & reporting |
| MfE/ Board of Inquiry | MfE/ Board of Inquiry | ERMA MED/EEZ Commissioner  
DoC MAF/Biosecurity Maritime NZ/ MPRS | Regional councils/Unitary authorities |

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- Hazardous substances
- New organisms
- Activities within the EEZ
- Freshwater fish
- Marine mammals
- Sustainable forestry
- Marine pollution
- Wild animals control/pest management
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In defence of regional councils

Few people outside the sector have much idea about what local government does. But far fewer still have any idea what regional councils do. I think the role and effectiveness of regional councils is routinely under-estimated.

Put simply, regional councils do a lot of stuff. And they have achieved a huge amount over the past 20 years. But much of it is low profile mostly slipping under the public radar. Having said that there have been very real environmental gains. Just think back 20 years – most dairy farms pretty average two pond systems with discharges of treated waste direct to water ways. I believe that only around a dozen such systems are now in use in Manawatu, for example, and I think even less than that in the Auckland region (notwithstanding around 1000 and 300 dairy farms in those regions respectively). That is progress.

It is fair to say that first generation a plans were pretty tentative efforts. They were feeling their way in a whole new world there weren’t any templates. Some issues like water allocation just weren’t dealt with in anything like the sophistication required given the demand that was – as it turns out- just around the corner.

In my experience the plans coming through now are a far different proposition (although water allocation is still an enormous challenge). Take Horizons One plan as an example where really quite a sophisticated regulatory framework is proposed for the primary sector and non point source discharges in particular.

Which brings me to the second point, although one can observe that certain provisions may not be in regional plans it is, I’d suggest seldom the case that that absence of regulation is due to governance failure. I think you have to accept that very often its the result of a process that puts such regulation to severe public and legal scrutiny. The hurdles erected are high in terms of the burden of proof of cause and effect and the cost and benefit, and even where those tests can be met, the costs of getting provisions in place and defending those through the Courts can be nothing short of astronomical.

So to lay the blame in regionally elected decision-makers is I think to overly simplify a complex dynamic.

Financial contribution of regions

Regions of course do have a range of mandatory functions that extends much more broadly than just RMA. These functions include transport planning and passenger transport funding, biosecurity planning and pest management, civil defence and emergency management, oil spill response, navigation and safety, river control and flood protection.

Over all this activity they currently spend $865 million per year. Around $250 million of this is directly “environmental”. Just under $100 million of that relates to non regulatory programmes – that’s money that goes to on the ground programmes including grants to groups and individuals – it is mostly focused on achieving sustainable land management, water quality biodiversity outcomes. $87million is spent of consents, plan development and compliance monitoring.
The “other” environmental category – some $67.5 million is mostly devoted to research, SoE monitoring and education of various kinds.

It is worth noting also that within the $615 million of non core environmental expenditure there is considerable environmental benefit – including from the big ticket items of passenger transport funding and pest management.

**Subsidiarity**

It is worth recalling that there are both theoretical and practical benefits associated with the principle of subsidiarity upon which the current devolved system is based.

The ability to design solutions that take account of local/regional costs and benefits is critical one and is why many economic commentators including the Treasury have supported subsidiarity. In simple terms, devolved regulatory functions avoids the potential for national solutions that are based on a false understanding of local costs and benefits leading to economically inefficient outcomes.

Others have pointed out that information necessary for good management is held regionally and that the regionalism fosters for policy innovation.

**Key risks**

The key risk of an EPA is that it may lead to the re-centralisation of environmental management functions that are currently carried out at the regional level. This risk has several layers. The first is that the benefits discussed above will be lost and that national solutions that don’t make environmental or economic sense everywhere are much more likely to be imposed by an EPA as if they do.

But secondly, there is a risk that removing RMA functions from regions causes the very viability of regional councils to be challenged leading to a much broader unravelling of the local government structure. That would be an enormous disruption that we, and the environment, could do without.

I cannot see a viable model involving stripping of regulatory functions from regions with an expectation that they continue with non regulatory programmes. That just wouldn’t make sense on any level. If regions stopped funding $160+ million per year of non regulatory environmental programmes – I cannot see central government filling the gap. So just where is the environmental benefit?

We also need to look overseas as Raewyn Peart has ably done, at experiences elsewhere. Certainly there is a feeling in some jurisdictions that non accountable environmental governance models lead to a kind of environmental elite-ism that is not wholly positive, has attendant risks of “capture” (or perceived capture) and alienates local communities and local scale environmentalism.

There is also an unmistakable feeling in some jurisdictions that such agencies can rapidly become unwieldy bureaucracies, overly academic in nature, too
removed from grass roots and contact with those affected by environmental regulation and that impose procedural complexities that are stifling.

I am aware that in Australia the NSW EPA was brought back within the newly formed department of Environment and Climate Change in 2007 and the Queensland EPA (established 1987) was similarly restructured with its functions brought within the new the Department of Environment and Resource Management in March of this year. I am also led to believe that there are similar rumblings about the Western Australian EPA. If I was advising the Minister on the question of an EPA for NZ I’d be having a very close look at would motivated such change in Australia.

**The politics of governance reform**

The Minister has openly stated that there is benefit from the central government political perspective of the devolved model. Politicians can side with the public on unpopular decisions without being held responsible for them. An EPA changes that fundamentally. The buck does stop – or at least will be seen to stop - with the Minister. Some regions may like that but it likely that – should it happen - future Ministers may have cause to curse any such change. I am told that unpopular decisions in Australia have been instrumental in bringing down state politicians. On the other hand, at times Ministers like to have control - recent experiences with the Electricity Commission illustrate my point.

Of course the key issue is what the relationship is between the EPA and the Minister. In Wellington state services jargon it’s whether the EPA would be an Autonomous Crown Entity (like ERMA) or a Crown Agent (like ACC). ACE’s can be asked to take account of government policy but can’t be directed to give effect to such policy.

For the reasons given it is pretty likely any EPA would be an ACE – but I’m not sure how much that will really help the Minister when things get really hot.

**The process from here and where’s it all headed?**

A Cabinet paper on the EPA phase 2 is expected in a matter of weeks. The start up date for the EPA phase 2 is reportedly1 July 2010. You don’t need to be a rocket scientist to work out that isn’t too far away and that the clear implication is that relatively modest change can be expected if this deadline is to be adhered to.

For all the reasons given I just cannot see phase 2 EPA being a huge step forward (or backwards – depending on your view) from “EPA Lite”.

I predict an agency that might extend as far as subsuming some existing “core” environment regulatory functions – at most. Clearly there will be an independent board (which legally is the “authority”) that takes over from the Secretary for the Environment as the interim agency - and a separate regulatory agency possibly with responsibility for Projects, Standards and Risk and probably not much else.
There are though a couple of wild cards I believe Wellington is still looking for a receptive home for the problem child that is aquaculture. And the Minster has signalled that he’s keen to get shot of operational matters to an agency with some operational expertise – so don’t be surprised if the Crown residual responsibility for environmental risks associated with past Crown activities also ends up with the EPA.

Of course there is also the possibility that EPA Lite remains as a project assessment unit with the Authority constituted as a separate board – either as a decision-making body – or more likely an advisory board that has some role national environmental standards.

The Minister has made his vision pretty clear. That involves a three separate entities (1) audit (which have sees being environmental reporting carried out by the PCE – although there are some constitutional issues to sort out before that can happen), (2) policy (MfE) and (3) implementation (EPA).

Personally I suggest that regional councils need to figure in that vision.

**Conclusions**

I can see very little prospect of an EPA coming out of stage 2 that costs the Government significant money. The Minister made already made it pretty plain that a Coastal Commission would not be a first term priority. I suspect as EPA that goes much beyond EPA Lite will be in the same category. Maybe though there will be a phase 3 or 4 further down the track.

The relationship of the EPA to the Minister is a vexed issue but in the end, notwithstanding recent government’s experience with the Electricity Commission – I suspect it will be an Autonomous Crown Entity. Whether that will be enough to shield the Minister from damaging fall out from the inevitable unpopularity of resource management decisions we’ll have to wait and see.

What of the EDS proposal? Well sensibly it doesn’t go into major local government restructuring territory so it stands some chance I suspect. But it does rely very much on a command and control hierarchal approach. It does rather assume – with more faith than I can summon – that central policy makers are innately smarter, better informed, less compromised or perhaps more appropriately incentivised than their regional counterparts. So much so that are able to, and should, tell regions what to do and have the final sign-off on policy. I’m not sure the evidence bares that supposed superiority out. The reality is that the bulk of this country’s experienced environmental regulators and policy makers currently sit in local government – scattered thinly for sure – but still vastly outweighing current central government capacity.

I see a great irony in proposals for greater collaborative management. A great concept for sure but surely the first priority for better environmental governance is better collaboration between central and regional policy-makers. I spend a great deal of my time helping one or other level to marshal arguments to hit the other about the head with (metaphorically speaking). There is still a very strong and unhelpful “them and us” attitude when it comes to the central/regional relationship. It’s like the Blues playing the Hurricanes when it should be more like the forward and the backs in the same team.
It’s always tempting to look across the ditch and assume that different ways of doing things are necessarily better – despite the weight of feedback from elsewhere that how we do things now is much admired by others and that perhaps we have got things more right than wrong.