Lumley House
3-11 Hunter Street
PO Box 1925
Wellington 6001
New Zealand

Tel: 04 496-6555
Fax: 04 496-6550
www.businessnz.org.nz

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Freshwater Reform
Ministry for the Environment
PO Box 10362
Wellington 6143

email: watercomments@mfe.govt.nz

Freshwater reform 2013 and beyond

BusinessNZ welcomes the opportunity to comment on the Ministry for the Environment's discussion paper, "Freshwater reform and beyond".

The discussion paper covers three key areas:

1. **Planning as a community** – introducing a collaborative planning option as an alternative to the current system under the Resource Management Act 1991.

2. A **National Objectives Framework -** requiring national minimum environment states in rivers and lakes for ecosystem and human health.

3. **Managing within water quality and quantity limits** – starting by requiring councils to account better for how all water in a region is used, including how much is taken and what is discharged into it.

Given the importance of water and more particularly sound water management to the economy, BusinessNZ is obviously concerned to ensure the best possible reform outcome, so that water management underpins current and future investment and assists in improving economic growth.

For its part, BusinessNZ was closely involved in the Land and Water Forum (LWF) project, having a representative on the Water Allocation Working Group and also being part of the broader Plenary.

BusinessNZ has also produced its own report *"Water Management Issues and Solutions" (March 2010)* to try and help inform the debate and address a number of contentious issues in respect to fresh water management. Many of the issues covered in that report are yet to be addressed by the Government but have been signalled as areas where policy "is to be developed" in the discussion paper. A link to BusinessNZ's report is attached which will assist the Ministry's thinking in respect to some of the more contentious reform areas:
http://www.businessnz.org.nz/file/1980/Business%20NZ_Water%20Management-Issues%20%20Solutions.pdf

It is reasonably clear to anyone who has been involved in the LWF process that the issues surrounding water management reform are complex and any changes will likely be part of a package of reforms to be implemented over a 5 – 10 year time frame, starting with basic concepts such as measuring current activity and analysing the impacts of making adjustments. Without such basic material it will be impossible to determine appropriate limits or to find opportunities to use water more efficiently through transfer/trading regimes etc. over the medium term.

The discussion paper readily acknowledges that the issues are complex and therefore is taking a step approach to the reform process, starting quite correctly with gaining a clear understanding of what water is being taken currently and of the implications for setting limits both for the quantity and quality of water.

The discussion paper is clearly supportive of the work of the LWF, and in particular, of the use of more collaborative processes in determining the way forward.

While encouraging consensus-building is a laudable objective, the danger, in BusinessNZ's view, is that given the possible effects of plan changes on potential property rights and investment, the need for full appeal rights against regional council decisions is fundamental to ensuring transparency, acting as a safety valve against inconsistent or ill-thought through plans.

In this respect it is very disappointing that the discussion paper has stated that under a collaborative approach (alternative planning process from the existing Schedule 1 of the RMA), appeal rights would be limited (p.26) despite the fact that a number of members of the LWF did not support the removal of appeal rights:

> *"Appeal rights would be limited, available only when council deviates from the recommendations of the hearings panel. The Environment Court will consider the original decision made by council and have the ability to re-hear evidence, though it could decide when this was appropriate. There may be limitations on new evidence being presented and heard by the Court, particularly where it was able to be produced during the hearings panel process. The right to appeal to the High Court on points of law will be available where a council accepted the hearings panel decisions/recommendations."* [1]

[1] Freshwater reform 2013 and beyond – March 2013 (p.26)

BusinessNZ would like to point out that while the second report of the LWF recommended greater collaboration in the plan-making process, no agreement was reached on the question of whether limiting the right to take appeals against Council plan decisions on freshwater to the Environment Court should be seriously restricted.

The Chair of LWF, Alastair Bisley, clearly made this fact known in his Foreword to the 3rd report of the LWF (Managing Water Quality and Allocating Water):

> *"…we were not in the event able to complete our consensus on the role of merit appeals in collaborative planning processes." (p.iii)*[2]

In BusinessNZ's view, the need for full appeal rights against regional council decisions is fundamental to ensuring transparency, acting as a safety valve against inconsistent or ill-thought through plans.

This is even more important given that a number of significant and contentious issues have not been addressed in the discussion paper but are to be addressed later in the process. These include:

- *Duration of permits*
- *Alternative tools for allocation of freshwater*
- *Options for allocating permits on expiry*
- *Transfer or offsetting mechanisms for water quality*
- *Incentives for efficient water use (both for quality and quantity): for example, pricing and standards.*

BusinessNZ considers it extremely premature seriously to restrict appeal rights without first developing a coherent response to all of the above issues since these will impact on the property rights of existing and potential future water users.

There is a strongly held view that merit appeal/review rights are essential in societies that fully respect fundamental rights. They can be seen as a safeguard or safety valve.

There are a number of important reasons for continuing to promote merit appeal rights, not only in respect to processes under the Resource Management Act (RMA) but also in respect to many other legislative and regulatory powers across a whole range of Acts of Parliament.

The right to merit reviews is currently available in New Zealand from the decisions of many tribunals, authorities and other decision-making bodies. Any restriction on appeal rights is relatively recent.

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[2] Appendix 5 of the third LWF report "Managing Water Quality and Allocating Water" (October 2012) outlined in 2 pages reservations some members of the LWF had with the collaborative policy and plan-making process. For this to be largely ignored in the Freshwater Reform 2013 and Beyond discussion paper, without rigorous analysis is simply unacceptable.

Phase 1 of the Resource Management Act (RMA) reform which occurred in 2009, initially proposed to restrict appeals on council plans to points of law unless an appellant successfully applied to the Environment Court for the right to appeal on the merits. The right to appeal against a plan on merit grounds was restricted to issues such as the plan's impact on property rights.

Having heard from many parties opposed to this concept, the Select Committee recommended deleting the relevant clauses stating: "…*On balance, we are not satisfied that the proposals, in their current form, will work as intended and deliver fairness and natural justice…"*

The reasons for supporting merit appeal rights are outlined below but not necessarily listed in any order of importance.

1. The prospect of scrutiny (appeals) will likely encourage primary decision-makers to make better and more careful decisions in the first place.
2. Appeal decisions can often lead to better and higher-quality outcomes given a "fresh look at the issues".
3. Some regulators have very wide powers that leave them, in effect, the rule makers. It is simply wrong that they should act as final judge and jury on the application of their own rules.
4. The risks of excessive individual influence on decisions are reduced by the right to take a decision to an outside body.
5. There is more confidence in the integrity of the law, and support for it, when there is at least one full right of appeal.
6. The parties crystallize the key issues better on their second run through a case.
7. The more elevated view of the appellate court makes it easier to extract principles of general application, and decisions are more likely to be stated in terms which allow people to predict how the law will work in future.
8. Appeal rights provide protection for property rights and thus create the conditions for investor confidence and economic growth.

These are all important issues. Inferior decisions generate uncertainty. Poor decisions force businesses into expensive second best "work arounds" to cope with the risk of uncertainty or arbitrary interventions. Poor precedents threaten investment and economic growth even though people may not be able to measure or even recognise the source of such costs. The difference between high quality predictable decisions and low quality ad hoc readings can be enormous for a small economy like New Zealand's.

International best practice in respect to Merit Appeals (Reviews)

Internationally, the role of merit appeal rights is firmly understood and is promoted strongly by the Organisation for Economic Cooperation and Development (OECD) in various documents relating to improving the quality of regulatory decision-making.

The *OECD Guiding Principles for Regulatory Quality and Performance* (2005) call on those charged with regulatory reform to *"Ensure that administrative procedures for applying regulations and regulatory decisions are transparent, non-discriminatory, contain an appeal process against individual actions, and do not unduly delay business decisions; ensure that efficient appeals procedures are in place." (p.5)*

In many jurisdictions, rights of appeal against the discretionary decisions of government planning agencies have been established to allow those affected by planning decisions to have the decisions reviewed.

Merit-based appeals against government planning decisions are not universal but it is understood they exist in many common law countries including England and Wales, Ontario (Canada), Hong Kong, Australia, and of course, New Zealand.

The Commonwealth of Australia's Administrative Review Council in a report stated:

> *"The Council prefers a broad approach to the identification of merit reviewable decisions. If an administrative decision is likely to have an effect on the interests of any person, in the absence of good reason, that decision should ordinarily be open to be reviewed on the merits.*
>
> *If a more restrictive approach is adopted, there is a risk of denying an opportunity for review to someone whose interests have been adversely affected by the decision. Further, there is a risk of losing the broader and beneficial effects that merit review is intended to have on the overall quality of government decision-making.*
>
> *The Council's approach is intended to be sufficiently broad to include decisions that affect intellectual and spiritual interests, and not merely, property, financial or physical interests." (p.3)*[3]

Given the place of merit appeals (reviews) in NZ's current legal framework, and the international support provided through credible international organisations such as the OECD, any moves to restrict appeal rights should be seriously considered before pre-emptive action is taken.

Water is extremely important to many large infrastructure users in NZ and the availability of appeal rights (reviews), as a safety valve against ill-considered planning decisions, must therefore be foremost in the minds of regulatory decision-makers.

BusinessNZ would urge policy makers to think carefully before proceeding to implement the proposal in the discussion paper via a legislative initiative.

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[3] Commonwealth of Australia, Administrative Review Council – What decisions should be subject to merit review? (7 April 2011).

Finally, in respect to the **National Objectives Framework,** BusinessNZ considers that determining “bottom lines” are important, but that these must be based on sound science relating to ecosystem and human health. Clearly, the impact of setting bottom lines needs to reflect the wider impact on economic growth that any such regime would have. Clear economic analysis must be available where limits may have implications for existing and future users of water.

I would be happy to meet with officials to elaborate on our submission in more detail if that would be considered helpful.

Yours sincerely

John Pask
Economist