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**BEFORE THE HEARINGS COMMITTEE**

**IN THE MATTER**

**of hearings on  
submissions concerning  
the proposed One Plan  
notified by the  
Manawatu-Wanganui  
Regional Council**

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**SUPPLEMENTARY LEGAL REPORT RELATING TO LAND CHAPTER HEARING**

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Dated

*25<sup>th</sup> July*

2008

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## INTRODUCTION

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1. This is a supplementary report relating to the land chapter hearing.
2. During the hearing there have been some strong and eloquent arguments against the approach adopted by HRC in its proposed One Plan. Hearings of this character are, to use a metaphor, like a flood and, post-flood, water clarity can be poor. This report is a small attempt to bring some structure to the issues and clarity surrounding the choices available.
3. The Hearing Panel is sitting as a planning authority. It is axiomatic that no-one including HRC's staff are required to discharge any legal burden of proof. HRC does accept however, an evidential burden to present reliable evidence (including expert evidence) that lends support to the view that the proposed framework is required to achieve the overarching purpose of the RMA. Submitters seeking an alternative including no controls have a similar evidential burden.
4. An inquiry into the planning framework and the outcome is an iterative process. That comes from the Latin 'iter' which means 'to journey'. Like any journey there is new information. That information is absorbed and ones understanding enhanced. You may require alternatives presently before you to be polished. For that reason I have encouraged the Hearing Panel to consider the use of minutes that provide indications of further work or information that would assist the Hearing Panel in its task based on its preliminary assessment of the evidence. Without this approach that will provide markers for the journey, there will be real difficulty at a later stage in completing the decision making task.

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## ACCELERATED LAND EROSION AS ONE OF THE BIG FOUR

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5. Because the One Plan is a combined plan a hearing on subject topics will span the RPS component (Part 1) and the Regional Plan component (Part 2). Part 1 (the RPS) has the function of stating the significant resource management issues of the region. This aspect of an RPS is more fully dealt with in the Section 42A Legal Report on the Overall Plan.
6. From the information received (and in particular the expert evidence)<sup>1</sup> there does not appear to be any serious challenge to the proposition that accelerated land erosion is a significant resource management issue for the region and therefore should be identified in the RPS. In making that statement, I put to one side argument as to the appropriate response to the issue and in particular the choice between regulatory and non regulatory

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<sup>1</sup> Every evaluative expert confirmed this including Messrs Forrest, Schofield and Murphy.

methods. The scale of soil loss in the region is undeniably a significant challenge and this is demonstrated by central government's commitment to provide funds to assist in addressing the issue<sup>2</sup>. Anyone who knows how difficult it is to make a case for such funding will appreciate that point.

7. Naming the issue is not an exercise in blame. It is the performance of a statutory function.
8. It is notable that no local authority within the region (and local representatives of local communities) challenges One Plan's identification of land erosion as a significant regional issue. PNCC endorses the content of the RPS. The TA collective and in particular its planner in his evaluation did not challenge the overall thrust of the land chapter as opposed to its implementation. It was not clear whether Ruapehu District Council adopted that evidence or not, although this seems reasonable. Ms Westcott did not challenge the issue on the basis of its significance but rather the implications of implementation.
9. Dr. McConchie in his oral presentation acknowledged that erosion was an issue and that not all erosion was good and emphasised the desirability of a hill country farming code of practice to reduce erosion. He acknowledged that a COP would result in the same or similar outcomes as the SLUI program.
10. The technical evidence for HRC demonstrates accelerated loss of land through erosion as a result of human activity. Dr. McConchie claimed that this needed to be kept in perspective as the land was struggling to get back down to the sea. It was also necessary in his opinion to consider the benefits of erosion. This opinion appeared to be akin to arguing that the wisdom of addressing erosion on coastal sand country arising from unsustainable land management practices is diminished by the fact that wind energy has for centuries eroded dunes and conferred the benefit of inland deposition. Hill country erosion is natural but so is the colonisation of hill country soils by woody vegetation that materially retards erosion and provides other benefits (Dymond *et al*).
11. I am not aware of any case law that suggests that significant land erosion from human activity is not a serious resource management issue. On the contrary it is recognised as an issue and responded to by various methods throughout the country. To the extent that erosion impacts on the productive capacity of soil or is lost through discharge to sea, land use that materially accelerates erosion fails to achieve a central tenet of sustainability which is sustaining the soil's life supporting capacity<sup>3</sup>.
12. The identification of accelerated erosion as a significant issue is not new to this region. The first objective of the existing RPS in relation to land is:

"to achieve sustainable land use"<sup>4</sup>

The description of the issue (RPS pg 77) and policies in the existing RPS are directed to amongst other things, hill country erosion. Reference is made to

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<sup>2</sup> See Carlyon SOE

<sup>3</sup> Sec 5.5(2)(c)

<sup>4</sup> Manawatu-Wanganui RPS pg 79

the 1992 storm event as a significant event revealing the extent of the problem. Many will remember that event. These events are not rare. Had engineers and politicians of HRC not treated 1992 as an omen of the future and not raised the flood protection of Palmerston North city then in the 2004 flood 25% of Palmerston North would have been flooded.

13. The land and water regional plan made operative as recently as 2003 provided a regulatory framework to address the issue identified in the RPS and to carry out regional functions including soil conservation. The primary objective (LM objective 1) is:

"To avoid accelerated soil erosion on vulnerable land"

In the explanation (LM issue 1) it is stated:

"The region contains 900,000ha of hill country susceptible to soil slip erosion. Of this nearly 400,000ha is susceptible to severe erosion. These areas are typically slopes with soft sedimentary soils."

There is then a discussion on physical disturbance and vegetation clearance as potential accelerants of erosion with the concluding statement:

"A decline in soil productivity persists for a long time (decades), after soil is lost through erosion. The cumulative effect of erosion is significant for the Region's total productivity. Controlling soil loss resulting from erosion is fundamental to achieving sustainable land use."

14. The existing rules provide for region wide controls on vegetation clearance beyond 2ha per annum. The permitted activity rule has estimable terms and conditions.
15. The RPS and Land and Water Regional Plan represent the community's present position. The question must be asked – have events since then reinforced the importance of the issue or not?
16. It is manifestly incorrect that accelerated erosion issue is new or that HRC's response is solely as a result of the 2004 event. The problem of soil erosion has been a persistent resource management issue in the region. The response of the POP is to:
  - (a) maintain non regulatory tools as a key method and provide, independently of the plan, a more targeted and technically robust program called SLUI; and
  - (b) target controls on land most at risk of erosion on the hills and coast.

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## WHAT'S IN A NAME?

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17. The acronym HEL has caused offence as many submitters poignantly stated. In addition, because of the way in which the land is mapped in Schedule A, land that is not HEL, according to the Dymond model is nevertheless identified as HEL. These concerns are understandable and justified.
18. It would be preferable if the areas on maps were described as "Erosion Management Areas" or a similar term. These would be further divided into 'Hill Country Erosion Management Areas' and 'Coastal Erosion Management Areas'.
19. Land that meets the definition of HEL could be termed Significant Erosion Risk Land (SERL) or some other name.
20. Leaving to one side the name, HRC considers that land that meets the criteria set by the Dymond model is prone to erosion by an order of magnitude (ie. a significant probability difference) that is sufficient to single it out for specific resource management attention<sup>5</sup>. The model is based on key features including:
  - (a) parent material ;
  - (b) geological features;
  - (c) slope<sup>6</sup>.

The technical evidence demonstrates that woody vegetation will materially reduce erosion on HEL (by an order of 70%)<sup>7</sup>. Therefore, erosion risk will be elevated by that order of magnitude through vegetation clearance and similarly re-vegetation will provide a reduction in risk of that order of magnitude.

21. Identifying HEL and identifying up front to the region the risks of certain action or inaction is appropriate in resource management terms. Leadership can be defined as truthfully naming the problem and identifying the risks of action or inaction.

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## THE ALTERNATIVES

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22. There are a range of alternatives available to the Hearing Panel but changes to SLUI is not one of them. The SLUI program is embedded in the LTCCP and subject to funding arrangements with external parties. This program will

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<sup>5</sup> xxx

<sup>6</sup> Roygaard SOE pg 8

<sup>7</sup> Dymond *et al*/Geomorphology 74 (2006) 70-79

happen independently of the One Plan. The cost of this program and its impact is not relevant to this process. Ms Westcott on behalf of RDC said:

"RDC believes the real and full extent of the costs associated with this non-regulatory method have not been fully analysed or considered by Horizons. It has also not been made clear to the community for their consideration as part of the One Plan process."<sup>8</sup>

HRC is not obliged through this process to justify the costs of a program that is available to rate payers on a voluntary basis. It has undertaken the consultation process under the LGA. Nor, does it make any sense to consider the consequences (be they social, financial or otherwise) to a district as a result of the adoption by individual rate payers of a voluntary program to sustainably manage their farms. If those individual choices lead to declines in population or infrastructure these are demographic changes beyond your control.

23. The alternatives appear to be:
  - (a) no regulation of vegetation clearance and land disturbance;
  - (b) regulation as proposed (which is focused on HEL) or with refinements so that:
    - (i) normal farming activities are not caught; and
    - (ii) more detailed standards or different thresholds of volume and rate are imposed.
24. A comparison with existing provisions in the Land and Water Regional Plan is relevant in the overall analysis.
25. The key difference is that POP moves from a 2 ha threshold to a 1 ha threshold and the rule only applies in respect of vegetation clearance (not otherwise identified as a significant habitat) in respect of HEL. Leaving aside the fact that the 'devil' for many submitters is in the detail of the definition of vegetation clearance it is submitted that the permitted baseline is not materially different under POP as it is under the existing plan. Generally the plan is more enabling for non HEL and slightly more restricted for HEL.
26. The difference between these permitted baselines in terms of effects on the economics of farming must be kept in perspective as probably the economics of 6 to 8 ewes on 1 ha of HEL (being the difference between the baselines) is minimal.
27. Ms Bryant was asked the question: how her farming operations would be different? She mentioned culverting. The POP is enabling of culverting but if it were to occur in HEL POP would require a field consent. That would provide the farmer with the knowledge of how to manage the erosion risk and sediment control which will prove invaluable where the land is HEL. Similar questions were directed at other farmers and the degree of difference brought about by POP was not demonstrated to be material.

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<sup>8</sup> Verbal submission by Westcott on behalf of RDC para 37

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## RULE MAKING AND CERTAINTY

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28. This section deals with the need for rules that are certain. The issue of certainty has arisen in a number of submissions.
29. The following general principles concerning rule making can be drawn from the case law<sup>9</sup>:
  - (a) the objectives of certainty, clarity and usability should be pursued in drafting plans and in particular rules;
  - (b) terms or conditions attaching to activities for the purpose of classification should be reasonably precise and not require the exercise of discretion. This is particularly true of permitted activities. The term 'specified' in S.77B(1) is deliberate<sup>10</sup>;
  - (c) one should not confuse the concept of vagueness with discretion;
  - (d) a rule is not invalid because it contains technical material or may require a degree of expert assessment or judgment however, permitted rules should be as clear as possible (judged by the need in the end to achieve the over arching purpose of the Act) to the reasonably informed person.
30. The virtue of a map as a 'term' or 'condition' of activity classification is that it is (if at an appropriate scale): objective, certain, clear and usable.
31. It is desirable to develop the point in 29(d) above Descriptions of resources or activities that:
  - (a) affect classification;
  - (b) involve technical material; and
  - (c) require a degree of assessment;

are not by their nature invalid. The following quote from McGeghan J's judgment in *McLeod Holdings Ltd v. Countdown Properties Ltd*<sup>11</sup> is instructive:

"I do not quarrel with unwillingness to permit predominant uses to be conditioned by concepts as vague as 'amenities'. However, it is important that matters do not progress too far. There is to be no automatic importation into such objectively phrased situations of the rule established in relation to

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<sup>9</sup> See for example *McLeod Holdings Ltd v. Countdown Properties Ltd* 14 NZTPA 363, *New Plymouth City Council v. Baker* W101/94, *Wilson v. Waikato District Council* A138/2001, *Ruddlestone v. Kapiti Borough Council* [1986] 11 NZTPA 301, *Twisted World Ltd v. Wellington City Council* W024/2002

<sup>10</sup> See for example *Bitumix v. Mt Wellington Borough Council* [1979] NZLR 57,

<sup>11</sup> 14 NZTPA 363 at page 375



subjective decision formulae. Further, and importantly a description of, and condition attached to, a predominant use is not to be condemned simply because there is *some* element of degree, judgment or "value judgment" involved in its ascertainment. It will usually be some element of judgment involved in an application of descriptions as to factual situations. There will usually be some element of degree. Some matters can be ascertained without undue difficulty and debate. There is a difference, after all between 'substantial' and 'beautiful'. The law does not require predominant uses to be defined ('specified') with scientific or mathematical certainty. Some degree of flexibility is permissible. A decision-making body frequently must hear evidence and reach a conclusion after weighing competing factors. In the end, the question reduces to one of degree: is the subject description too wide or too vague to have 'some measure of certainty'? That is not an inquiry assisted by imported references to 'discretion' and 'value judgment'. It is not a situation of automatic condemnation because some degree of evaluation is involved."

32. The learned author Mr Burrows QC in his text *Statute Law in New Zealand*<sup>12</sup> also confirms that technical material often exists in modern day legislation. This is the nature of modern society where increasingly refined regulation is necessary to achieve the common good.
33. Turning to POP, as I understand it there are three maps:
  - (a) a map based on the landside susceptibility model using 15m pixel resolution. This model is based on slope thresholds (Table 1 Dymond *et al*). It excludes land with woody vegetation. It therefore identifies land that would benefit from woody vegetation. This is a tool designed for and that forms part of the SLUI program that promotes in consultation with the land owner re-vegetation of land identified as HEL (MAP A);
  - (b) a map based on the model in (a) above but including land that is HEL but covered with woody vegetation. The purpose of this map is to include land which would otherwise qualify as HEL in the absence of woody vegetation. It would not make sense to implement SLUI to achieve a reduction in erosion while at the same time losing significant woody vegetation on HEL which is providing erosion retardation benefits. This is discussed in more detail in Roygaard SOE para 29-31. This map is also to 15m pixel resolution (MAP B);
  - (c) a map based on Map B above that is then scaled up to cadastral boundaries (see Roygaard SOE para 33). Land that might only have a small amount of HEL is nevertheless identified in its entirety as HEL. This map is the map in Schedule A at a scale of 1:50,000 (MAP C).

<sup>12</sup> Lexis Nexis 3<sup>rd</sup> Ed Chapter 4: Drafting pg 974

34. The control in POP on land disturbance and vegetation clearance in Rules 12-3 and 12-4 is based on the land falling within Schedule A (i.e. Map C) and having a slope greater than 20 degrees.
35. In my opinion, Schedule A is not at an appropriate scale for the purpose of a rule. However, because it is based on cadastral boundaries Schedule A could be produced at a 1:25,000 with cadastral boundaries included. It would then be an appropriate<sup>13</sup> method forming part of a rule. It does however have a deficiency in that it captures some properties where the amount of land that would actually qualify as HEL based on the model is small. As the sole threshold for rule application and definition of HEL such a map would be too crude. The additional requirement of a 20 degree threshold as proposed in One Plan provides an additional refinement.
36. It is assumed that there are very real practical difficulties in producing a map based on NZLRI showing HEL at an appropriate scale (say 1:10,000).
37. I consider it preferable as part of the RPS (Part I) that Map B is used since this includes only land (to 15m pixel resolution) that is presently highly susceptible to erosion or would be if the existing woody vegetation is removed. This map could be produced to 1:50,000 scale. This map is at an appropriate scale for an RPS and does not overstate (unlike Schedule A) the area that qualifies as HEL.
38. I consider it preferable that as part of the Regional Plan (Part II):
  - (a) a map booklet be produced based on Schedule A at a 1:25,000 scale;
  - (b) the map in (a) above includes, based on Map B, the indicative location of HEL. This is not a regulatory tool but does provide plan users with an indication of the likely location of HEL and more fairly represents the total area of a farm likely to include HEL;
  - (c) there is secondary threshold. Either a slope threshold or some other descriptive threshold such as that proposed by Mr Percy. The former has the virtue of greater simplicity and is capable of verification using an inclinometer by farmers. The latter is more accurate but would require a degree of expert assessment.
39. HEL would be defined as land within the EMA and meets the description.
40. If the Hearing Panel is favourably disposed to this approach without deciding the ultimate question, then a minute could be issued along the following lines:
  - “(a) The Hearing Panel is not in a position to determine the submissions on the land chapter and in particular those relating to what is described in the Proposed One Plan as Highly Erodible Land until it has received the additional information under S.32 RMA it requested in a previous minute;

<sup>13</sup> This includes compliance with Regulation 37 of the Resource Management (Forms) Regulations 1993

- (b) If the Hearing Panel were to decide that some land use controls were required on erosion prone land, it would prefer the use of more detailed maps than those presently found in schedule A;
- (c) The Hearing Panel before making its decision would be assisted by maps based on Schedule A at a scale of 1:25,000 with cadastral boundaries shown including the indicative location of land that meets the test for HEL (whether with existing woody vegetation or not) based on the Dymond model;
- (d) These maps will be included in the additional material distributed to the submitters and in respect of which they will have a further opportunity to make submissions."

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## **COASTAL ERODIBLE LAND**

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41. Similar issues apply to CEL as apply to the definition of HCHL and further work is required on this to provide appropriate rules and maps.

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## **SLUI IN THE RULES**

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42. Currently whole farm business plans do not have the specificity required to adequately control effects associated with vegetation clearance and land disturbance. Therefore dispensing with the requirement for a consent in those cases undermines the argument for control in respect of other hill country land.
43. My preference is not to recognise SLUI in rules in the manner provided in POP. There is also an issue as to whether or not it is appropriate to have effectively rule dispensation by discretion of a soil conservator.
44. If SLUI finds itself into the rules then the words "In accordance with" are insufficiently clear to explain what is authorised and what is not authorised and further work on the wording will be required.

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## **SCIENTIFIC EVIDENCE**

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45. HRC has, under the supervision of Dr Roygard, commissioned detailed reports for the purpose of enabling targeted regulatory and non regulatory responses to the problem of land erosion. These have been in large part provided by CRI's based in Palmerston North.
46. To the extent that there is a contest between experts on subjects within their disciplines it is necessary to make some decisions about relevance and

reliability. The reports on land erosion susceptibility for HRC are based on extensive ground work, task specific analysis and internationally peer reviewed findings. It is noted that Dr. McConchie has not carried out any personal fieldwork in relation to this issue and in the context of the Manawatu-Wanganui region specifically. Nor has he done a detailed study of the effects of the 2004 storm event and its impact on the region.

47. The use of models is an acceptable method to develop resource management tools. Many of New Zealand's more intractable environmental problems do not lend themselves to simple cause and effect analysis but involve probabilities and multilayered variables. This does not necessarily mean the model is not robust or scientific. The Overseer model is often criticised but now frequently recognised as a tool in managing nitrogen leaching. Models can also be useful to predict benefits even though the benefits do not lend themselves to precise measurement.
48. Dr. McConchie recognised the existence of erosion and the need to take active management steps to control it. He recommended a COP requiring farmers to farm in a sustainable manner. It is requested that that acknowledgement be recorded in the decision of the Hearing Panel. In answer to a question from Commissioner van Voorthuysen, Dr. McConchie said that the difference between a COP and SLUI was that it was more farmer 'buy in'. However, their content would be largely similar. Given that Dr. McConchie is the only expert technical witnesses on this subject it is noted that his evidence presents no serious challenge to the primary non regulatory method adopted by HRC to deal with unsustainable land use practices i.e. SLUI.
49. It remains to be seen whether such a COP is developed. At his stage there does not appear to be any industry body leading the development of a COP for hill country farmers.

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## **THE STEEPLANDS DECISION**

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50. POP does not require land retirement but the SLUI program will result in some land retirement on a voluntary basis. In such situations the farmer will be satisfied that it would be unsustainable to continue to farm that land. The SLUI initiative provides for a WFBP. A plan is a detailed pathway to farming hill country land sustainably. It is in direct contrast to an ad hoc approach which has been the norm. It links farmers to New Zealand's intellectual resources concerning land management and best practise farming. It enables them to give better effect to the ethics of stewardship (s.7(b)) or manaakitanga.
51. For example, Dr Roygaard's SOE mentions a WFBP for the Gray property that provides for afforestation of 30.6ha with the result net sediment loss would reduce from 2640 tonnes per year to 820 tonnes per year over 20 years<sup>14</sup>.

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<sup>14</sup> See Roygaard SOE para 47

52. The submissions are on a continuum between those that oppose any controls and those that require more controls even on farmers with WFBP. To the extent meaningful progress is not achieved, it is realistic to expect that those tensions will increase, not decrease over time.
53. A recent decision of the Environment Court delivered on 27 May 2008 called *Friends of Steeplands v. Tasman District Council*<sup>15</sup> is on the topic of erosion.
54. In that case, the Appellant representing himself was a soil scientist and he sought comprehensive controls on steep hill country farming, including controls on grazing. This is well beyond what POP proposes. The Court concluded that there was insufficient evidence to show that erosion activity on pasture cover in the districts steeplands is primarily caused or exacerbated by the grazing of stock. The Court also endorsed a non regulatory response to the issue including sustainable land use management programs.
55. Erosion from grazing was found not to be a significant issue in Tasman District. The proportion of HEL particularly in the Wanganui, Whangaehu and Turakina catchments is significantly greater than in Tasman<sup>16</sup>. It is note worthy however, that TDC's principal witness recognised that vegetation loss was a cause of erosion and it appears controls existed in the plan in relation to vegetation clearance. At paragraph 28 the Court noted:

"It is Mr Burton's evidence too that most probably erosion is caused by:

- Lack of secondary vegetation – this is considered more of a driver than grazing/pastoral use;
- The geology of the area and degree of slope are also causes;
- Grazing, but only in combination with other named factors."

56. The case was advanced with minimal scientific evidence and provided for comprehensive controls including nutrient management of hill country farms without demonstrable benefits. The case is brought to your attention for the sake of completeness. However, the case generally supports the approach of HRC in POP to the extent that:
  - (a) non regulatory methods are a key method;
  - (b) recognises COP's;
  - (c) uses targeted regulatory methods rather than methods having general application across the region;
  - (d) focuses on vegetation clearance and land disturbance as significant potential triggers for erosion rather than existing agricultural operations.

<sup>15</sup> C63/2008

<sup>16</sup> See Table 3 Roygaard SOE pg 10

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## TA's COLLECTIVE SUBMISSION

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57. It is considered that the TA's collective submission contained reasonable arguments. In particular, I agree in general terms with the submissions of Mr Green including the relocation of some policies from the RPS into the regional plan. Consideration of the objectives and their location in One Plan is also being considered by Ms Bell.
  58. Changes to the plan to reflect the TA's submission will require work and will need to be pre-circulated at a later stage in a tracked changes document.
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## THE THIN END OF THE WEDGE

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59. Some submitters saw POP as a step in an inexorable process of land retirement. Justification for that view includes reference in POP for the need for regulation in the event that non regulatory methods prove ineffective.
  60. It is considered inappropriate to assume the content of future plans if the outcomes sought in One Plan are not achieved.
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## COP's

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61. POP recognises in Policy 5-5 COP's and BMP's. Specifically, the plan uses COP's appropriately drafted as performance standards for permitted activities where appropriate. This approach has received endorsement from a number of sectors. The use of COP's in this way is increasingly common particularly in regional plans.
62. A helpful decision to consider is *Bodle v. Northland Regional Council*<sup>17</sup>. This was a case concerning the proposed use by the Northland Regional Council of a NZS Standard (NZS 8409:1999) regarding the application of agrichemicals. The following paragraphs from the Environment Court decision are relevant:

"[31] First, as to appropriateness in law *McIntyre v Christchurch City Council* was an appeal concerning whether or not consent should be granted to the siting of a telecommunications facility for a mobile telephone service. The applicant there contended that if the proposed facility should meet a certain NZ Standard concerning exposure to radio frequency radiation, it would pass muster concerning effects on the environment. In holding that compliance with standards is not decisive of that issue, and that a consent authority was not bound to use them as a basis for deciding a

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<sup>17</sup> A225/2003

resource consent application, the Court nevertheless held that such standards are often used for that purpose and are also referred to in district plans, as are other technical guidelines and standards.

[32] Examples of Standards that have been referred to in court decisions as serving such purposes, include Standards about radio-frequency radiation, engineering works, and measurement and assessment of construction noise, airport noise, and general environmental noise.

[33] We are in no doubt that published standards can sometimes helpfully be used as yardsticks. This may be done even if the purpose of the published standards is not of itself to promulgate rules of a directory or mandatory nature. (They will only acquire that character if the district or regional rules referring to them as a yardstick, give them that quality for the purposes of those rules). A question that will then remain is as to whether the published standards have sufficient certainty for the purpose of rule making, particularly where the activities regulated are described as permitted activities. We heard a considerable body of evidence and submission about this, and some care will certainly be required if the contents of NZS 8409:1999 or even just some of them, are to be used on this occasion as a yardstick."

63. Some submitters sought recognition of guidelines or COP's in their sector. Generally, Horizons Regional Council only supports the use of COP's where they are sufficiently comprehensive, clear and where necessary certain.
64. In the *Bodle* decision the Regional Council relied on a COP. The appellants sought mandatory buffer zones when the COP had only 'directory' as opposed to 'mandatory' requirements. In the end, the Court preferred the approach adopted by the Regional Council as the most appropriate method despite the absence of mandatory buffer zones.
65. An examination of that case is recommended to orientate you as to the types of issues that can arise when there is a contest regarding the appropriateness of using COP's as performance standards for permitted activity classification. In addition, it shows how those issues are addressed by the Court.

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## **BEST PRACTICABLE OPTION**

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66. Policy 12-1(g) refers to BPO's. BPO is a term expressly recognised in the RMA in the context of discharges to land and water. There is a particular definition for that purpose in the RMA.
67. BPO's can be relevant to land use. The concept is short hand for recognition that the best option will be selected out of the range available based on a comparative assessment having regard to:
  - (a) its efficacy in mitigating effects;
  - (b) its feasibility of implementation;

- (c) its economic viability.

68. This is similar to the three legged stool referred to by a farmer in Ohakune.

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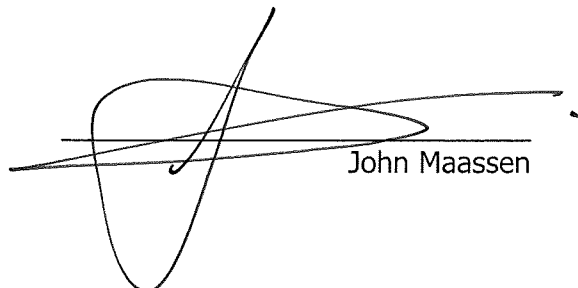
## **FUTURE MINUTES**

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69. From hearing the submissions the Hearing Panel may have formed some preliminary views of further work that could be undertaken to address submitters concerns. These could be identified as part of a minute. That minute will need to be carefully worded. Minutes will tend to deal with smaller issues (particularly those issues that are raised by submitters who do not challenge the central thrust of the planning instruments) and therefore will enable decision makers to focus on the big questions in their decision making.

70. A non-exhaustive list of matters that could be addressed in the minute and expressed at either requests for further information or requests for further caucusing include:

- (a) preferred terminology;
- (b) mapping of hill country HEL;
- (c) extent and mapping of CEL;
- (d) what should or should not be considered for inclusion or exclusion in the definition of vegetation clearance and land disturbance;
- (e) how provisions should be made and the extent of provisions (in rules and policies) for infrastructure, maintenance including Hearing Panel's comments on e.g. Transpower's proposed minor upgrading rule;
- (f) preferred option for dealing with Horticulture New Zealand's submission;
- (g) wording of permitted activity performance conditions including points raised by Meridian Energy per Ewen Robertson;
- (h) the classification of activities and scope of discretion;
- (i) which policies in RPS might be considered for inclusion in the Regional Plan.



John Maassen