



ENVIRONMENT AND CONSERVATION ORGANISATIONS OF NEW ZEALAND (INC.)

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NGO Joint Submission on Environment and Human Rights

to the UN Universal Periodic Review of New Zealand, February 2014

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Background Information on the Submitter – ECO

Environment and Conservation Organisations of NZ Inc (ECO) is an umbrella for New Zealand organisations with a shared concern for the environment and conservation. ECO membership includes New Zealand branches of large international groups such as Greenpeace and Friends of the Earth, national groups including National Council of Women, as well as small local groups such as Kapiti Environmental Action and Save the Otago Peninsula, and issue oriented groups like the Yellow-eyed Penguin Trust.

During the more than forty years that ECO has been established, ECO has campaigned to protect habitats and species including native forests, lakes and rivers and marine areas and other ecosystems. We have since the 1970's championed sustainable energy policies and are active in opposition to climate damaging policies.

ECO continues active engagement in environmental campaigns on fisheries and marine management, both nationally and in the high seas, and environmental management. ECO is engaged in New Zealand's policy on marine and terrestrial resource governance and presses for law and policy to safeguard and enhance marine and land-based biodiversity and oceans management.

Since 1982 ECO has been active on environmental protection in Antarctica, including the defeat of the Antarctic Minerals Regime and the adoption of conservation measures, the Protocol to the Antarctic Treaty on Environmental Protection, and is pressing with colleague organisations for the protection of a large network of protected areas in the Southern Ocean, including the Ross Sea.

Over many years ECO has also worked to promote the open society in New Zealand and internationally, and has pressed for public access to information, open government and due process.

We have pressed for the adoption of the ideas underpinning sustainable development, including strong sustainability, recognition of social and natural capital, social justice and other ethical underpinnings of sustainability. We have worked on the various Rio and other sustainable development conferences.

We are an active member of the international community, via IUCN, the South Pacific Regional Fisheries Management Organisation, the Antarctic Treaty System, the UN climate change reporting processes and various other regional and international meetings and processes.

Submission on Environment and Human Rights in New Zealand

Some obligations to protect the environment are entailed in existing human rights law. For example, the right to life entails a right to adequate clean and healthy air, food and water, in order to permit a life of dignity. Such obligations are owed both to current generations and to preserve the rights of future generations. ECO is concerned that the New Zealand government is adopting regressive environmental laws and policies such that they have affected people's current human rights and will certainly affect those of future generations if these laws and policies are not modified. Below are some key concerns of ECO in this respect.

1. The right to water

In recent years the right to water has been increasingly recognised in international fora and instruments, for example by the CESCR in General Comment 15 (2003). The United Nations General Assembly adopted an important statement on the human right to water and sanitation in 2010. New Zealand abstained from the statement and should be encouraged to support this.

The quality and quantity of New Zealand's freshwater has declined over the reporting period while its population has increased. For example, a 2012 report noted that pollution of New Zealand lakes and rivers has significantly increased, including 43 per cent of monitored lakes in NZ now classed as polluted and an increased number of people are now catching waterborne diseases. The biggest cause is agriculture and industry. While New Zealand's domestic water supply is good, especially compared with many overseas countries, non-domestic sources are currently declining and the lack of action to address this risks violating rights to health and/or to life, of current and future populations, as well as rights in relation to the loss of biodiversity. New Zealand should be encouraged to address this urgently.

1. Recommendations:

- (a) Adopt the UN General Assembly statement on the human right to water
- (b) Legally recognise the right to water as a human right, for current and future generations, and take action to protect it

2. Climate change

The Human Rights Council has already identified that climate change has a wide range of negative implications for the effect of enjoyment of human rights, including the rights to life, health, food, water, housing and self-determination.¹

In 2012 New Zealand withdrew from the Kyoto Protocol binding commitments for reduction of climate gas emissions. The current New Zealand government has also effectively suspended aspects of its domestic emissions trading scheme yet New Zealand has no other program for emissions reductions. New Zealand's emissions of climate gases are at its highest levels ever and emissions are still increasing. Further, the current government still subsidises the oil industry in New Zealand and plans to increase dirty fossil fuel extraction, thus contributing to increased future global emissions (e.g., through the export of coal).

Please note that New Zealand has an emissions trading scheme but allocation of units was free and the scheme is uncapped. The price is fixed at New Zealand \$25 but the trading value has varied. The current value is now one unit for two tonnes of emissions; thus the price is New Zealand \$12.50 per tonne, or approximately US \$10. The generous free allocations and lack of a carbon price signal is added to the fact that the sector with New Zealand's highest climate gas emissions (agriculture) has been exempted from the scheme. All of these factors have meant that the scheme has been completely ineffective at reducing emissions and instead emissions in the years 2009 to 2011 rose by 20%.

New Zealand needs to be encouraged to set a binding emissions reduction target and to adopt a plan of action in order to achieve it. The human rights of future generations depend on New Zealand doing its fair share. New Zealanders currently have an ecological footprint that is very high by world standards. In the interests of future New Zealanders as well as future inhabitants of the whole globe, New Zealand should be encouraged to do more than it is now.

2. Recommendations:

- (a) Adopt a rights-based approach to climate change policy at home and abroad, including by reducing greenhouse gas emissions to safe levels that are consistent with the full enjoyment of human rights and setting a binding emissions reduction target
- (b) Commit to the 2nd period of reductions standards under the Kyoto Protocol
- (c) Explore sustainable alternatives to oil and dirty fuel extraction

3. A right to a healthy environment

The right to a healthy environment can be seen as a precondition upon which all other rights rest. A life of dignity cannot be enjoyed without the ecosystem services provided by the natural environment that we currently enjoy. This fundamental basis for life needs to be

¹ Human Rights Council resolutions 7/23, 10/4, 18/22. The Council has also held panel discussions in 2009 and 2012 that have elaborated on the human rights implications of climate change. The Office of the High Commissioner for Human Rights also conducted a study in 2008 – 2009 on the effects of climate change on the enjoyment of human rights (A/HRC/10/61), confirming the direct and indirect threats to human rights that climate change will pose.

recognised by governments worldwide. The work undertaken by the UN in this regard is to be commended.²

Of the 193 United Nations member states, 153 are legally obliged to uphold the right to a healthy environment, whether through their constitution, constitutional case law, domestic legislation, regional treaties and/or regional court decisions. If you add the other 25 UN member states who have signed the non-binding Male Declaration on the Human Dimension of Climate Change, then you have 178 states or 92% of United Nations members who recognise the right to health environment.³ In addition to this, some states recognise the right to healthy environment at a sub-national level, even if they do not recognise it at a national constitutional level. (For example, 5 provinces or territories in Canada, and 6 states on the USA recognise such a right at the provincial level). Unfortunately, New Zealand is in the minority of fewer than 13 states worldwide which do not in any way recognise a human right to a healthy environment.

New Zealand should be encouraged to formally recognise the right to healthy environment, particularly in its constitutional law. It should take the opportunity to more fully investigate this option in its current constitutional review.

3. Recommendation:

Legally recognise the right to a healthy environment, for example in the NZ Bill of Rights Act

4. Freedom of belief, expression, association and peaceful assembly

The right to protest against environmentally damaging activities has recently been denied by legislation⁴ prohibiting protest at sea – in New Zealand's Exclusive Economic Zone and even on the high seas over New Zealand's extended continental shelf. This arguably violates international law rights of free passage, but of concern in this Review is the violation of the freedom of speech, expression, and the right of peaceful assembly under NZBORA, as well as New Zealand's obligations under the ICCPR to protect freedom of expression (Article 19), the right to peaceful assembly (Article 21) and freedom of association (Article 22). In particular, the new law created a retrospective criminal offence. ECO notes that this law was passed without public consideration and under government-imposed Parliamentary urgency.

The need for proportionality in the creation of measures that interfere with the right to freedom of expression was confirmed by the Human Rights Committee, which, in General Comment 34, stated that “restrictions must not be overbroad”⁵

² The commissioning of reports by the Human Rights Council and its predecessor on the link between human rights and the environment has been extremely valuable. This issue has been examined since the 1990s (e.g., the Final report by Special Rapporteur Ksentini on *Human Rights and the Environment*, E/CN.4/Sub.2/1994/9, 6 July 1994). The most recent such report is the *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, John H Knox, *Preliminary report*, A/HRC/22/43, 24 December 2012.

³ See David Boyd, *The Environmental Rights Revolution* (UBC Press, 2012), at page 92.

⁴ Crown Minerals (Permitting and Crown Land) Bill 2012 (70-2).

⁵ *Human Rights Committee General Comment No. 34*, CCPR/C/GC/34, 102nd sess (2011)

This law should be of concern to the international community and the government should be urged to repeal it.

4. Recommendation:

Repeal the Crown Minerals (Permitting and Crown Land) Act that restricts the right of New Zealanders to protest at sea

5. Democratic rights of political participation in environmental decision-making

The current government has suspended democratic governance of water allocation in the Canterbury region. Constitutional lawyers complain that it has breached democratic rights, plus fundamental constitutional principles such as the separation of powers, and is generally a "constitutional affront."⁶ New Zealand needs to be encouraged to repeal this damaging legislation and reinstate the relevant democratic decision-making body.

5. Recommendation:

Repeal the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010

6. Procedural rights associated with environmental protection

In addition to general procedural rights such as access to the courts and participation in political decision-making, such rights have been exquisitely recognised in relation to environmental decision-making, including the right to access to information concerning the environment that is held by public authorities. Principle 10 of the Rio Declaration, which NZ supported, recognises such important procedural human rights in relation to environmental matters. Principle 10 has been influential in the further development and delineation of such principles that international and domestic levels. For example, the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters – or the Aarhus Convention -- provides more detail and binding such procedural human rights in relation to environmental matters. Such protections focus on interactions between citizens and government in environmental decision-making. The protections are general human rights, simply applied to the particular area of environmental decision-making.

In contrast with the current international movement towards further recognition of such procedural rights, the current New Zealand government has reduced various forms of public access to environmental decision-making and is in the process of changing our resource management legislation to reduce it even further. Such reductions would be in violation of such principles, especially those contained in the Aarhus Convention. ECO considers that New Zealand desperately needs the protections contained in the clear statements of the Aarhus Convention.

⁶ See, for example, Philip Joseph, a prominent New Zealand constitutional lawyer:
http://www.ourwaterourvote.org.nz/uploads/Joseph-2010-June-ECan-legislation-NZLJ-193_opt.pdf

6. Recommendations:

- (a) Repeal legislation providing for the reduction and/or loss of access to information, access to courts, and participation in environmental decision-making, such as contained in the reforms to the Resource Management Act 1991.
- (b) Uphold the provisions of Principle 10 of the Rio Declaration protecting procedural human rights in relation to environmental matters.
- (c) Ratify the Aarhus Convention and ensure that New Zealand's domestic laws are in compliance with it.

7. Fully implementing international human rights in domestic law

The rights contained in the International Covenant on Economic, Social and Cultural Rights have not been incorporated in New Zealand law. This is in direct contrast to those in the ICCPR which have been incorporated in New Zealand's Bill of Rights Act 1990. The rights contained in IESCR have been significantly affected in other countries by environmental factors. New Zealand should be encouraged to incorporate these rights in New Zealand law and hopefully thereby avoid such violations in New Zealand.

New Zealand has not yet ratified the Optional Protocol to ICESCR and should be encouraged to do so.

7. Recommendations:

- (a) Incorporate all rights enshrined in ICESCR into domestic law to ensure these rights are enforceable in New Zealand courts.
- (b) Ratify the Optional Protocol to ICESCR

8. Other general rights

ECO notes that New Zealand's Bill of Rights Act 1990 has been overridden by other legislation more than 20 times by the current New Zealand government – expressly overriding certificates of non-compliance issued by the Attorney-General. New Zealand needs to strengthen the status of its Bill of Rights Act in order to make human rights protections in New Zealand much more effective.

8. Recommendations:

- (a) Establish the NZBORA as over-riding ordinary statutes
- (b) Procedurally entrench the New Zealand Bill of Rights Act 1990.

9. Native flora and fauna – violation of environmentally sustainable development

Native flora and fauna populations have reduced over the reporting period, despite stated government aims of conservation. For example, the World Wildlife Fund report "Beyond Rio" (May 2012) reported:

- More than 60 per cent of native freshwater fish are now threatened with extinction.
- Seven of New Zealand's ten official 'indicator species' for measuring biodiversity status are threatened. One bird has suffered a 90 per cent contraction in its range since the 1970s.
- Iconic species such as Maui's dolphins and NZ sea lions are listed as 'nationally critical'. Only an estimated 55 Maui's over the age of one year remain and NZ sea lion pup numbers have halved over the past 12 years at their main breeding area.
- Almost two-thirds of New Zealand's seabird species are listed as threatened with extinction. The main threats to seabirds are predation by introduced mammals, fishing methods and human disturbance.

Unfortunately, the current government has significantly reduced the budget and staff of New Zealand's Department of Conservation plus it is embarking on significant exploration and mining projects, including within New Zealand's National Parks or the conservation estate. The approval to open-cast mine the Denniston Plateau for coal is an example of this.

New Zealand is risking the human rights of at least future generations if not also current generations through the loss of biodiversity and needs to be encouraged to address this. Eco considers that the New Zealand government is not upholding its commitment to "ensuring the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations" which it re-committed to in June 2012 at the United Nations Conference on Sustainable Development.⁷

9. Recommendations:

(a) Commit to ecologically sustainable development in order to avoid irreversible environmental damage and thereby better uphold the human rights of current and future generations.

(b) Commit to funding such protection and not subsidising destructive activities, such as fossil fuel extraction.

⁷ United Nations Conference on Sustainable Development resolution 1 "The future we want", contained in its report, A/CONF.216/16, para.1, endorsed by the General Assembly in its resolution 66/288.