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HOW TO GIVE LEGAL EFFECT IN REGIONAL PLANS TO THE NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT 2011

Background

This opinion addresses issues involving how regional councils give legal effect to specific provisions in the National Policy Statement for Freshwater Management (NPSFWM). It is not a comprehensive evaluation of all the provisions in the national policy statement but focuses on specific matters the regional councils have asked me to consider.

The questions I have been asked to consider relate to (addressed in Part A of the opinion) Policy A1; Policy A3; the use of biological indicators to express a water quality limit; and (addressed in Part B of the opinion) the use of process standards in a regional plan; a process leading to the review of resource consent conditions; and integrated management approaches by linking land uses and water quality using stock numbers and nitrogen loadings.

PART A:

1.0 Instructions

In Part A of my opinion I address the following questions the regional councils have asked me to consider in respect of the NPSFWM:

- (a) Policy A1 of the NPS for Freshwater Management 2011 requires regional councils to implement methods including rules to avoid over-allocation with respect to freshwater objectives and freshwater quality limits. Is this test different, and more onerous than the standard RMA requirement to avoid, remedy or mitigate test?
- (b) Policy A3 of the NPS for Freshwater Management 2011 requires regional councils where permissible to make rules requiring the adoption of the best practicable option to prevent or minimise any actual or likely effect on the environment of any discharge of a contaminant into fresh water, or onto or into land in circumstances that may result in contamination.
 - i) In what circumstance would such rule making not be permissible?
 - ii) How does the requirement to “prevent or minimise” fit with the normal obligation to avoid, remedy or mitigate adverse effects?
 - iii) How can a council meet the requirements of both Policy A1 and Policy A3? i.e. is the requirement to “avoid” in A3 compatible with the BPO approach?

I have also been asked to consider whether the use of biological indicators to express a water quality limit would give effect to the NPSFWM provisions and meet the purpose of the Resource Management Act 1991 (the RMA or Act).

2.0 Introduction

The relevant policies in the NPSFWM which you have asked me about in respect of questions (a) and (b) above state:

Policy A1

By every regional council making or changing regional plans to the extent needed to ensure the plans:

- (a) establish freshwater objectives and set freshwater quality limits for all bodies of fresh water in their regions to give effect to the objectives in this national policy statement, having regard to at least the following:
 - i. the reasonably foreseeable impacts of climate change
 - ii. the connection between water bodies
- (b) establish methods (including rules) to avoid over-allocation.
(my emphasis)

Policy A3

By regional councils:

- (a) imposing conditions on discharge permits to ensure the limits and targets specified pursuant to Policy A1 and Policy A2 can be met and
 - (b) where permissible, making rules requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of any natural process from the discharge of that contaminant, any other contaminant) entering fresh water.
- (my emphasis)

The proposed policies must be relevant to achieving the purpose of the RMA. Section 45(1) states:

45. Purpose of national policy statements (other than New Zealand coastal policy statements)

- (1) The purpose of national policy statements is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act.

The Court of Appeal in *Auckland Regional Council v North Shore City Council*¹ considered that policies which are directive and highly specific are lawful.

The policy directions in the NPSFWM must be addressed by regional councils in the context of the RMA and pursuant to the statutory powers and duties they have under that Act.

In *Unison Networks Ltd v Commerce Commission*² McGrath J, in the Supreme Court said:

[53] A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision-maker "so uses his discretion as to thwart or run counter to

¹ [1995] NZRMA 424 at 430 (CA).

² *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53] – [54].

the policy and objects of the Act".³ A power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by other purpose.⁴

[54] Ascertaining the purpose for which a power is given is an exercise in statutory interpretation which is not always straightforward. This is partly because legislative regimes differ in the specificity with which they grant powers. In this area the courts are concerned with identifying the legal limits of the power rather than assessing the merits of its exercise in any case. They must be careful to avoid crossing the line between those concepts.

The Supreme Court went on to recognise that where a public body has expert knowledge it may be appropriate for a court to apply a degree of deference (at [55]):

Parliament generally contemplates that wide policy considerations will be taken into account in the exercise of the expert body's powers. The courts in those circumstances are unlikely to intervene unless the body exercising the power has acted in bad faith, has materially misapplied the law, or has exercised the power in a way which cannot rationally be regarded as coming within the statutory purpose.

The provisions of the NPSFWM must be given effect to in regional plans.⁵ Section 67(3) of the RMA states:

67 Contents of regional plans

- (3) A regional plan must give effect to—
- (a) any national policy statement; and
 - (b) any New Zealand coastal policy statement; and
 - (c) any regional policy statement.

The statutory duty to give effect to the provisions of the NPSFWM in a regional plan must be met by applying the provisions of the RMA which contain the powers and duties of regional councils.

³ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, at p 1030 per Lord Reid.

⁴ *Attorney-General v Ireland* [2002] 2 NZLR 220, at [42] and [43] (CA); *Poananga v State Services Commission* [1985] 2 NZLR 385, at 393-394 (CA).

⁵ The words "give effect to" are used in other sections of the RMA. In sections 55, 62, 65, 67, 73 and 75 an instrument implemented under the RMA must "give effect to" other superior planning instruments.

The interpretation of the RMA is required to be purposive and ambulatory.⁶ Section 5(1) and section 6 of the Interpretation Act 1999 state:

5 Ascertaining meaning of legislation

(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

6 Enactments apply to circumstances as they arise

An enactment applies to circumstances as they arise.

The High Court considered the words “to give effect to” in a statute, in *Foodstuffs (South Island) Limited v Christchurch City Council*.⁷ That case contrasted a requirement to “have regard to” a matter with one to “give effect to” that matter and concluded that they are quite different. In line with the Court of Appeal’s reasoning in *New Zealand Fishing Association v Ministry of Agriculture and Fisheries*,⁸ the High Court noted that the former requires that the matter be given genuine attention and thought, but that ultimately the decision-maker has the discretion to determine the impact of those matters on the outcome of its decision; while in contrast, the phraseology “give effect to” allows no such discretion on the part of the decision-maker.

In *Goldfinch v Auckland City Council*⁹ the High Court referred to the interpretation of the phrase by Casey J in the Supreme Court case of *GUS Properties Limited v Blenheim Borough* which considered section 35(7) of the Town and Country Planning Act 1953. He said:

The use of the words “give effect to” in s7(a) clearly import the idea of full compliance or completion of the thing envisaged, and it is straining their ordinary meaning to say that they contemplate only the first physical step of the operation envisaged by the consent to the specified departure.¹⁰

⁶ “Statute Law in New Zealand” 4th ed, Burrows & Carter (eds). See pages 397-405 for discussion on ambulatory or dynamic approach to interpretation.

⁷ [1999] NZRMA 481.

⁸ [1988] 1 NZLR 544.

⁹ [1997] NZRMA 117.

¹⁰ Christchurch M394/75, 24 May 1976.

Although in a different factual and statutory context, this case suggests the positive nature of the duty in the words “give effect to”. Put simply, a requirement to give effect to a matter is an imperative, and a regional council has no discretion to take any other course.

The Environment Court has considered the words “give effect to” in respect of regional policy statements and district plans. In *Clevedon Cares Incorporated v Manukau City Council*¹¹ the Court stated:

[50] Section 75(3) requires that the Plan Change “*must give effect to*” the operative Regional Policy Statement. We agree with Mr Allan, that with respect to Section 75(3) of the Act, the change in the test from “*not inconsistent with*” to “*must give effect to*” is significant. The former test allowed a degree of neutrality. A plan change that did not offend the superior planning instrument could be acceptable. The current test requires a positive implementation of the superior instrument. As Baragwanath J said in *Auckland Regional Council v Rodney District Council* [2009] NZCA9:

This does not seem to prevent the District Plan taking a somewhat different perspective, although insofar as it would be inconsistent, it would be ultra vires. (The 2005 Amendment to Section 75, requiring a District Plan to “give effect to” national policy statements, NZCPS and Regional Policy Statements, now allows less flexibility than its predecessor).

[51] The phrase “*give effect to*” is strong direction. This is understandably so for two reasons:

- [a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and
- [b] The Regional Policy Statement, having passed through the Resource Management Act process, is deemed to give effect to Part 2 matters.

Also, the Environment Court in *Clifford Bay Marine Farms Ltd v Marlborough District Council*¹² has given significant weight to the original New Zealand Coastal Policy Statement which included the words “to avoid” in its provisions:

[25] The NZCPS also identifies two national priorities which are of particular relevance to the assessment of effects on Hector’s dolphin. The first is to avoid (with no reliance on remedying or mitigating):

areas and habitats important to the continued survival of any indigenous species

¹¹ [2010] NZEnvC 211, paras 50 and 51.

¹² Decision No.C 131/2003, para 25.

The second is:

...to protect the integrity, functioning, and resilience of the coastal environment in terms of:

- ...
- (c) natural movement of biota;
- ...
- (e) natural biodiversity, productivity and biotic patterns; and
- (f) intrinsic values of ecosystems.

We will put a great deal of weight on these policies because of their place in the hierarchy of instruments to be considered.

The Board of Inquiry's *Final Decision and Report into the New Zealand Transport Agency Transmission Gully Plan Change Request* referred to a policy in the Greater Wellington Regional Freshwater Plan which gives preference to the avoidance of effects on waterways of significance. It stated inter alia:¹³

- Although the Act does not provide a preference between avoidance, remedy or mitigation, the Freshwater Plan seeks to preserve, safeguard and protect natural values. Although those concepts do not require absolute avoidance of adverse effects, we consider that they support a preference for avoidance as a starting point before consideration of the other alternatives (including offsetting). This view was supported by the ecologists' evidence that avoidance of adverse effects was a natural first step and preferred as an outcome. That preference is reflected in the revised policy wording proposed by the Board. We consider that promotion of avoidance as a preferred option is an appropriate first step in managing adverse effects of TGP.

In my opinion, the words "must give effect to" in section 67(3)(a) of the RMA mean a regional plan should include provisions which relate to and implement the provisions of the NPSFWM and are not contrary to them or lessen their effectiveness.

The Environment Court has jurisdiction to evaluate whether a regional plan gives effect to the policies in the NPSFWM in declaratory proceedings pursuant to sections 82 and 310 of the RMA.

¹³ Final Decision and Report of the Board of Inquiry into the New Zealand Transport Agency Transmission Gully Plan Change Request, October 2011, page 61.

82 Disputes

(1) Subsection (2) applies if there is a dispute about—

...

(c) whether a regional policy statement or a plan gives effect to a national policy statement or New Zealand coastal policy statement.

(2) A Minister or local authority responsible for a relevant national policy statement, New Zealand coastal policy statement, policy statement, plan, or order may refer a dispute to the Environment Court for a decision resolving the matter.

310 Scope and effect of declaration

Declaration may declare -

(ba) whether a provision or proposed provision of a regional plan,—

(i) contrary to section 67(3), does not, or is not likely to, give effect to a provision or proposed provision of a national policy statement, New Zealand coastal policy statement, or regional policy statement for the region; or

The Court can also consider that matter in respect of references to it in appeals involving a regional plan pursuant to Schedule I of the RMA.

3.0 The Questions:

I have addressed your questions by considering how one would approach an argument in the Environment Court to show how these policies could be given effect to in a regional plan as a matter of law.

3.1 Policy A1 – to avoid over-allocation

Policy A1 of the NPS for Freshwater Management 2011 requires regional councils to implement methods including rules to avoid over-allocation with respect to freshwater objectives and freshwater quality limits. Is this test different, and more onerous than the standard RMA requirement to avoid, remedy or mitigate test?

3.1.1 The meaning of policy A1(b)

The policy language of A1(b) is aspirational. It is counter-intuitive to suggest that regional councils would not have a policy goal of avoiding over-allocation.

In my opinion, the verb “avoid” in the policy direction in A1(b) “to avoid over-allocation” needs to be addressed in a different context to the verb “avoid” in section 5(2)(c) of the RMA.

The term “avoid over-allocation” in the policy context must be given a meaning which does not restrict regional councils from meeting the purpose of the RMA.

The purpose of a regional plan is set out in section 63(1) of the RMA:

63 Purpose of regional plans

(1) The purpose of the preparation, implementation, and administration of regional plans is to assist a regional council to carry out any of its functions in order to achieve the purpose of this Act.

It is necessary to provide a way for Policy A1(b) in the NPSFWM to be translated into regional plans in accordance with the RMA and its purpose in order to give effect to the policy.

Policy A1(b) also needs to be aligned with the other policies in the NPSFWM, including the transitional provisions, when implementing the objectives.

The purpose of the NPSFWM is contained in its preamble. The preamble states that setting enforceable quality and quantity limits is a key purpose of the NPSFWM.

Setting enforceable quality and quantity limits is a key purpose of this national policy statement. This is a fundamental step to achieving environmental outcomes and creating the necessary incentives to use fresh water efficiently, while providing certainty for investment. Water quality and quantity limits must reflect local and national values. The process for setting limits should be informed by the best available information and scientific and socio-economic knowledge.

[Emphasis added]

This statement gives a strong indication of how to give effect to the NPSFWM policies in a regional plan. It is for regional councils to ensure that enforceable quality and quantity

limits are established in regional plans. The rationale for any limits in a plan rule must be section 5(2).¹⁴

When referring to section 5 and the interpretation of a district plan, the Environment Court in *Brownlee v Christchurch City Council*¹⁵ stated:

[35] But the most important provision to consider is the purpose of the RMA in section 5 especially the recognition that the purpose is to promote (not plan for) the management of the use, development and protection of natural and physical resources in a way which enables people and communities to provide for their welfare while meeting two standards and “avoiding, remedying, or mitigating adverse effects of activities on the environment”.

In my opinion it would be useful to establish objectives and policies in regional policy statements (RPS) and regional plans that disclose the approach which will be implemented by rules and methods developed by a regional council when giving effect to the national policy goal of establishing enforceable water quality and quantity limits.

Within the NPSFWM there is reference to a number of terms describing how regional councils can manage the way and rate water resources are used through a regulatory regime contained in a regional plan. These terms include: flows, levels, limits and targets. The functions of regional councils recognise that.

30 Functions of regional councils under this Act

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

...

(e) the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—

(i) the setting of any maximum or minimum levels or flows of water:

(ii) the control of the range, or rate of change, of levels or flows of water:

(iii) the control of the taking or use of geothermal energy:

¹⁴ *Contact Energy Ltd v Waikato RC* 14 ELRNZ 128.

¹⁵ [2001] NZRMA 539.

The preamble also gives an indication of what the policy goal is in respect of managing freshwater resources so as to avoid over-allocation. “Over-allocation” is defined in the interpretation section of the NPSFWM as:

Over-allocation is the situation where the resource:

- (a) has been allocated to users beyond a limit or
- (b) is being used to a point where a freshwater objective is no longer being met.

This applies to both water quantity and quality.

The term “over-allocation” is also mentioned in the Preamble to the NPSFWM.

Once limits are set, freshwater resources need to be allocated to users, while providing the ability to transfer entitlements between users so that we maximise the value we get from water. Where water resources are over-allocated (in terms of quality and quantity) to the point that national and local values are not met, we also need to ensure that over-allocation is reduced over agreed timeframes.

To give effect to the policy goal of avoiding over-allocation, regional councils are to establish the limits involving flows, thresholds, and levels which they judge will meet the purpose of the Act. They then manage water uses within the limit and also implement a process which includes timeframes and targets for addressing those currently lawful uses which exceed them.

When developing regional plans to address their functions, regional councils must remain focused on the purpose of the RMA, that is, “sustainable management”. In judging whether that statutory purpose will be met by altering existing lawful uses, regional councils are informed by the principles in sections 6 and 7 which relate to water resources, namely 6(a), (c), (d), (e) and 7(a).

It is also clear that a regional council may judge that its existing regional plan gives effect to the policies you have referred to me without any further change. This is apparent from the words “to the extent needed to ensure the plans established methods (including rules) to avoid over-allocation”.

Regional councils must apply their statutory powers in the RMA in order to give effect to these policies in plan rules. Some of these powers are contained in sections 30(1)(fa)(fb)(4), 67(5), 68(7), 69, 70, 128, 131 and 339(5)(b) of the RMA.

To be enforceable, rules which have the status of regulations (section 68(2)), need to be certain, reasonable and intra vires the statute which empowers the statutory body (the regional councils) to promulgate the instrument.

When developing rules which allow for a phasing out of existing lawful uses, regional councils judge whether they will exceed water quality limits which they have established to achieve the purpose of the RMA. This raises a number of relevant legal considerations, including the legitimate expectation of land owners, the need not to derogate existing rights, and fairness.

The policy of avoiding over-allocation by managing excessive use of a water resource so that the resource is maintained and protected to meet the purpose of the RMA inevitably creates tensions in respect of public law duties and powers, and private law rights.

The exercise of a regional council's public law discretion as to what is appropriate and lawful under the RMA requires it to take into account relevant considerations, not to take into account irrelevant considerations, to act for a proper purpose, to act reasonably, and to act fairly.

In my opinion, for regional councils to give effect to Policy A1(b) after considering the other provisions in the NPSFWM and their duties and powers pursuant to the RMA, the following approach would be appropriate.

1. Fix allocation limit to achieve purpose of RMA.
2. Manage uses which exceed the allocation limit.

The authors of *Environmental and Resource Management Law*¹⁶ referring to the allocation of water, state inter alia:

However, what has become clear in the current water debate is that:

- Some catchments in New Zealand are “over-allocated” – that is, consents have been granted to take more water than is surplus in those catchments.
- Once a consent holder has the right to take a certain amount of water, then no further resource consents can be granted to take or use that same water where that would be to derogate from the grant of the first consent. In practical terms, this means that allocation can occur effectively through the resource consent process.
- It is likely that tradable water permits will emerge for serious discussion. (The effect of the *Aoraki Water Trust* decision would appear to be that, if a catchment is already fully allocated, the only way that a new entrant could obtain water is to make use of an existing water take permit.)
- Future water take permits are likely to focus more on requiring any water taken to be used efficiently, and there may need to be “use it, or lose it” conditions imposed on consents to avoid applicants acquiring large allocations of water but not actually using that water.
- In some areas, where water shortages are being experienced, the relevant regional councils will soon need to make decisions about how to reduce water takes in a fair and equitable manner, giving appropriate regard to quite different considerations: for example, ecological considerations, interest of recreational users, demands of irrigators, needs of public water supply providers, requirements of hydro-generators, and interests of Maori.
- Priority between competing applications will continue to be a significant issue, particularly in catchments with high demand.

Statutory provisions for avoiding over-allocation with reference to a water quality limit are found in provisions for:

- a. reviewing existing resource consent conditions;
- b. addressing applications to renew resource consents;
- c. integrating land and water uses including land use controls.

3.1.2 Reviewing existing resource consent conditions

The objectives and policies in the NPSFWM indicate that over-allocation may be avoided by regional councils establishing levels, flows, rates or standards in a regional rule and then reviewing the conditions of existing discharge permits to enable the rule to be met under section 128(b).

¹⁶ 4th edition (Nolan & ors) page 553.

128 Circumstances when consent conditions can be reviewed

(1) A consent authority may, in accordance with section 129, serve notice on a consent holder of its intention to review the conditions of a resource consent—

...

(b) in the case of a coastal, water, or discharge permit, when a regional plan has been made operative which sets rules relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality or air quality, or ranges of temperature or pressure of geothermal water, and in the regional council's opinion it is appropriate to review the conditions of the permit in order to enable the levels, flows, rates, or standards set by the rule to be met; or

The viability of the activity using the water needs to be addressed during a review of conditions. Section 131(1)(a) of the RMA states:

131 Matters to be considered in review

(1) When reviewing the conditions of a resource consent, the consent authority—

(a) shall have regard to the matters in section 104 and to whether the activity allowed by the consent will continue to be viable after the change; and

I consider how to lower the risk of a legal challenge when acting pursuant to the circumstances in section 128 and section 131(1)(a) of the RMA in Part B of this opinion.

3.1.3 Applications to renew resource consents

When considering applications to renew resource consents to give effect to the policy to avoid exceeding an allocation limit, section 30(4) applies.

30 Functions of regional councils under this Act

...

(4) A rule to allocate a natural resource established by a regional council in a plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:

(a) the rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and

(b) nothing in paragraph (a) affects section 68(7); and (c) the rule may allocate the resource in anticipation of the expiry of existing consents; and

(d) in allocating the resource in anticipation of the expiry of existing consents, the rule may—

(i) allocate all of the resource used for an activity to the same type of activity; or

- (ii) allocate some of the resource used for an activity to the same type of activity and the rest of the resource to any other type of activity or no type of activity; and
- (e) the rule may allocate the resource among competing types of activities; and
- (f) the rule may allocate water, or heat or energy from water, as long as the allocation does not affect the activities authorised by section 14(3)(b) to (e).

Pursuant to section 67(5), a regional plan must record how it has allocated a natural resource under section 30(1)(fa) or (fb) and (4), if it has done so. Also, sections 68(7) and 69(3) are relevant.

68 Regional rules

...

(7) Where a regional plan includes a rule relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality or air quality, or ranges of temperature or pressure of geothermal water, the plan may state—

- (a) whether the rule shall affect, under section 130, the exercise of existing resource consents for activities which contravene the rule; and
- (b) that the holders of resource consents may comply with the terms of the rule, or rules, in stages or over specified periods.

69 Rules relating to water quality

...

(3) Subject to the need to allow for reasonable mixing of a discharged contaminant or water, a regional council shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters at the time of the public notification of the proposed plan unless it is consistent with the purpose of this Act to do so.

3.1.4 Integrated management and water use controls

To achieve integrated management of land uses with water uses pursuant to section 30(1)(a) and (b) and to control land uses for the purposes under section 30(1)(c)(ii) and (iii) needs robust objectives and policies in a RPS and a regional plan.

The methods or rules contained in a regional plan which manage the risk of over-allocation and a return to sustainability inevitably mean that regional councils in a section 32 assessment become involved in the language of risk as well as economics (including the issue of transaction costs) where a proposed management regime will affect existing lawful water users and their legitimate expectations as land owners.

When dealing with what an acceptable risk is and applying section 5 in the context of risk management, an alignment of law and policy is required. This will be reflected in a RPS, regional plan and in any co-regulatory and non-regulatory adaptive management regimes.

A method commonly used when dealing with integration and planning (and plans which have a regulatory effect and enforceable rules), is to use co-regulatory methods which involve both enforceable rules and processes for working towards achieving integrated management of natural and physical resources through community involvement as part of the planning approach.¹⁷ This will need to be achieved by using process standards as rules rather than just environmental performance and technology standards.

I also foresee the need for difficult judgements to be made involving the interface between law and policy when regional councils address Part 2 matters in a situation where the national values referred to in the NPSFWM may be in conflict with significant regional or local values involving land and water uses.¹⁸

When making a value-judgement about what promotes the purpose of the RMA, a regional council must often make choices between incommensurable values. When addressing the incommensurable values in section 5(2), the decision-maker has a choice or a discretion as to which values to choose and which to reject. This is sometimes known as the ability to make tragic choices.¹⁹ When dealing with incommensurable values, the value-choices and the reasons for those choices should be set out carefully. Those reasons should be based on expert and lay evidence.

¹⁷ *Golden Bay Marine Farmers v Tasman District Council* Environment Court, W19/2003.

¹⁸ The High Court has tended to defer to the Environment Court when value-judgements have been involved in environmental decision-making. Thus in *Manukau City Council v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58 at 60, Chilwell J stated: "This [High] Court has no general appellate jurisdiction on questions of fact in this area... this is because the Tribunal [now the Environment Court] is seen as 'an expert jury on matters of fact and policy, and questions of reasonableness and public interest as far as relevant to the planning powers'. It is not therefore appropriate for the Court to enter into a re-examination of the merits of the case."

¹⁹ See J Alder, "Dissents in courts of last resort: tragic choices" (2000) 20 *Oxford Journal of Legal Studies* 221.

If competing national and local values are involved with a freshwater resource then in order to give effect to the policies in the NPSFWM more weight should be given to national values. If values are incommensurate and cannot be balanced or weighed because there is no common measure or factor, then as a matter of choice the national values should be chosen ahead of the local values.

To give effect to the NPS in a regional plan, a regional council does not need to rely on quantitative environmental performance and technology standards to meet the purpose of the RMA. To achieve integrated management of land and water controls, environmental process standards which reflect local values will be very important. In Part B of this opinion I address the legal effect of process standards for addressing environmental risks and integrated management.

Other provisions in a regional plan which do not give effect to the NPSFWM provisions are not unlawful because there are directive policies in the NPSFWM which must be given effect to. A regional council needs to indicate in a section 32 assessment why it considers the provisions of the NPS have been recognised and implemented effectively in a proposed change to a regional plan. The main issue would be whether or not other provisions lessen or reverse the effectiveness of the NPS policies.

In Part B of this opinion I consider the legal implications of using integrated land-use controls with water-use controls by linking the classification of activities to stock numbers and nitrogen loadings.

3.2 Policy A3 - “Best practicable option”

Policy A3 of the NPS for Freshwater Management 2011 requires regional councils where permissible to make rules requiring the adoption of the best practicable option to prevent or minimise any actual or likely effect on the environment of any discharge of a contaminant into fresh water, or onto or into land in circumstances that may result in contamination.

- i) In what circumstance would such rule making not be permissible?**
- ii) How does the requirement to “prevent or minimise” fit with the normal obligation to avoid, remedy or mitigate adverse effects?**
- iii) How can a council meet the requirements of both Policy A1 and Policy A3? i.e. is the requirement to “avoid” in A3 compatible with the BPO approach?**

3.2.1 In what circumstance would such rule making not be permissible?

The qualifying words in policy A3(b) “where permissible”, in my opinion mean where permissible under the RMA. One can judge where it might not be legally permissible to use a BPO rule by considering section 70(2) of the RMA.

A regional council would be exercising its discretion unlawfully if it failed to take into account the mandatory relevant considerations in section 70(2) and give them genuine consideration.

Section 70(2) of the RMA provides as follows:

Before a regional council includes in a regional plan a rule requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant, the regional council shall be satisfied that, having regard to:

- (a) The nature of the discharge and the receiving environment; and
- (b) Other alternatives, including a rule requiring the observance of minimum standards of quality of the environment,—

the inclusion of that rule in the plan is the most efficient and effective means of preventing or minimising those adverse effects on the environment.

Section 70(2)(b) refers to one alternative to a BPO rule but there may be many others. The word “including” has been interpreted to mean “not exclusive”.²⁰

In *Peninsula Watchdog Group Inc v Waikato Regional Council*²¹ the Planning Tribunal considered whether a condition of the kind imposed pursuant to what is now section 108(2)(e) would be the most efficient and effective means of preventing or minimising any actual or likely adverse effect on the environment. The Tribunal concluded that it would not be, and stated:

The imposition of such a condition would leave uncertainty on what concentrations of contaminants in the discharge might from time to time be permissible or impermissible. That uncertainty would, in the event of conflict, have to be resolved by the respondent (or possibly the Planning Tribunal on appeal) after hearing detailed scientific and economic evidence. However in these proceedings the Tribunal has heard such evidence from twelve witnesses over nine hearing days and is in a position to dispose of the appeal in a way which would allow all parties to refer to conditions which prescribe with certainty the maximum permitted concentrations of contaminants. In our opinion that would be a more efficient and effective means of preventing any adverse effect on the environment from the discharge.

The courts are unlikely to support the interpretation of a RMA instrument which leads to an absurdity or anomaly.²² Section 67(3) (giving effect to the provisions in a NPSFWM in a regional plan) and section 70(2) can be applied in a way which does not create an anomaly if a regional council is not precluded from electing not to include a BPO rule in a regional plan after considering the relevant mandatory statutory considerations contained in section 70(2).

It would be important that a regional council gives its reasons for considering that the benefit of an alternative outweighs the use of the BPO in a rule because it was more likely to meet the objectives and policies of the NPSFWM as a more efficient and effective means of preventing or minimising actual or likely adverse effects on the environment.

²⁰ See *Statute Law in New Zealand*, 4th ed, Burrows at 417-420.

²¹ Planning Tribunal Auckland A52/94, 29 June 1994, at 32-33.

²² See *Nanden v Wellington City Council* [2000] NZRMA 562, para 48, a case that addresses district plan interpretation by William Young J in the High Court.

The BPO is defined in section 2 of the RMA as follows:

In relation to a discharge of a contaminant or an omission of noise, means the best method of preventing or minimising the adverse effects on the environment having regard, among other things, to:

- (a) The nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and
- (b) The financial implications, and the effects on the environment, of that option when compared with other options; and
- (c) The current state of technical knowledge and the likelihood that the option can be successfully applied.

The words ‘best practicable option’ do not mean the best option, the best technical option, the best economic option, or the best environmental option. A judgement needs to be made as to what is practicable and proportionate to the risks likely from a contaminant. The Shorter Oxford English Dictionary defines “practicable” as “capable of being carried out in action; feasible”.

In *Medical Officer of Health v CRC*²³, it was held that “practicable” is the key word in the definition of BPO, and it would be wrong to impose conditions which afforded the holder no practical means of compliance.

The words “among other things” in the definition do not limit the considerations a regional council may address, to those matters in paras (a), (b) and (c).

The matters in paragraphs (a), (b) and (c) are relative. This approach reflects the “principle of proportionality” which allows for a dilution of absolute standards and is used in European community law. Some overseas jurisdictions put more emphasis on technical options for addressing pollution. This is sometimes known as a technologically forcing regulatory approach. The BPO is the optimum combination of all methods to manage the risk of an adverse environmental effect to the greatest extent practicable. It is necessary to consider the options and financial implications when determining how best to attain the BPO.

²³ [1995] NZRMA 49.

Thus, what constitutes the BPO in any given case is a question of fact and degree. Regard is to be had primarily to all three subsections (a), (b) and (c) of the definition, although one or more may be given more weight than others in any given case. The environmental performance targets being aspired to by using the BPO should be set out in the documentation.

If a BPO rule does not provide for sufficient certainty or enforceability of a rule there would be concern that its imposition could lessen the effectiveness of the policy directions in the NPS to establish methods and rules which avoid over-allocation.

In *Auckland Kart Club v Auckland City Council* the Planning Tribunal²⁴ held:

The definition ‘best practicable option’ has too many matters of interpretation and discretion built into it to allow it to be used as a basis for strict liability. The phrase ‘other things’ does not limit the regard to be given to just the three provisions (a), (b), and (c) of the definition; it means that one provision should prevail over another. The question of weight accorded each provision depends on the particular case. The conjunctive use of ‘and’ at the end of each provision means that an evaluation of the best method should take account of all factors mentioned in the provisions. However, one or two of the provisions may, at any one time, be exclusive of others. What is reasonable is a question of fact and degree.

I am of the opinion that a regional council has the discretion not to include a BPO rule in its regional plan if the other rules it has developed to give effect to other policies in the NPS are more likely to promote the purpose of the Act. Also, a regional council may judge that a BPO requirement could lessen the effectiveness and efficiency of other rules in the plan. This may be the approach taken where the receiving water quality is high and better alternative rules will maintain it.

However, the RMA does indicate how Policy A3(b) could be given effect to by a specific BPO rule when seeking to avoid over-allocation. It could be an important part of a management regime for proposed action once an allocation limit has been fixed by a regional council.

²⁴

A124/92 1 & 2 NZPTD 337.

A BPO rule would be useful when reviewing resource consent conditions pursuant to sections 128(1)(a)(ii) and 131(2) of the RMA.

128 Circumstances when consent conditions can be reviewed

(1) A consent authority may, in accordance with section 129, serve notice on a consent holder of its intention to review the conditions of a resource consent—

(a) at any time or times specified for that purpose in the consent for any of the following purposes:...

(ii) to require a holder of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or 15B to adopt the best practicable option to remove or reduce any adverse effect on the environment; or

Such a rule may be useful to establish the basis for any notice which can be given under section 129 as required under section 128(2).

131 Matters to be considered in review

(2) Before changing the conditions of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or 15B to include a condition requiring the holder to adopt the best practicable option to remove or reduce any adverse effect on the environment, the consent authority shall be satisfied, in the particular circumstances and having regard to—

(a) the nature of the discharge and the receiving environment; and

(b) the financial implications for the applicant of including that condition; and

(c) other alternatives, including a condition requiring the observance of minimum standards of quality of the receiving environment—

that including that condition is the most efficient and effective means of removing or reducing that adverse effect.

If a regional plan includes BPO rules, that could assist the court if it were to make an order under section 339(5)(b) of the RMA.

339 Penalties

(5) If a person is convicted of an offence against section 338, the court may, instead of or in addition to imposing a fine or a term of imprisonment, make 1 or more of the following orders:

(b) an order requiring a consent authority to serve notice, under section 128(2), of the review of a resource consent held by the person, but only if the offence involves an act or omission that contravenes the consent.

3.2.2 How does the requirement “to prevent or minimise” fit with the normal obligation to avoid, remedy or mitigate adverse effects?

A BPO rule is used in a different context to section 5 of the RMA. It is a method for addressing considerations where there may not be a better practicable option for avoiding or minimising the adverse effects on the environment of a discharge. It is a risk management method.

The words “to prevent or minimise any actual or likely adverse effect” can be difficult to apply. The word “likely” requires a judgement as to the probability of an adverse effect. The lexicon of risk is used when addressing likelihoods.

When considering rules in a district plan, the Environment Court in *Long Bay-Okura Great Park Society v North Shore City Council*²⁵ stated:

[20] The traditional fact/law/judgment division of civil cases inadequately describes the role of a local authority (or the Environment Court on appeal) in relation to a district or regional plan, a policy statement or a resource consent. We consider there are not three but four general steps in most proceedings under the RMA:

- (1) fact-finding;
- (2) the statement of the applicable law;
- (3) risk predictions: assessing the probabilities of adverse effects and their consequences;
- (4) the overall assessment as to what better achieves the purpose of the RMA.

[21] Steps (1), (2) and (4) are the traditional steps in legal decision-making, although under the RMA the fourth step involves more value judgements than Courts are usually entrusted with. The extra step under the RMA – step (3) – will be considered separately in this decision although it is usually subsumed in steps (1) or (4) without recognition of either its importance or of its separate characteristics. We consider that the assessment of future effects – that is, establishing our best and most accurate belief of the probability of each relevant alleged (future) effect and its consequences – is a separate and very important step.

The superior courts have held that it is difficult to differentiate clearly between “likely” and “probable” to any sensible degree, and that the test for likelihood is the probability both of

²⁵ *Long Bay-Okura Great Park Society Inc v North Shore City Council* Decision A78/2008, paras 20 and 21.

an event occurring and of that event having the effects contemplated or foreseen. Possible and speculative effects must be disregarded in reaching the final conclusion.²⁶ “Likely” has been expressed as a real and substantial risk that the stated consequence will happen.²⁷

The Environment Court cannot require a regional council to prove as a fact a prediction about the future. Standards of proof and fact finding involve past events, not predictions of future ones. In the *Long Bay* case the Court stated:

[321] We conclude on the authority of *Fernandez v Government of Singapore*²⁸ (which is binding on us) supported by the other Superior Court decisions cited that there is no such thing as a standard of proof for future events. All a local authority and, on appeal, the Environment Court can and should do is to make an assessment of the probabilities of a future event (given an array of frequencies and intensities). The Court should not confine the prediction to whether the event achieves a ‘toss of the coin’ standard. Then the local authority must continue by working out the costs and benefits of the event so as to assess the risk as required by section 32 in particular and the Act in general.

The RMA uses the word “avoid” in relation to section 311(2) which states that the Environment Court can consider whether there has been contravention of a rule in a plan or proposed plan that requires a consent holder to adopt the best practicable option to avoid or minimise any adverse effect of the discharge to which the consent rule relates. The Court can only make a declaration on the application of a consent authority or the Minister.

Section 311(2) states:

311 Application for declaration

- ...
- (1) No person (other than the consent authority or the Minister) may apply to the Environment Court for a declaration that a consent holder or any other person is contravening any condition of a resource consent or a rule in a plan or proposed plan that requires the holder to adopt the best practicable option to avoid or minimise any adverse effect of the discharge to which the consent or rule relates.

(My emphasis)

²⁶ *Air New Zealand v Commerce Commission* [1985] 2 NZLR 338 at 342.
²⁷ *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 555 at 562-63 (CA).
²⁸ [1971] 2 All ER 691 at 696.

In my opinion the wording in section 311(2) indicates that the BPO must aim at avoiding or mitigating any adverse effect of the discharge to which a consent relates and this reflects the language of section 5(2)(c).

3.2.3 How can a council meet the requirements of both Policy A1 and Policy A3? i.e. is the requirement to “avoid” in A3 compatible with the BPO approach?

A BPO rule would help to avoid or mitigate adverse effects involving lawful uses which exceed an allocation limit fixed by a regional council.

It might be a very useful rule where well-established land uses have long-term consents to discharge contaminants and the regional council wishes to take an active step to restore or improve water quality. This approach would give effect to the policy goal of avoiding over-allocation.

3.3 Whether the use of biological indicators to express a water quality limit would give effect to the NPS provisions and meet the purpose of the RMA.

This question relates to the statutory duties and discretionary powers regional councils have when developing methods (including rules) to avoid over-allocation by assessing water quality and then setting limits which they judge will promote the sustainable management of natural and physical resources in their regions.

In my opinion, regional councils with their expertise, have a wide discretion to use biological measures to develop water quality standards and limits to deal with the inevitable variability of water bodies.

Water quality is a manifestation of the health of fresh water and its associated ecosystems. Water quality is influenced by many matters such as geological structure, topography, soils, weather, micro-climates, hydrology, vegetation, and natural diversity,

as well as the aesthetic, cultural and historic aspects of the water, which will vary from catchment to catchment.

What is integral to healthy fresh water and associated ecosystems is the maintenance of the diversity and abundance of healthy vegetation and fauna species (including invertebrates). The health of the fresh water and associated ecosystems is threatened if human activities reduce that abundance and diversity. Biodiversity is central to the life-supporting capacity of water and ecosystems.

Safeguarding the health of water is particularly relevant where it is under threat. The preamble to the NPSFWM recognises this.

New Zealand faces challenges in managing our fresh water to provide for all of the values that are important to New Zealanders. The quality, health, availability and economic value of our fresh water are under threat. These challenges are likely to increase over time due to the impacts of climate change.

In my opinion, the establishment of a water quality limit based on scientific methods, which allows the health of a freshwater resource and its associated ecosystems to be evaluated and monitored as a basis for allocating the water to competing users, would be difficult to challenge on the grounds that it wasn't giving effect to the provisions of the NPSFWM or meeting the purpose of the RMA.

The NPSFWM also includes the following relevant objectives and policies:

Objective A1

To safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water, in sustainably managing the use and development of land, and of discharges of contaminants.

Objective A2

The overall quality of fresh water within a region is maintained or improved while:

- (a) protecting the quality of outstanding freshwater bodies
- (b) protecting the significant values of wetlands and
- (c) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated.

Policy A1

By every regional council making or changing regional plans to the extent needed to ensure the plans:

- (a) establish freshwater objectives and set freshwater quality limits for all bodies of fresh water in their regions to give effect to the objectives in this national policy statement, having regard to at least the following:
 - i) the reasonably foreseeable impacts of climate change
 - ii) the connection between water bodies
- (b) establish methods (including rules) to avoid over-allocation.

Policy A2

Where water bodies do not meet the freshwater objectives made pursuant to Policy A1, every regional council is to specify targets and implement methods (either or both regulatory and non-regulatory) to assist the improvement of water quality in the water bodies, to meet those targets, and within a defined timeframe.

Policy A4 and direction (under section 55) to regional councils

By every regional council amending regional plans (without using the process in Schedule 1) to the extent needed to ensure the plans include the following policy to apply until any changes under Schedule 1 to give effect to Policy A1 and Policy A2 (freshwater quality limits and targets) have become operative:

“1. When considering any application for a discharge the consent authority must have regard to the following matters:

- a) the extent to which the discharge would avoid contamination that will have an adverse effect on the life-supporting capacity of fresh water including on any ecosystem associated with fresh water and*
- b) the extent to which it is feasible and dependable that any more than minor adverse effect on fresh water, and on any ecosystem associated with fresh water, resulting from the discharge would be avoided.*

[Emphasis added]

Section 5(1) and (2) states:

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

- (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Thresholds that are established for making a judgement required by section 5(2)(b) should be informed by an evaluation under sections 6 and 7 of whether the natural character of wetlands, lakes and rivers would be preserved, whether significant indigenous vegetation and significant habitats of indigenous fauna would be protected, whether intrinsic values of ecosystems, and the habitat of trout and salmon would be protected, and whether the relationship of Maori and their culture and traditions with their ancestral water would be provided for, or undermined.

Life-supporting capacity also includes important concepts for Maori including mauri, waahi tapu, waahi taonga, and kaitiakitanga. Fresh water is a source of mahinga kai. The concepts of mauri and kaitiakitanga are particularly relevant when judging matters in section 5(2)(b).²⁹

In my opinion biological controls as a water quality limit would allow for a regional council to achieve section 5(2)(a)(b) and (c) and give effect to the provisions of the NPSFWM, which identify the national values of freshwater and act as a way in which a judgement can be made in terms of the health of the natural resource and how that health might be altered due to water uses. How those water uses are then managed to avoid an over-allocation because the limit is exceeded, requires regional councils to develop methods and rules which may integrate land and water uses. Those methods and rules may relate to controls on discharges which are likely to exceed the water quality limit which relates directly to the life-supporting capacity of the water and the ecosystems and is the basis of the limit.

²⁹ A useful summation of how section 5(2) of the RMA should be applied to activities that would alter flows or levels of freshwater, or would result in it being contaminated, is found in a paper by retired Environment Judge David Sheppard “Reaching Sustainable Management of Fresh Water”, Resource Management Law Association Conference, Christchurch, 2010.

The quality of water relates to the thresholds in section 5(2)(a) and (b). Maintaining the quality or enhancing it should be the imperative when regional councils develop controls on the use of water for human activities in order to meet the threshold in section 5(2)(c).

It is not sufficient to rely on the mitigation of adverse effects pursuant to section 5(2)(c) by using physical and chemical measures, without addressing the potential of the fresh water to meet the reasonably foreseeable needs of future generations, and determining whether the life-supporting capacity of the water, and of ecosystems associated with it, are safeguarded.

Regional councils have a discretion pursuant to section 69(1)(b) and (2) to use other methods from those physical and or chemical ones contained in Schedule 3 to the RMA.

69 Rules relating to water quality

(1) Where a regional council—

(a) provides in a plan that certain waters are to be managed for any purpose described in respect of any of the classes specified in Schedule 3; and

(b) includes rules in the plan about the quality of water in those waters,—

the rules shall require the observance of the standards specified in that schedule in respect of the appropriate class or classes unless, in the council's opinion, those standards are not adequate or appropriate in respect of those waters in which case the rules may state standards that are more stringent or specific.

(2) Where a regional council provides in a plan that certain waters are to be managed for any purpose for which the classes specified in Schedule 3 are not adequate or appropriate, the council may state in the plan new classes and standards about the quality of water in those waters.

(3) Subject to the need to allow for reasonable mixing of a discharged contaminant or water, a regional council shall not set standards in a plan which result, or may result, in a reduction of the quality of the water in any waters at the time of the public notification of the proposed plan unless it is consistent with the purpose of this Act to do so.

When developing a water quality limit which reflects the health of a freshwater body and associated ecosystems it would be helpful to relate the land use controls to a measurement which indicates whether or not the health of the freshwater body and its associated ecosystems is being diminished, maintained or improved. To be meaningful, the allocation limit should relate to such matters.

4.0 Conclusion

When considering how to give effect in a regional plan to policies A1(b) and A3(b) contained in the NPSFWM, regional councils must do that pursuant to their statutory duties and powers contained in the RMA. At all times the purpose of the RMA should be paramount.

Policy A1(b) can be given effect to by developing a water quality limit which meets the purpose of the RMA. This limit is central to a management regime aimed at avoiding over-allocation and managing uses that exceed the limit. Endeavouring to bring those uses within the limit in a timely manner is an important role for regional councils when giving effect to the NPSFWM in regional plans.

Policy A3(2) must be given effect to in a way which meets the mandatory relevant considerations to be taken into account by regional councils in section 70(2) of the RMA. There are many benefits to having a BPO rule when managing the risks of over-allocation of freshwater resources to give effect to the NPSFWM in a regional plan.

Due to the mix of values contained in Part 2 of the RMA, it is not necessary to express regional rules in numerical or quantifiable language for them to have regulatory effect and be enforceable. The provisions of the NPSFWM do not preclude co-regulatory and self-regulatory methods for controlling freshwater and land uses to achieve integrated management.

Including biological indicators in water quality limits which allow the health of the fresh water and its associated ecosystems to be maintained and enhanced, would give effect to the provisions of the NPSFWM and promote the purpose of the RMA.

PART B:

1.0 Instructions

In this part of my opinion I expand on:

- (a) the use of process standards in a regional plan,
- (b) a robust legal process leading to the review of resource consent conditions, and
- (c) the use of integrated management approaches linking land uses and water quality by using stock numbers and nitrogen loadings to give effect to the NPSFWM.

2.0 The Questions

2.1 The use of process standards in a regional plan

There appear to be three principal actions required of regional councils to avoid over-allocation.

1. Improve water quality pending the fixing of water quality limits.
2. Fix water quality limits.
3. Manage activities to improve and maintain water quality with reference to the limits.

I am of the opinion that process standards (rules) can provide for mandatory procedures to be followed by all land owners who may be carrying out activities that are or could place water quality at risk from point and non-point source contaminants.

The rules should allow regional councils to obtain information in order to achieve the purpose of the Act, namely to safeguard the health of the water and manage adverse effects on the environment, including the ecosystem.

Process standards can provide a timetable for responses in order to address the risk to fresh water from current activities including those where existing discharge permits have been granted. They are a planning and resource management tool.

Process standards do not need to be developed following a significant and lengthy consultation period because they provide for timetables within them to allow for ongoing consultation over the development of risk management plans and the gathering of information.

Process standards should include fair and transparent procedures. They need to be flexible, targeted and pragmatic. But above all, they need to be enforceable.

Process standards can assist in developing integrated land use and water use plans for addressing risks to water quality. They are particularly useful when addressing environmental risk management where there may be uncertainty because of insufficient information about a complex ecological system, or water quality limits which are currently expressed in a regional plan or a resource consent condition in narrative rather than numerical terms.³⁰

Because they are associated with managing the risk of a significant adverse effect on water quality, process standards need to be developed using the language of risk. Such standards (rules) are often used to address hazard risks in respect of activities:

Standards involve the establishment of uniform requirements on broad categories of activities to achieve specific environmental goals. These include: ambient standards; technology-based performance standards; design or specification standards; environment management standards; and product standards. Of these, the major categories are technology-based standards, performance-based standards, and process-based standards.

... Process-based standards address *procedures and parameters* for achieving a desired result, in particular, the processes to be followed in managing nominated hazards. They are most used in respect of hazards that do not lend themselves to easy measurement, such as safe working practices, or Environmental Management Systems.³¹
[Emphasis added]

³⁰ For example, “numerical” is to allow no more than x parts per million of chrome in a discharge from an outfall, and “narrative” is not to allow any change in the conspicuous colour of water from a discharge.

³¹ “Smart Regulation – Designing Environmental Policy” Neil Gunningham and Peter Grabosky, Oxford University Press, 1998, page 40, 41.

Environmental process standards can also be used as a way of developing thresholds which would then avoid the need for an Assessment of Environmental Effects (AEE) with resource consent applications and hence could allow for a permitted activity status subject to section 70(1) of the RMA.

70 Rules about discharges

(1) Before a regional council includes in a regional plan a rule that allows as a permitted activity—

- (a) a discharge of a contaminant or water into water; or
- (b) a discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water,—

the regional council shall be satisfied that none of the following effects are likely to arise in the receiving waters, after reasonable mixing, as a result of the discharge of the contaminant (either by itself or in combination with the same, similar, or other contaminants):

- (c) the production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials:
- (d) any conspicuous change in the colour or visual clarity:
- (e) any emission of objectionable odour:
- (f) the rendering of fresh water unsuitable for consumption by farm animals:
- (g) any significant adverse effects on aquatic life.

Pursuant to Policy A4 and B7 (transitional policies pursuant to section 55), when an application is made for a change or increase in any discharge, process standards could be imposed to enable 1(a) and (b) to be addressed.

Process standards are particularly relevant when dealing with conditions subsequent. These are resource consent conditions that address obligations to develop procedures and plans following the grant of a resource consent.

The biggest advantage of process standards is being able to implement precautionary adaptive management methods to address risk and the reduction of risk, and also the remediation of degraded water resources.

Adaptive risk management techniques are derived from new scientific and ecological insights that interpret the natural world as dynamically changing, full of uncertainty, and

continually surprising.³² Measures are designed to monitor results systematically and to be modified through constant feedback. Management actions and monitoring programmes are carefully designed to generate reliable feedback and to clarify the reasons, underlying outcomes, actions and objectives, and are then adjusted on the basis of this feedback and improved understanding. In addition, decisions, actions and outcomes are carefully documented and communicated to others so that knowledge gained through experience is passed on.³³

Adaptive management methods have often been addressed by the Environment Court over a number of years without being described as such. These methods include environmental management plans, staging, monitoring, contingency plans, environmental audits, the best practicable option, and review mechanisms. They allow for environmental administrators and decision-makers to work through the tensions that might occur with the conflicting interests and values of land owners, local authorities, members of the community, iwi and others. The whole process is designed to be transparent.

Adaptive management allows for co-regulation. Co-regulation enables a land owner, a local community and a local authority to co-operate and work together in order to promote sustainable management by:

- gathering information about the natural resources involved with a land-use;
- using science advisory groups to address uncertainty;
- using community working parties to involve local values;
- providing for public dissemination of monitoring results;
- providing for the establishment of environmental audit groups.

³² AT Iles “Adaptive Management: Making Environmental Law and Policy More Dynamic, Experimentalist and Learning” (1996) *Envil. & Pl LJ* 288.

³³ Nyberg: An introductory guide to adaptive management for project leaders and participants, January 1999. See C S Holling (ed) *Adaptive Environmental Assessment and Management*, John Wiley & Sons, Chichester, 1978, 286, and R J Somerville QC, *Water Law: Risk, Values, Environmental Law Decision-Making*, Royal Society 2003 Conference on Water.

Adaptive approaches can involve the use of performance bonds similar to development levies in rules or resource consent conditions that address the fact that many applicants may not have an incentive to try and actually improve water quality.

I suggest a possible process standard in the next section of this opinion.

2.2 A robust legal process leading to the review of resource consent conditions

I have been asked to consider the circumstances under which a regional council can review consent conditions in order to comply with the objectives and policies in the NPS so that over-allocation may be avoided. The specific matter the regional councils have asked me to address is:

In particular we would benefit from a discussion of transition issues relating to the sequence of a plan change, the scope to review consent conditions once a council has determined that there is a problem but before they have managed to complete a plan change and the standing of a notified plan with respect to a review of consent conditions.

The further advice sought is in the context of the earlier advice that:

The objectives and policies in the NPS indicate that over-allocation may be avoided by regional councils establishing levels, flows, rates or standards in a regional rule and then reviewing the conditions of existing discharge permits to enable the rule to be met under section 128(b).

I assume that the further advice is sought in circumstances where, although a regional council has an operative water plan, the plan does not as yet contain sufficient water quality rules which give effect to the NPS.

In this section of my opinion I will focus on the relevant legal provisions in the RMA before addressing approaches which could be adopted pending an operative plan change which sets water quality standards.

2.2.1 The general role of regional councils

Section 30 of the RMA lists the functions and duties of regional authorities under the Act.

Section 30(1)(e) lists among these duties:

- (e) The control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including –
 - i. The setting of any maximum or minimum levels or flows of water:
 - ii. The control of the range, or rate of change, of levels or flows of water:
 - iii. The control of the taking or use of geothermal energy.

Section 30(1)(fa) provides that regional councils also have the following function:³⁴

- (fa) If appropriate, the establishment of rules in a regional plan to allocate any of the following:
 - i. The taking or use of water (other than open coastal water):
 - ii. The taking or use of heat or energy from water (other than open coastal water):
 - iii. The taking or use of heat or energy from the material surrounding geothermal water:
 - iv. The capacity of air or water to assimilate a discharge of a contaminant.

Section 30(4) relevantly provides:

A rule to allocate a natural resource established by a regional council in a plan under subsection (1)(fa) or (fb) may allocate the resource in any way, subject to the following:

- a) the rule may not, during the term of an existing resource consent, allocate the amount of a resource that has already been allocated to the consent; and
- b) nothing in paragraph (a) affects section 68(7); ...

Section 68(7) of the Act states:

Where a regional plan includes a rule relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality or air quality, or ranges of temperature or pressure of geothermal water, the plan may state –

- a) whether the rule shall affect, under section 130, the exercise of existing resource consents for activities which contravene the rule; and
- b) that the holders of resource consents may comply with the terms of the rule, or rules, in stages or over specified periods.

³⁴

Inserted, as from 10 August 2005, by the Resource Management Amendment Act 2005.

Thus section 68(7) provides that water quality rules may be expressed so as to affect existing consent holders.

Regional councils may prepare regional plans to assist them to carry out any of these functions in order to achieve the purpose of this Act.³⁵ The authority of regional councils to allocate water can be restricted by the provisions of a national policy statement.³⁶ Regional plans must give effect to the NPSFWM.

Section 68(1) provides that regional councils may make rules in regional plans for the purpose of carrying out their functions under the Act. Accordingly the situation could arise where an existing discharge carried out pursuant to resource consent is affected by a proposed new water quality rule. Such discharges may be restricted by a review of a resource consent pursuant to section 128(1)(b) of the RMA.

2.2.2 The power to review resource consent conditions

Section 128 of the RMA sets out the circumstances when resource consent conditions can be reviewed. Conditions can be reviewed where:

- a) the resource consent specifies a time for review (section 128(1)(a));
- b) in the case of a coastal, water, or discharge permit, relevant national environmental standards have been made (section 128(1)(ba));
- c) the information made available by the applicant contained inaccuracies which materially influenced the decision to grant the consent (section 128(1)(c)).

³⁵ RMA 1991, section 63.

³⁶ RMA 1991, section 67(3)(a).

Section 128(1)(b) provides that a resource consent may also be reviewed at any time:

(b) In the case of a coastal, water, or discharge permit, when a regional plan has been made operative which sets rules relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality or air quality, or ranges of temperature or pressure of geothermal water, and in the regional council's opinion it is appropriate to review the conditions of the permit in order to enable the levels, flows, rates, or standards set by the rule to be met; [Emphasis added].

As I have noted above, section 68(7) of the RMA provides that water quality rules may be expressed so as to affect existing consent holders. Therefore, where the new or changed rule is expressly stated to apply to existing resource consents, the power under section 128(1)(b) may be used to enable that rule to be met.

However, the power to review existing resource consent conditions can only be used by a consent authority when that rule has become operative. That raises the question of when rules in a proposed plan or change become “operative”.

Section 43AA of the RMA defines “operative” to mean:

Operative, in relation to a policy statement or plan, or a provision of a policy statement or plan, **means that the policy statement, plan, or provision –**

- a) **has become operative –**
 - i. **in terms of clause 20 of Schedule 1; or**
 - ii. **under section 86F; and**
- b) has not ceased to become operative. [Emphasis added]

Section 43AA defines “plan” to mean a regional or a district plan, and “regional plan” means “an operative plan approved by a regional council under Schedule 1 (including all operative changes to the plan(whether arising from a review or otherwise)) ...”

Section 65 of the RMA provides that regional plans are to be prepared and changed in accordance with Schedule 1.

Following the decisions by the regional council and the court on appeal, the approved plan becomes operative on a date which is to be publicly notified. (Clause 20). Where a regional council wishes to make a new water quality rule it will need to address the question of the interim effect of the proposed rule, that is, until it becomes operative.

2.2.3 Implications of rules having legal effect prior to completion of submission/decision process involving a plan change

I have considered whether there is an argument that regional councils could apply under section 86D of the RMA for an order that a proposed water quality rule would have legal effect on notification. A further order could be sought that the new rule be deemed to be operative on that earlier date. Regional councils could then seek to review the conditions of existing consents to enable the new rule to be met under section 128(1)(b).

Section 86D states:

86D Environment Court may order rule to have legal effect from date other than standard date

- (1) In this section, **rule** means a rule—
 - (a) in a proposed plan or change; and
 - (b) that is not a rule of a type described in section 86B(3)(a) to (e) or (6).
- (2) A local authority may apply before or after the proposed plan is publicly notified under clause 5 of Schedule 1 to the Environment Court for a rule to have legal effect from a date other than the date on which the decision on submissions relating to the rule is made and publicly notified under clause 10(4) of Schedule 1.
- (3) If the court grants the application, the order must specify the date from which the rule is to have legal effect, being a date no earlier than the later of—
 - (a) the date that the proposed plan is publicly notified; and
 - (b) the date of the court order.

However in my view there are difficulties with this argument. Section 86A makes a distinction between a rule in a proposed plan or change, which when published may have no legal effect, and a rule which subsequently does have legal effect. The Court has held that the term “legal effect” is a reference to when rules must be complied with. However,

the status of a rule having legal effect is again distinguished from a rule that has become operative pursuant to section 43AAB, by being part of an operative plan.³⁷

Section 86A states:

86A Purpose of sections 86B to 86G

- (1) The purpose of sections 86B to 86G is to specify when a rule in a proposed plan or change described in section 86B(6) has legal effect.
- (2) Except to the extent that subsection (1) applies, sections 86B to 86G do not limit or affect the weight that a consent authority gives to objectives, policies, and other issues, reasons, or methods in plans before the plan becomes operative.

Under section 86B, a rule in a proposed plan has no legal status unless a decision on submissions relating to the rule is made under clause 10(4) of Schedule 1, or one of the following three alternatives apply. First, if the rule protects or relates to water it will have immediate legal effect. Second, the Environment Court may on application make an order that the rule has legal effect from an earlier date. Third, the local authority may resolve that the rule has no legal effect unless it becomes operative.

Section 86B states:

86B When rules in proposed plans and changes have legal effect

- (1) A rule in a proposed plan has legal effect only once a decision on submissions relating to the rule is made and publicly notified under clause 10(4) of Schedule 1, except if—
 - (a) subsection (3) applies; or
 - (b) the Environment Court, in accordance with section 86D, orders the rule to have legal effect from a different date (being the date specified in the court order); or
 - (c) the local authority concerned resolves that the rule has legal effect only once the proposed plan becomes operative in accordance with clause 20 of Schedule 1.
- (2) However, subsection (1)(c) applies only if—
 - (a) the local authority makes the decision before publicly notifying the proposed plan under clause 5 of Schedule 1; and
 - (b) the public notification includes the decision; and
 - (c) the decision is not subsequently rescinded (in which case the rule has legal effect from a date determined in accordance with section 86C).
- (3) A rule in a proposed plan has immediate legal effect if the rule—
 - (a) protects or relates to water, air, or soil (for soil conservation); or
 - (b) protects areas of significant indigenous vegetation; or
 - (c) protects areas of significant habitats of indigenous fauna; or
 - (d) protects historic heritage; or

³⁷

That is, operative under Clause 20 of Schedule 1 or under section 86F RMA 1991.

(e) provides for or relates to an aquaculture management area.

(4) For the purposes of subsection (2)(c), a decision is **rescinded** if—

(a) the local authority publicly notifies that the decision is rescinded; and

(b) the public notice includes a statement of the decision to which it relates and the date on which the decision was made.

(5) For the purposes of subsection (3), **immediate legal effect** means legal effect on and from the date on which the proposed plan containing the rule is publicly notified under clause 5 of Schedule 1.

(6) A rule in a change to a plan proposed by a person under Part 2 of Schedule 1 that provides for or relates to an aquaculture management area and that has been accepted by the local authority

under clause 25(2)(b) of Schedule 1 has legal effect on and from the date the change is publicly notified under clause 26(b) of that schedule.

Where no submissions are made or lodged, or all submissions have been determined or withdrawn and all appeals have been withdrawn or dismissed, under section 86F, the rule must be treated as operative. This is in addition to the rule having had legal effect in the sense that it must be complied with. Significantly, however, a rule that has legal effect is not an operative rule for the purposes of section 128(1)(b) of the RMA until it is also an operative rule, in terms of section 43AAB.

In summary, it is my view that because the RMA in sections 86A-86F treats the term “legal effect” separately from “operative”, an attempt to review consent conditions under section 128(1)(b) on the basis that the proposed rule has “legal effect” (but is not yet operative) is likely to be unsuccessful.

2.2.4 The section 55 procedure

Alternatively, it could be argued that the new policy referred to in Policy A4 of the NPSFWM is a deemed operative provision for the purposes of section 128(1)(b) of the RMA.

In particular, Policy A4 provides that:

Policy A4 and direction (under section 55) to regional councils

By every regional council amending regional plans (without using the process in Schedule 1) to the extent needed to ensure the plans include the following policy

to apply until any changes under Schedule 1 to give effect to Policy A1 and Policy A2 (freshwater quality limits and targets) have become operative:

"1. When considering any application for a discharge the consent authority must have regard to the following matters:

- a) the extent to which the discharge would avoid contamination that will have an adverse effect on the life-supporting capacity of fresh water including on any ecosystem associated with fresh water and*
- b) the extent to which it is feasible and dependable that any more than minor adverse effect on fresh water, and on any ecosystem associated with fresh water, resulting from the discharge would be avoided.*

2. This policy applies to the following discharges (including a diffuse discharge by any person or animal):

- a) a new discharge or*
- b) a change or increase in any discharge – of any contaminant into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of any natural process from the discharge of that contaminant, any other contaminant) entering fresh water.*

3. This policy does not apply to any application for consent first lodged before the National Policy Statement for Freshwater Management takes effect on 1 July 2011."

Under section 55(2) of the RMA, regional councils are required to amend their regional plans to give effect to the objectives and policies of the NPSFWM. Regional councils must make those amendments without using the process in Schedule 1 of the RMA.³⁸

In my view, given the limited wording of the new policy referred to in Policy A4, regional councils will not be able to use the section 55 procedure to review consent conditions under section 128(1)(b). The Policy does not give regional councils authority to review conditions of existing discharges. While there is a reference to "a change or increase in any discharge", it would not, in its present wording, allow a council to impose rules in relation to new flows but could allow for adding process-based conditions to give effect to the provisions in the NPSFWM.

³⁸ Section 55(2A) of the RMA. Philip Milne addresses the provisions in the NPSFWM relating to section 55(2) of the RMA in "The NPS on Freshwater Management: What will it mean in practice?" *RMJ*, November 2011, page 13.

2.2.5 Proposed plan change with transitional rules which have legal effect

In order to protect water quality, particularly if evidence shows that water quality is at risk through over-allocation and the risks need to be managed pending the development of an operative plan change which allows for a review of resource consent conditions, an option is to include process standards (rules) within a proposed plan change which are to be given legal effect immediately in order to protect water quality.

86B When rules in proposed plans and changes have legal effect

(3) A rule in a proposed plan has immediate legal effect if the rule—

(a) protects or relates to water, air, or soil (for soil conservation);

...

(5) For the purposes of subsection (3), **immediate legal effect** means legal effect on and from the date on which the proposed plan containing the rule is publicly notified under clause 5 of Schedule 1.

2.2.5.1 Possible process standards

An example of a way to protect water quality by using a co-regulatory management regime involving both land owners using water and the local authorities is to include in a proposed plan rules which include process standards for the protection of water quality which apply to land owners with or without resource consents to use water and or discharge contaminants to water.

The standards could require landowners:

- (a) to establish management plans to address the risk arising from adverse effects from their land uses on water;
- (b) to implement best practicable options (BPO) within a fixed time which include the establishment of buffer areas, fencing, and farm layout practices which will reduce the risk of contamination of fresh water;
- (c) to provide a timetable for the implementation of (a) and (b) but not later than a fixed date;
- (d) to take part in a working party involving local authorities and the community to establish an integrated land and water use plan for an identified area (or zone).

2.2.5.2 Classification of activities

In my opinion it would also be appropriate to include in a proposed change rules establishing classes of activity requiring resource consents which involve land uses that are likely to place water quality at risk.³⁹

The rules could then require applications to be made for resource consents pursuant to section 15(1)(b) of the RMA.

15 Discharge of contaminants into environment

(1) No person may discharge any—

(b) contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or

2.2.5.3 Staging water quality limits

There is sufficient scope within the objectives and policies of the NPSFWM to allow for a management regime which manages risks by providing for a staged approach to the implementation of controls aimed at achieving the sustainable management of the water resource.

Section 68(7) states:

68 Regional rules

(7) Where a regional plan includes a rule relating to maximum or minimum levels or flows or rates of use of water, or minimum standards of water quality or air quality, or ranges of temperature or pressure of geothermal water, the plan may state—

(a) whether the rule shall affect, under section 130, the exercise of existing resource consents for activities which contravene the rule; and

(b) that the holders of resource consents may comply with the terms of the rule, or rules, in stages or over specified periods.

[Emphasis added]

³⁹ The use of stock numbers and nitrogen loadings to classify activities is addressed in 2.3.2 of this opinion.

Where water quality is degraded and needs to be improved to meet the purpose of the Act a proposed plan change could be prepared which includes interim water quality standards expressed in narrative or qualitative terms rather than numerical terms.

To manage the risks associated with degraded water and continuing adverse effects on the ecosystems and the health of the water, interim measures could be imposed pending the development of an integrated land and water use strategy which includes regulatory (rules and plans) and co-regulatory methods involving communities and landowners developing initiatives to improve water quality through self-regulatory, educative, and voluntary mechanisms.

A subsequent plan change could include numerical controls in respect of point and non-point sources of contamination to meet the purpose of the Act.

2.2.5.4 Buffer zones

The establishment of rules which require buffer zones based on the impact of contaminants on vegetation which is inextricably related to the health of fresh water can be applied in resource consent conditions. (Section 108(2)(c)). The development of buffer zones based on lichenology or other indicators would also align with the objectives and policies in the draft NPS on biodiversity.

The location where a discharge contaminant is measured can be some distance away from the water and more particularly at a point where if there is contamination it is likely to affect the health of the fresh water. (Section 108(8) applies.) A buffer zone can also be an element of the best practicable option and give rise to a condition pursuant to section 108(2)(e):

Section 108(2)(c) and (e) and 108(8) states:

108 Conditions of resource consents

(2) A resource consent may include any 1 or more of the following conditions:

...

(c) a condition requiring that services or works, including (but without limitation) the protection, planting, or replanting of any tree or other vegetation or the protection, restoration, or enhancement of any natural or physical resource, be provided:

...

(e) subject to subsection (8), in respect of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or section 15B, a condition requiring the holder to adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of the discharge and other discharges (if any) made by the person from the same site or source:

(8) Before deciding to grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or 15B subject to a condition described in subsection (2)(e), the consent authority shall be satisfied that, in the particular circumstances and having regard to—

(a) the nature of the discharge and the receiving environment; and

(b) other alternatives, including any condition requiring the observance of minimum standards of quality of the receiving environment—

the inclusion of that condition is the most efficient and effective means of preventing or minimising any actual or likely adverse effect on the environment.

If adequate buffers are put in place it may be that activities can be categorised as controlled or restricted discretionary rather than discretionary or non-complying. If there is no buffer in place the activity may be prohibited. When fixing buffers the regional councils should take into account the principles contained in section 6 and 7 of the RMA.

2.2.5.5 Best Practicable Option

The use of a rule to give effect to Policy A3(b) in the NPSFWM requiring a holder of a resource consent to adopt the best practicable option to avoid or minimise any adverse effect of the discharge to which a rule relates is perhaps the most effective process standard for the period leading up to the finalisation of water quality standards which can then be managed through the use of activity classifications and land use controls.

Such discharges would be those addressed by section 15(1)(b). A proposed plan change should state that such discharges are subject to procedures being followed by the land owner which include matters such as the development of a management plan, measures to

be taken to establish buffer zones, and the implementation of the best practicable option by a particular date. The criteria for the best practicable option could be included in the change.

The criteria for the best practicable option needs to be established in a rule. Provisions in section 68(7) and section 131 apply. It is possible to obtain a declaration as to whether or not the holder of a resource consent is complying with the rule pursuant to section 311.

311 Application for declaration

(1) Subject to subsections (2) and (3), any person may at any time apply to the Environment Court in the prescribed form for a declaration.

(2) No person (other than the consent authority or the Minister) may apply to the Environment Court for a declaration that a consent holder or any other person is contravening any condition of a resource consent or a rule in a plan or proposed plan that requires the holder to adopt the best practicable option to avoid or minimise any adverse effect of the discharge to which the consent or rule relates. [Emphasis added]

2.2.5.6 Requirements for review of resource consent conditions

Plan changes can include criteria for the reviewing of conditions involving existing resource consents pursuant to section 128(i)(b) once the plan change which includes interim water quality measures is operative.

If the regional plan contains process rules which are to be followed when resource consent conditions are reviewed and that process is fair, transparent and has a level of certainty, it would be difficult for a consent holder to challenge the review as being unreasonable, unlawful or unfair.

2.2.5.7 Enforceability of rules in proposed plans

All these suggested rules in a proposed plan will have immediate legal effect if they are designed to protect or relate to water. They will have legal effect from the date of notification of the proposed plan.

If there is any question about whether a provision in a proposed regional plan change does not or is not likely to give effect to the provision or proposed provision of the NPSFWM, regional councils can confirm their legality in terms of the RMA by seeking a declaration to the Environment Court, particularly if there is to be a uniform approach throughout the country.

Section 310 states:

310 Scope and effect of declaration

- (ba) whether a provision or proposed provision of a regional plan,—
 - (i) contrary to section 67(3), does not, or is not likely to, give effect to a provision or proposed provision of a national policy statement, New Zealand coastal policy statement, or regional policy statement for the region; or
 - (ii) contrary to section 67(4), is, or is likely to be, inconsistent with a water conservation order, any other regional plan for the region, or a determination or reservation of the chief executive of the Ministry of Fisheries made under section 186E of the Fisheries Act 1996; or

The actions required of landowners could be subject to enforcement orders. Once a rule has legal effect then enforcement proceedings can be taken under section 314(1)(a)(i) and (ii), (b), (c), (da) and (e).

314 Scope of enforcement order

- (1) An enforcement order is an order made under section 319 by the Environment Court that may do any 1 or more of the following:
 - (a) require a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that, in the opinion of the court,—
 - (i) contravenes or is likely to contravene this Act, any regulations, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent, section 10 (certain existing uses protected), or section 20A (certain existing lawful activities allowed); or
 - (ii) is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment;
 - (b) require a person to do something that, in the opinion of the court, is necessary in order to—
 - (i) ensure compliance by or on behalf of that person with this Act, any regulations, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent; or
 - (ii) avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by or on behalf of that person;
 - (c) require a person to remedy or mitigate any adverse effect on the environment caused by or on behalf of that person;

(d) require a person to pay money to or reimburse any other person for any actual and reasonable costs and expenses which that other person has incurred or is likely to incur in avoiding, remedying, or mitigating any adverse effect on the environment, where the person against whom the order is sought fails to comply with—

(i) an order under any other paragraph of this subsection;

or

(ii) an abatement notice; or

(iii) a rule in a plan or a proposed plan or a resource consent; or

(iv) any of that person's other obligations under this Act:

(da) require a person to do something that, in the opinion of the court, is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment relating to any land of which the person is the owner or occupier:

(e) change or cancel a resource consent if, in the opinion of the court, the information made available to the consent authority by the applicant contained inaccuracies relevant to the enforcement order sought which materially influenced the decision to grant the consent:

2.3 Use of integrated management approaches linking land uses and water quality by using stock numbers and nitrogen loadings to give effect to the NPSFWM

I have been asked to consider:

... whether, assuming that the council is able to justify a linkage between the quality of the water and the level of activity in the catchment, it would be vires for a council to set water quality limits based on the level of activity in the catchment and whether this approach would give effect to the NPS?

2.3.1 Integrating land use activities and water quality controls

Polluting activities as land uses need to be managed by integrated land and water use instruments that provide for the management of risks associated with those land uses in order to protect a water resource and give effect to the NPSFWM.

When giving effect to the NPSFWM provisions by using land-use controls linked to the level of activity in a catchment, there needs to be a strategic approach for integrating the management of land and water uses so that water quality is improved, maintained and is likely to meet a standard which promotes the purpose of the RMA.

It would be useful if such an approach were included in a change to a regional policy statement (RPS) when addressing significant water quality issues for a region. The changes could be uniform across the country. That would give effect to Objective C1 and Policy C2 of the NPSFWM.

Objective C1 and Policy C2 state:

Objective C1

To improve integrated management of fresh water and the use and development of land in whole catchments, including the interactions between fresh water, land, associated ecosystems and the coastal environment.

Policy C2

By every regional council making or changing regional policy statements to the extent needed to provide for the integrated management of the effects of the use and development of land on fresh water, including encouraging the co-ordination and sequencing of regional and/or urban growth, land use and development and the provision of infrastructure.

It is appropriate to use an RPS as the basis for achieving integrated management of natural and physical resources of a whole region (section 59), and for allowing a regional council to perform its functions under section 30(1)(a).

59 Purpose of regional policy statements

The purpose of a regional policy statement is to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.

[Emphasis added]

30 Functions of regional councils under this Act

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

(a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:

[Emphasis added]

Changing a RPS and the regional and district plans in order to address the strategy for protecting water quality allows for an integrated land and water use regime.

73 Preparation and change of district plans

(4) A local authority must amend a proposed district plan or district plan to give effect to a regional policy statement, if—

- (a) the statement contains a provision to which the plan does not give effect; and
- (b) one of the following occurs:
 - (i) the statement is reviewed under section 79 and not changed or replaced; or
 - (ii) the statement is reviewed under section 79 and is changed or replaced and the change or replacement becomes operative; or
 - (iii) the statement is changed or varied and becomes operative.

74 Matters to be considered by territorial authority

(2) In addition to the requirements of section 75(3) and (4), when preparing or changing a district plan, a territorial authority shall have regard to—

- (a) any—
 - (i) proposed regional policy statement; or
 - (ii) proposed regional plan of its region in regard to any matter of regional significance or for which the regional council has primary responsibility under Part 4; and
- (b) any—
 - (i) management plans and strategies prepared under other Acts; and
 - (ii) *[Repealed]*
 - (iia) relevant entry in the Historic Places Register; and
 - (iii) regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial Maori customary fishing),—
 to the extent that their content has a bearing on resource management issues of the district; and

75 Contents of district plans

(3) A district plan must give effect to—

- (a) any national policy statement; and
- (b) any New Zealand coastal policy statement; and
- (c) any regional policy statement.

An application can be made by a district council to the Environment Court on an ex parte basis pursuant to section 86D for an order that the rules in its proposed district plan change should have legal effect from the date of its notification (under clause 5).⁴⁰

⁴⁰

New Plymouth District Council (re an application) [2010] NZEnvC 427.

In *New Plymouth District Council (re an application)* the Environment Court considered an application by the council under section 86D for an order that rules in its Proposed Future Urban Development Overlay Plan Change (PC15) should have legal effect from the date of its notification (under clause 5).

Judge Dwyer noted that section 86D(2) allowed a local authority to apply, either before or after notification of a proposed plan change, for a rule to have legal effect from the date other than the date on which decisions on submissions would be made.

The court held that the absence of any specific criteria or matters to be considered by the court indicates that the court has a wide discretion in determining whether to grant or refuse an application pursuant to section 86D(2). As with any discretion exercised by the Environment Court it ought to be exercised on a principled basis having regard at all times to the purpose of the RMA contained in section 5.

Judge Dwyer considered evidence, and other factors such as the strategic importance of PC15 in dealing with future urban growth, and concluded that it was appropriate for the rules in PC15 to have immediate legal effect. Accordingly the application was granted.

A useful comparison can be made with the approaches taken in the USA under its legislation for addressing the integration of land and water uses by reference to non-point pollution sources.

When designing a regulatory response for addressing water quality pursuant to the Clean Water Act in the USA, a distinction is made between water quality standards, effluent limitations, technology-based standards and the permit procedure. The national pollution discharge elimination system (NPDES programme) is tied inextricably to the permit procedure.

[a] Water Quality Standards

Effluent limitations – or technology-based limitations – are different from water quality standards. The manner in which they are different is important to understand if one is to grasp the strategy of the NPDES program.

Historically, “water quality standards” were the means by which the end result – the quality of a water body – was evaluated. The CWA places primary reliance for developing water quality standards on the states.

...

Water quality standards historically have been expressed in narrative terms (i.e., that the water must be free of certain pollutants which interfere with designated uses), although the CWA requires states to adopt numerical criteria for toxic pollutants. Water quality criteria also may be expressed in terms of “lethal concentrations” or a bioassay scale determining the relative toxicity of particular concentrations to aquatic life. The EPA has published water quality criteria for all listed toxic pollutants.

...

[b] Effluent Limitations or Technology-Based Standards

“Effluent limitations” or “technology-based standards,” by contrast, do not depend on the particular quality of the receiving water, but assume that a stringent and progressively strict reduction of all discharges of pollutants inevitably will improve water quality to a pure level. Effluent limitations are just that – limitations on *effluent* or *discharges* – which are imposed prior to the waste water leaving the facility.⁴¹

The use of total maximum daily loads (TMDLs) is an opportunity to engage non-point sources in reducing pollution.

To reduce nonpoint pollution, it is necessary to make the Clean Water Act effective against agricultural sources. As the law professor Jonathan Cannon, a former EPA general counsel, argued at the “Breaking the Logjam” symposium, the most direct way of doing this is to achieve Total Maximum Daily Loads (TMDLs) – that is, the maximum daily loads of pollutants a water body can receive and still comply with water-quality standards. States are required to establish TMDLs for water bodies that do not satisfy water-quality standards even when technology-based standards are in place for point sources. In establishing a TMDL, states are also required to allocate total loadings between the point and nonpoint sources that affect the water body. This allocation creates an opportunity to engage nonpoint sources in reducing pollution. But this opportunity has often gone unrealized because EPA regulations do not require states to develop and carry out plans for implementing TMDLs. As a result, there are no enforceable obligations on many nonpoint sources to reduce water pollution.⁴²

⁴¹ “Understanding Environmental Law” (2nd ed) Philip Weinberg and Kevin A Reilly, LexisNexis Group, 2008, pages 129, 130 and 131.

⁴² “Breaking the Logjam: Environmental Protection that will work” David Schoenbrod, Richard B Stewart, and Katrina M Wyman, Yale University Press, 2010 at page 105, 106.

2.3.2 Using stock numbers to classify activities

Using land use activities (including stock numbers) which can adversely affect water quality to establish different categories of activity within rules in a regional plan, would in my opinion be lawful for giving effect to the policies in the NPSFWM.

When addressing whether or not resource consents should be granted pursuant to section 15(1)(b), rules in a regional plan should address how to manage the likely effects which may result in water quality from land use activities.

When developing proposed changes to regional plans it is important to provide in a section 32 analysis the indicators which link stock numbers to water quality and how the benefits of such a regulatory regime in terms of managing risks would outweigh the costs (including transactional costs to land owners).

The thresholds developed for stock numbers in respect of different activity classes could also relate to whether or not land owners have put in place risk management regimes such as buffer zones and treatment methods, including the development of wetlands.

Even with the safeguards in section 70(1) of the RMA there is a risk when using permitted activity status for dealing with integrated land and water use controls unless there are significant risk management steps in place which involve performance standards that need to be met.

70 Rules about discharges

(1) Before a regional council includes in a regional plan a rule that allows as a permitted activity—

(a) a discharge of a contaminant or water into water; or

(b) a discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water,—

the regional council shall be satisfied that none of the following effects are likely to arise in the receiving waters, after reasonable mixing, as a result of the discharge of the contaminant (either by itself or in combination with the same, similar, or other contaminants):

- (c) the production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials:
- (d) any conspicuous change in the colour or visual clarity:
- (e) any emission of objectionable odour:
- (f) the rendering of fresh water unsuitable for consumption by farm animals:
- (g) any significant adverse effects on aquatic life.

When considering whether stock numbers should be the basis of a permitted activity, it is necessary to evaluate whether or not it is appropriate that an AEE should be provided to address the likely effects of the activity on fresh water and whether the risk can be managed by the imposition of standards contained in the plan.

Schedule 4 **Assessment of effects on the environment**

1 Matters that should be included in an assessment of effects on the environment

Subject to the provisions of any policy statement or plan, an assessment of effects on the environment for the purposes of section 88 should include—

- (b) where it is likely that an activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking the activity:

2 Matters that should be considered when preparing an assessment of effects on the environment

Subject to the provisions of any policy statement or plan, any person preparing an assessment of the effects on the environment should consider the following matters:

- (c) any effect on ecosystems, including effects on plants or animals and any physical disturbance of habitats in the vicinity:

[Emphasis added]

It is important that management plans and ex poste conditions are not used as a means of avoiding ex ante scrutiny of likely significant impacts in an AEE.⁴³

Where high biodiversity values which need to be protected are involved, the provisions in plans should be aligned to protect areas of significant indigenous vegetation and

⁴³ Cf position in UK. See “Mitigation and Screening for Environmental Assessment” Donald McGillivray [2011] *J.P.L.* 1539.

significant habitats of indigenous fauna to give effect to the national policy statement on biodiversity when it is operative.

3.0 Conclusion

In my opinion, in order to give effect to the provisions in the NPSFWM, it is preferable to move quickly to provide uniform plan changes throughout the country which can be applied by all regional councils. It would be appropriate for them to contain process standards and interim performance standards, and to classify activities in order to protect water quality. These can then be given immediate legal effect.

If there is any question about whether rules in proposed regional plan changes will or will not give effect to the provisions of the NPSFWM, regional councils could seek a declaration from the Environment Court about their legal enforceability.

Dr R J Somerville QC
20 January 2012