Measuring Up: The proposed national "state of the environment" reporting system

In this article Ceri Warnock and Madeleine Wright consider the implementation of a national "state of the environment" reporting system. Ceri Warnock is a Senior Lecturer at Otago University.

Introduction

New Zealand is the only country in the OECD that does not have a specific legislative mandate requiring the regular collection and publication of national "state of the environment" information.[1] In August of 2011 the Ministry for the Environment released a discussion document entitled "Measuring up: Environmental Reporting". The discussion document outlines the proposals for an Environmental Reporting Bill that would implement a national "state of the environment" reporting programme. This article briefly considers those proposals and raises a number of preliminary questions that may need to be addressed if such a programme is to fulfill its potential usefulness.

Problems with the existing practice

Despite criticisms from the OECD Environment Directorate extending back to 1981,[2] the government has only released two national "state of the environment" publications in the last twenty years.[3] The irregular nature of this reporting makes it extremely difficult to accurately assess the state of the national environment, to locate environmental pressures and to thereafter develop effective management responses. Further, the usefulness of the national reports prepared thus far has been undermined by the inconsistency and questionable quality of the data obtained.[4]

At present, there is no specific entity allocated the task of environmental monitoring with a national focus. The Ministry for the Environment collates and reports environmental information in a broad manner via a programme undertaken in conjunction with Statistics New Zealand[5] but neither agency undertakes monitoring in its own right.[6] Uncoordinated monitoring is undertaken by a number of disconnected bodies including research institutes, environmentally concerned interest groups, and government bodies that include regional and territorial authorities. Each of these bodies focuses upon monitoring different environmental variables and a plethora of methodologies are used. Whilst all local authorities have a duty pursuant to s 35 of the Resource Management Act 1991 (RMA) to monitor the state of their local environment, this is directed at assisting them to "carry out their functions under the Act" and authorities are under no specific compulsion to collect or supply uniform, standardised data to the Ministry.

The national reports produced to date have also been marred by a perceived lack of independence, with the Ministry as collator, writer and subsequent policy maker. This issue was highlighted with the publication of "Environment New Zealand 2007", which was published without a conclusion, presented many statistics in incoherent graphical forms and used poorly representative data.[7] Thus the current national reporting system is ad hoc, undirected and fails to conform to the reporting standards recommended by international bodies. There can be little doubt that this situation hinders the making of efficacious national policy.

The Proposals

The discussion document proposes a national programme underpinned by two inter-related branches: environmental monitoring and the subsequent dissemination of this information via a regular, independent report. Any effective national "state of the environment" system will depend upon both branches equally; both must clearly allocate responsibility for tasks and provide consistent, systematic processes to be followed.

The preferred option for monitoring would amend the regulation-making powers under s 360 of the RMA. This amendment would allow regulations to be made "that require local authorities to monitor certain variables of their environment according to specified methodologies and monitoring sites".[8] Authorities would then be required to supply data in a standardised form to New Zealand's Official Statistics System, whose standards and protocols would apply. The proposed monitoring mechanism has a number of positive characteristics. Ensuring the standardization of data from each region will allow information to be nationally aggregated with ease. As a result of their existing functions and monitoring duties under the RMA, local authorities are arguably the most efficient and appropriate entities for undertaking monitoring.[9] Most will have monitoring infrastructure in place and whilst existing processes may have to be expanded and potentially adjusted somewhat, placing the responsibility here will save costs. However, whilst the RMA is the "natural legislative location"[10] for the regulation-making power[11] it is unclear why the government would choose to make regulations to achieve a national reporting framework as opposed to using the more streamlined approach of promulgating a national environmental standard.

The option advocated as the best reporting alternative is an amendment to the Environment Act 1986 requiring the Parliamentary Commissioner for the Environment (PCE) to produce a state of the environment report every five years. The discussion document envisages a measure of structural consistency within each report as the PCE will be required to cover (although not limited to) a set of specified environmental domains: fresh water, land, air, oceans and biodiversity. There are a number of clear strengths in allocating this responsibility to the PCE. The role aligns with the existing

functions of the PCE who is charged with "reviewing and investigating national environmental management with the objective of maintaining and improving the quality of the environment".[12] Critically, allocating this role to the PCE would avoid the allegations of conflict that have accompanied previous reports and ensure the independence of the report. Having the PCE produce a report at five yearly intervals is aligned with international practice[13] and delineating a specific framework for the structure of the document ensures that there is consistency between reports, thus facilitating comparison.

Critiquing the proposals

Whilst the creation of a national "state of the environment" monitoring and reporting system is of undeniable importance, the discussion document prompts a number of important questions. The first is: what will the report be used for? The discussion document suggests that the information in the report will "underpin all environment and economic decisions, and is essential for understanding the impact of policies and decisions on natural resources over time."[14] But in order to assess how useful any report would be, it is important to consider what type of information will be included and what obligations decision-makers will be under to take that information into account.

In terms of content, international practice has been to monitor specific environmental indicators. The OECD recommends that indicators be based on the "pressure-state-response framework" (PSR) ensuring that the present state of the environment, causes and effects of environmental pressures and the success of any policy interventions are all monitored and reported on. Although the Ministry acknowledged the importance of the PSR format within the existing reporting framework, the discussion document makes no mention of PSR and refers solely to assessing the physical state of the environment. It would appear that authorities will only be asked to monitor and supply data on the present state of the environment. If the suggestion is to separate out the three factors inherent in PSR, this should be made clear because there are certain ramifications that flow. If the national report is to address only the more neutral data-set (present state of the physical environment), rather than reporting also on pressures and responses (evaluations that have more scope for qualitative assessment) this will serve to de-politicise the report but, as a result, its value will be diminished. Alternatively, it may be that whilst local authorities are just to monitor one aspect of PSR (thus easing the burden upon them), the PCE will be able to report on the full gamut of pressure-state-responses. The discussion document explains that the Ministry for the Environment will continue to "regularly aggregate national environmental statistics to support policy formation and international reporting obligations" from other sources, and so these public statistics will be available to the PCE. If this *is* to be the approach adopted, and in order to report as comprehensively as possible, the PCE will be forced to rely once again upon the ad hoc, non-standardised Ministry data collection process that has been operating to date, and in respect of that data the criticisms made above remain. The PCE does have significant powers relating to the seizure of any environmental information necessary to fulfill her statutory functions[15] but this does not substitute for the regular provision of comprehensive and standardised data. Thus, the purpose and general content of a report and critically, the type of information that is to fall within a standardized monitoring system, is an important discussion to be had at national level before the formulation of legislation.

Further (and regardless of the above) the requirements of how and when the document is to be used must be explicitly stated to ensure that the report does not become another stack of stapled paper in the multitude of government documents. A national report on the state of the environment would fit well with and support a number of existing legislative regimes and thus reference to the report should be incorporated into relevant statutes. For example, the functions of the Ministry of the Environment are set out in s 31 of the Environment Act 1986 and include giving advice to the Minister; explicit reference to the report in that section would help to ensure its consideration at the national policy level. A continuing criticism within the resource management context has been the lack of central government leadership in creating planning documents. A legislative mandate for government, explicitly linking the report with the creation of national environmental standards and national policy statements could create exciting possibilities for streamlined and efficacious planning, and thus prove useful in addressing this concern. Consideration should also be given to how such a report could be used to inform district and regional plan formation, the call-in process and resource consent decision-making. Explicit reference to the report could, for example, be made in s 104(1)(b) of the RMA. This might ensure that a more holistic approach to granting consents is taken and may assist decision makers in considering the true cumulative effects of individual consents.

A second important question that arises in relation to the proposals concerns the specific accountability and flexibility afforded to local authorities: what will be the actual degree of accountability placed upon them? Interlinked with this question is a concern that the proposals avoid a duplication of resources and effort. Numerous bodies undertake regular environmental monitoring (eg other environment-related legislative entities, central government agencies, research institutes and universities) but the proposed legislative system is explicitly limited to local authorities and does not include monitoring or statistics generated by these other bodies.[16] Placing the responsibility for monitoring solely on local authorities makes accountability clear and simple but failure to incorporate these other bodies where possible into the monitoring scheme excludes a useful, cost-minimizing tool. Dual monitoring also risks creating conflict, with the possibility of one set of monitoring interfering with the other and compromising results. In practice, local authorities do not always undertake monitoring themselves, and this flexibility should be preserved. But if accountability is to rest solely with local authorities, the arrangements for authorities to use data from other organizations should be clarified. If a variable is *not* already monitored, local authorities should be free to enter into

arrangements with expert groups, contracting the monitoring to them. This decision would ultimately come down to a cost-benefit analysis for the local authority in each situation. However, if monitoring of a specific area *is* already undertaken by another body (for example NIWA, GNS Science, or another crown entity or research organization) will local authorities be able to use this data for free? If the body does not use the standardised methodology, will local authorities be able to request that they change their practices, and will the costs of this be borne by the local authority? All of these issues must be discussed fully before the creation of any legislation.

A further issue that may arise in relation to the private sector is monitoring post consent allocation. Two issues in particular arise. There is the potential for interference with monitoring: consent holders may come into conflict with local authorities if their activity impedes or interferes with monitoring. There is also the possibility of placing the onus on consent holders to undertake the requisite monitoring. Again local authorities should be assured a degree of flexibility in order to deal with these situations and should be given legislative support where necessary. For example, authorities may choose to place the onus of monitoring on the consent holder via the use of conditions on the consent. To facilitate this, ss 108(3) and (4) of the RMA should reflect the ability of authorities to require consent holders to follow the requisite methodologies. Further, s 108 may need amending to clarify that this type of monitoring constitutes a valid use of conditions and thus authorities will not be susceptible to challenge under the tests set down in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578. Alternatively, authorities might wish to undertake post-consent monitoring themselves and may require a financial contribution from the consent holder to facilitate this. The proposals should be clear that this is a valid exercise of local authority power.

Clarity of the different roles assigned to regional councils and territorial authorities also needs to be ensured. Although regional councils currently conduct the majority of "state of the environment" monitoring, territorial authorities also have responsibilities in this area and there is the potential for overlap, particularly with land that may be important from a district and regional perspective, water, and natural hazards and hazardous substances. Ensuring that the regulations state explicitly which entity shall monitor which areas will remove any potential for overlap. Alternately, authorities could be empowered to allocate between themselves the monitoring of specific indicators or locations in a given region. Such powers would need to be accompanied by clear processes and deadlines to facilitate collaboration and prevent delay.[17]

A further important question concerns the capacity of the PCE: does the PCE have the resources to undertake the reporting role? Typically, in other jurisdictions, the entity charged with national "state of the environment" reporting has a large support service assisting them.[18] Although these support services often undertake actual environmental monitoring, they also include expert advisory and technical committees. In Ireland the Environmental Protection Agency (which is charged with national reporting) has a staff in excess of 290 during the publication year. The PCE in contrast has a total of 16 staff. It is clear (and Dr Wright alludes to this in her submission) that the PCE does not have the resources at present to prepare a quinquennial report of the scale and calibre necessary whilst also continuing to fulfill her other statutory functions. A defined avenue to secure support for the PCE would be essential. Potentially the Environmental Protection Authority could be given the task of providing this support as need demands; this task would fit smoothly with the present legislative role and functions placed upon the EPA[19] and would align with international practice. However, the Minister for the Environment has recently suggested that the intention of government is to develop the EPA fully into an "arms length regulator" and to achieve the appropriate institutional accountability there will need to be a clear separation of roles between the Ministry, the PCE and the EPA.[20] In those circumstances it may be regarded as inappropriate for the EPA to assist the PCE and the only option will be to provide the PCE with additional staff.

Finally, the specific conduits for information flows between the PCE and local authorities must be made clear. The PCE supports the need for a degree of flexibility in what specifically is reported upon to ensure that significant temporal issues can also be included or addressed. In her submissions on the issue Dr Wright stated that, "our perspective on what should be measured changes as our understanding of the environment grows".[21] Flexibility is clearly an important factor, but given the onus placed on local authorities to provide the relevant information, the degree and approach to this flexibility needs to be carefully thought out to ensure that monitoring is directed at the issues the PCE wishes to report on. This is particularly so if local authorities are to rely upon other bodies for the collection of information.

Conclusion

The Government's proposal is a strong step in the right direction and it proposes a system that makes use of what mechanisms New Zealand currently has in place. However, there are complexities evident at this early stage of its development and an early pinpointing of these issues will allow them to be addressed. Interested parties should note that the Ministry proposes a symposium in February 2012 to assist in developing the proposed legislation. Clearly, the input of the professions will be critical in ensuring the best possible outcome.

Footnotes

1. "Measuring Up: Environmental Reporting. Discussion Document Submission" Dr Jan Wright Parliamentary Commissioner for the Environment (29 September 2011).
2. Report of the Parliamentary Commissioner for the Environment "How clean is New Zealand? Measuring and reporting on the health of our environment" (April 2010) at 11.
3. Ministry for the Environment 1997 "The State of New Zealand's Environment" Report Number ME612; 2007 "Environment New Zealand 2007" Wellington: MfE.
4. See generally PCE above n 2 at 12.

5. Environment Act 1986, s 31(b).
6. Ministry for the Environment "Measuring Up: Environmental Reporting — Discussion Document" (18 August 2011) ME 1065 at 12.
7. PCE above n 2 at [1.3] and [2.2–3.1].
8. Discussion Document above n 6 at 25.
9. Resource Management Act 1991 ss 30(1), 31(1) and 35(2)(a).
10. Discussion Document above n 6 at 25.
11. Organization for Economic Co-operation and Development "OECD Environmental Performance Reviews: New Zealand 2007" (2011) Environmental Performance Reviews, at 15.
12. Environment Act 1986 ss 16(1)(a) and (b).
13. For example Australia publishes a national "state of the environment" report every five years.
14. PCE Submission above n 1 at 2.
15. Environment Act 1986 ss 19(1) and (2).
16. Discussion Document above n 6 at 4.
17. Collaboration may be more appropriate as each entity has the best insight into what areas they are in a better position to cover therefore maximizing existing infrastructure and minimizing cost.
18. PCE above n 4 at [6.3].
19. Under the Environmental Protection Authority Act 2011 s 12(1)(a) the underlying objective of the EPA is to facilitate the "efficient and effective management of New Zealand's environment and natural and physical resources" and under s 13(c) they are given the function of providing technical advice and administrative assistance if requested by the Minister.
20. See Environmental Defence Society "Election environment debate transcript" 1 November 2011, Hon Dr Nick Smith, at 17–18, available at http://www.eds.org.nz/index.cfm.
21. PCE Submission above n 1 at 1.

Māori cultural values and the Environment Court

In this article Warren Bangma and Gerald Lanning discuss five Environment Court decisions with an emphasis on the way Māori cultural concerns are taken into account by the Court. Warren Bangma is a partner at Simpson Grierson and Gerald Lanning is a senior associate at Simpson Grierson.

Introduction

This article considers issues arising from five recent decisions of the Environment Court and one High Court decision on appeals involving proposals with claimed adverse effects on Māori cultural values. This article summarises those decisions, and then considers their implications.

Mokau Ki Runga Regional Management Committee v Waitomo District Council [2010] NZEnvC 437

Background

The Waitomo District Council ("the Council") applied for a resource consent for a centralised wastewater treatment plant for the town of Piopio, to discharge treated wastewater to the Mokau River ("the River"). Piopio relied on septic tanks for sewage treatment, which often overflowed and, in the Council's view, posed a risk to human health. The Council was granted the necessary resource consents for the plant. The discharge consent was appealed by a local iwi group ("the appellant").[1]

Issues on appeal

The appellant called evidence that the discharge of treated sewage into the river would "taint the river and deprive Māori of their legally recognised role as kaitiaki, wound their mana, harm the ecology, destroy the mauri of the river and rob them of their tradition and culture by preventing them from gathering kai".[2] The appellant proposed the Council either treat the discharged effluent to drinking water standards, or that it pump the treated wastewater to where it could be disposed onto land.[3]

The Council called evidence that even under a near worst case scenario (low river flow and above average loading) the adverse effects on the River from the discharge were likely to be small.[4] The Council had considered a number of different treatment options, including land based disposal options that would avoid discharge of treated effluent to the River. However, these were "prohibitively expensive".[5] The Council called further evidence that it had an approved subsidy of $3.025 million for the municipal scheme. However, expenditure above that figure required by more expensive schemes, would require an increase in local rates.[6]

The Court's findings

The Court found:

- Section 6(e) of the Resource Management Act 1991 (RMA) required it to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral water.[7]
- The proposed discharge was "...unlikely to result in any significant adverse effects on the river, subject to the imposition of appropriate conditions".[8]
- It was the Council's responsibility to consider how to fund the proposal and that the additional rates needed to fund an alternative proposal would be prohibitive.[9]
- Although Tangata Whenua witnesses considered any discharge of human waste, treated or otherwise,