

BEFORE THE HEARINGS COMMITTEE

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

**End of Hearing Statement of Barry Gilliland for the
General Hearing – Infrastructure, Energy and Waste**

INTRODUCTION

1. The purpose of this report is to:
 - answer questions raised by the hearing panel during the hearing on 22 June 2009 and any subsequent questions posed by the Panel during evidence presented by submitters; and
 - respond to matters raised by experts at the hearing that after further consideration have caused me to re-evaluate my recommendations.
2. I have dealt with these matters in the order that they arise in the chapter.
3. The Panel can assume that if I do not make or change a recommendation in this report, then I have not changed my opinion after considering evidence raised by submitters at the Hearing. I do not generally detail the reasons for my disagreement in this report and my original reasoning in my previous reports stands in those cases.
4. There are no “tracked changes” relating to recommendations made in this report. Any recommended changes are shown in the text of the evaluation.
5. I am happy to elaborate on any of these matters if the hearing panel have any questions.
6. The following table sets out my end of hearing report.

Barry Gilliland

4 August 2009

	Issue	Raised by	Discussion and Recommendation
The term "operation"			
1.	<p>Can you review the definition of "operation" for the purpose of certainty? Consider whether stating what isn't included in the definition may assist certainty? How would this work in practice if it is restricted to structures only (not resource use)? (Speaking Notes 22 June 2009, clause 6, page 2)</p>	<p>Hearing panel question Meridian Energy Ltd Genesis Energy Ltd Trust Power Ltd Mighty River Power Ltd</p>	<p>The purpose of the RMA is to promote the sustainable management of natural and physical resources. The purpose of Chapter 3 is to provide recognition of the benefits of infrastructure as physical resources of importance to communities. I consider the structure-focus of Chapter 3 is appropriate in this context. However, I acknowledge that some aspects of resource use are closely connected to the benefits of some infrastructure, e.g., use of water through turbines to generate electricity. I also consider that activities such as lake level manipulation and land use activities could be resource use activities included in the term operation as it applies to existing infrastructure.</p> <p>The current definition recommended for the term "operation" is: "...<i>operation of any structure or part of a structure defined as infrastructure.</i>" The term "operation" relates to activities associated with existing infrastructure, but not the establishment of new infrastructure.</p> <p>The Panel asked the question how the term "operation" would apply to an intake structure on the Tongariro Power Development. When I drafted the definition I intended that spilling water across the structure and down the natural channel during higher flows would be included in the definition, but water abstracted and diverted out of its natural catchment would not be included. In hindsight, I acknowledge that the definition as recommended is not helpful in clarifying this.</p>

	Issue	Raised by	Discussion and Recommendation
			<p>I note that much of the RMA defined infrastructure simply exists once it is established, e.g., electricity transmission lines, road and rail networks. Infrastructure with a significant resource use component includes: hydro electricity generation facilities, water supply systems, irrigation systems, drainage and sewerage systems.</p> <p>Although I consider some resource use activities can be included in the definition of operation, I <u>do not</u> consider it is appropriate to include abstraction of water, discharge of contaminants or occupation of the Coastal Marine Area. These activities are subject to management by allocation and it is not appropriate for policy provisions to give infrastructure priority status as this could result infrastructure “trumping” the resource uses of other activities during resource allocation and decision making processes. I do not consider this would be an appropriate resource management outcome.</p> <p>Some submitters sought deletion of the definition “operation” from the Glossary. I do not support this because it would simply result in case by case interpretative argument during decision making processes. I consider it more appropriate that the intended scope of resource use included in “operation” is as made as certain as possible.</p> <p>Mighty River Power Ltd sought inclusion of the clause “associated resource use activities” in a number of the policy provisions. From the evidence presented at the hearing, I understand the intent of this clause is to cover takes, diversions, dams and discharges. I</p>

	Issue	Raised by	Discussion and Recommendation
			<p>consider the scope of this to be too wide for Chapter 3 policy provisions.</p> <p>I note that providing certainty on this matter is a difficult task. One possible solution is to provide a definition of “operation” for the Plan with appropriate exclusions. I suggest the following wording may form an appropriate basis for a definition:</p> <p style="text-align: center;"><i>“Operation means use of structures and parts of structures, including ancillary resource use but excluding water abstraction, discharge of contaminants and occupation of the Coastal Marine Area.”</i></p>
Chapter 3 Scope and Background			
2.	Deletion of specific references to government policy and proposed policy	Meridian Energy Ltd Mighty River Power Ltd EECA	<p>The additions of specific policies were made in response to expert evidence from Meridian Energy Ltd and it was evident at the Hearing that specific references were no longer supported because they may become out of date over the life of the Plan. Deletion of specific references in favour of a broader description along the lines of that offered by Richard Peterson for Mighty River Power can be considered as an appropriate alternative should the Panel favour this option. The Section would then read (“Green Version” Track Changes, second paragraph under heading Energy:</p> <p style="text-align: center;"><u>The Government has made a commitment to reduce New Zealand’s greenhouse gas emissions and to achieve increasingly sustainable energy use. This commitment is specifically addressed in the RMA and in national strategy and policy documents. expressed by the inclusion of sections 7(ba), 7(i) and 7(j) in the</u></p>

	Issue	Raised by	Discussion and Recommendation
			<p>RMA in 2004 and in national strategy and policy documents including:</p> <ul style="list-style-type: none"> • The New Zealand Energy Strategy to 2050 (2007) • The New Zealand National Energy Efficiency and Conservation Strategy (2007) • Proposed National Policy Statement for Renewable Electricity Generation (2008)
Policy 3-1			
3.	Is it appropriate to use the term “recognise and provide for” in Policy 3-1(b) given this is a term used in Section 6 of the RMA? (Tracked Changes “green version”, Policy 3-1(b), page 3-5)	Hearing Panel Question	<p>Since making this recommendation I have both seen and heard evidence that demonstrates that there is a substantial variation of opinion about this. The two extremes are typified by advice received from Mr John Maassen, the Regional Council’s legal advisor; and evidence given by Mr Ian Cowper, counsel for Mighty River Power Ltd, in response to the Panel’s questions.</p> <p>In essence the advice from Mr Maassen is that the phrase “...is very likely to be interpreted by decision makers including the Environment Court as a deliberate direction to elevate the importance of infrastructure to a matter of very high importance in the Horizons region through the equivalent direction as a matter of national importance in Part 2.”</p>

	Issue	Raised by	Discussion and Recommendation
			<p>In contrast, Mr Cowper had a very different interpretation. He considered that these were simply words in the English language that had no special meaning other than their normal dictionary meaning when used outside section 6 of the RMA.</p> <p>The intent of Policy 3-1(b) is to smooth the rails for infrastructure in the Region, but not elevate it to a matter of national importance. I consider the words are used in different contexts. Section 6 of the RMA directs all persons exercising functions and powers to “recognize and provide for” a number of matters of national importance, whereas Policy 3-1(b) directs the Regional Council and territorial authorities to “recognize and provide for the benefits derived from infrastructure.”</p> <p>I acknowledge that the Panel may find Mr Maassen’s advice quite persuasive and decide to moderate the direction given in Policy 3-1(b). In that situation I would support any alternative wording that continues to deliver the intent of the policy. If wording consistent with that in the RMA is preferred then “have particular regard to” or “take into account” may be suitable as alternatives. I note that Policy 3-3(b) as notified used the term “taken into account,” although I prefer use of “have particular regard to” to give a stronger direction to decision makers.</p>

	Issue	Raised by	Discussion and Recommendation
Policy 3-2			
4.	What is the time allowed under the RMA before an unimplemented resource consent lapses? (Tracked Changes "green version", relating to Policy 3-2(b) and (ba), page 3-5)	Hearing Panel Question	<p>Section 125 of the RMA states that a resource consent lapses on the date specified in the consent or, if no date is specified, five years after the date of commencement of the consent unless, before the consent lapses:</p> <ul style="list-style-type: none"> i. Unless the consent is given effect to; or ii. On application, a consent authority grants an extension after matters specified in section 125 (1)(b) are taken into account.
5.	Can the matter of including air transportation networks in Policy 3-2(g) be given further evaluation? (Planning Evidence and Recommendations Report, p117, Palmerston North Airport Ltd, 285/6)	Hearing Panel Question	<p>I have re-read the original submission from Palmerston North Airport. The submitter argues that the Palmerston North Airport is a strategic transportation network and that "land use planning needs to be integrated with effective functioning of not only the road and rail networks but also the air transportation network." I assume the submitter is particularly concerned about reverse sensitivity effects.</p> <p>I acknowledge that the Palmerston North Airport forms part of a national air transportation network. The Airport is identified as a physical resource of regional or national importance in Policy 3-1. The reverse sensitivity effects of other activities on infrastructure are dealt with generally in the policy provisions of Policy 3-2. In my view Palmerston North Airport receives appropriate protection through these provisions without the need for specific mention in Policy 3-2(g). I would expect land use planning directly affecting the airport to be carried out at territorial authority level.</p>

	Issue	Raised by	Discussion and Recommendation
Policy 3-3			
6.	Please ask John Maassen to review the response given to Question 8 regarding use of the term “functional constraints” in new Policy 3-3. (Hearing Panel’s Preliminary Questions 22 June 2009, Question 8, page 3)	Hearing Panel Question	<p>John Maassen has reviewed this matter and his advice is contained in the memorandum attached to this report. In essence he remains concerned that “the difficult to pin down” terms “functional, operational or technical constraints” form an important gateway in the policy and are therefore poor terms for a qualifying condition. Mr Maassen does, however, state that: “<i>The other approach (and one that I would prefer) would be to make these matters (i.e., functional, operational and technical constraints) relevant to the consideration of an application as opposed to a gateway to a different approach to evaluation.</i>”</p> <p>The intent of Policy 3-3(iii) is to provide a mechanism for evaluating activities involving establishment of new infrastructure that may have more than minor adverse effects on the environment. I note that evidence presented by Richard Matthews for Genesis Energy Ltd and Richard Petersen for Mighty River Power Ltd contains recommendations to clarify the wording of Policy 3-3. I consider this evidence very helpful because the intent of Policy 3-3(iii) is retained, but the terms “functional, operational and technical constraints” become relevant matters for consideration of an application, rather than a gateway to a different approach to evaluation.</p> <p>I also support the extension of Policy 3-3(c)(iii) to cover appropriate environmental offset (including financial contributions) because it is consistent with policies relating to financial contributions provided for in Chapter 18 of the Plan.</p>

	Issue	Raised by	Discussion and Recommendation
			<p>On that basis, I support a change to Policy 3-3 from that recommended in the "Green Version" Track Changes to read as follows:</p> <p>Policy 3-3: Adverse effects[^] of infrastructure[^] on the environment</p> <p><u>In managing any adverse environmental effects[^] arising from the establishment, operation*, maintenance* and upgrading* of infrastructure[^], the Regional Council and territorial authorities[^] shall:</u></p> <ul style="list-style-type: none"> (a) <u>allow the operation*, maintenance* and upgrading* of all infrastructure[^] once it has been established, no matter where it is located</u> (b) <u>allow minor adverse effects[^] arising from the establishment of new infrastructure[^]</u> (c) <u>avoid, remedy or mitigate more than minor adverse effects arising from the establishment of new infrastructure taking into account: in the same manner as these effects would be avoided, remedied or mitigated for other types of activities unless this is impracticable due to functional, operational or technical constraints, in which case the following matters shall be taken into account:</u> <ul style="list-style-type: none"> (i) <u>The need for the infrastructure; and</u> (ii) <u>Any functional, operational and technical constraints that require infrastructure to be located and designed in the manner proposed The</u>

	Issue	Raised by	Discussion and Recommendation
			<p>extent to which adverse effects can be practicably avoided, remedied or mitigated, including whether there are any practicable alternatives to the proposed location and design of the infrastructure; and</p> <p>(iii) Whether a financial contribution should be sought to offset or compensate for any more than minor adverse effects that cannot be adequately avoided, remedied or mitigated can be appropriately offset, including through the use of financial contributions.</p>
Policy 3-4			
7.	Is use of the Part II, section 5 wording (“social, economic, cultural and environmental”) of the RMA appropriate in this Policy 3-4? (Tracked Changes “green version”, Policy 3-4, page 3-7)	Hearing Panel Question	<p>I consider the value of including these terms in the policy is to simply ensure that the scope of benefits considered under Policy 3-4 is clear to Plan users (especially lay users). I acknowledge that these matters will be considered as a matter of course by decision-makers and deleting them from the first paragraph in Policy 3-4 (a) will not detract from the intent of the policy.</p> <p>I have also received advice from John Maassen on this matter since the hearing and he generally holds the view that the proposed wording does not improve ones understanding beyond section 7 and may be misleading.</p> <p>On that basis I confirm my observation at the Hearing that the words may be deleted.</p>

	Issue	Raised by	Discussion and Recommendation
Policy 3-5			
8.	Please consider whether the term “efficient use of energy” used in Policy 3-5(a) is materially different from that used in RMA section 7(ba) “the efficiency of the end use of energy” and whether there is any further recommendation to the panel from that. (“Green Version” Track Changes)	Hearing Panel Question	<p>I consider the intent of policy 3-5(a) is to encourage energy efficiency by large energy users because they are positioned to make the biggest savings. In effect the policy seeks “efficiency of the end use of energy” from these users. It is therefore appropriate for the wording to be consistent with that in the RMA and I recommend that Policy 3-5(a) read:</p> <p style="text-align: center;">“The <u>Regional Council and territorial authorities shall take into account</u> the efficient <u>end</u> use of energy shall be taken into account in consent decision-making processes for large users of energy.”</p>
Policy 3-9			
9.	Please evaluate how a farm dump that doesn’t meet Rule 13-5 (Permitted Activity) would be dealt with under the Proposed One Plan. (Refer to Planning Evidence and Recommendations Report, Section 4.18.2, last paragraph, p199.	Hearing Panel Question	<p>Rule 13-5 contains Conditions/Standards/Terms that restrict the content of the material disposed of and buffer zones to manage adverse effects on the environment and sensitive receptors.</p> <p>If a farm dump does not meet the conditions of the permitted activity then it defaults to discretionary activity status under Rule 13-27 of the Plan. Consent decision making for discharges to land is provided for in Policy 13-2, which includes directing decision makers to have particular regard to:</p> <p style="text-align: center;"><i>“(f) the objectives and policies of Chapters 3, 4, 7, 10 and 11 to the extent that they are relevant to the discharge.”</i></p>

	Issue	Raised by	Discussion and Recommendation
			Chapter 3 includes objectives and policies relating to waste and I would expect these to be considered during the decision making process. However I would also expect the proviso in Policy 13-2(f) would mean that policy provisions would be applied to the extent that they are relevant to a farm dump as compared their relevance to a large scale municipal landfill.
Policy 3-13			
10.	Is the term “fit for purpose” defined anywhere? (Tracked Changes “green version”, Policy 3-13, page 3-11)	Hearing Panel Question	<p>The term “fit for purpose” was introduced by David Le Marquand in his evidence on behalf of the Oil Companies (Submitter 267) received in August 2008. This term is used in the MfE paper “Working Towards A Comprehensive Policy Framework for Managing Contaminated Land in New Zealand (2006). I refer the Panel to page 6 of David Le Marquand’s evidence.</p> <p>If the Panel considers this term introduces unacceptable uncertainty to the policy, then a phrase such as “suitable for the intended land use” may be an appropriate alternative.</p>
11.	Please advise whether it is vires to incorporate the clause sought by Federated Farmers into Policy 3-13 Management of priority contaminated land.	Hearing Panel Question	<p>Federated Farmers sought an “extra point or advisory note” in Policy 3-13 stating:</p> <p>“There is no obligation on the current landowner or occupier to remediate sites which (1) were not caused by them or (2) occurred prior to 1991 while operating according to the standards of the time. If remediation of a site is required Council will work with the landowner to address the issue (or words to that effect).”</p> <p>John Maassen has provided advice on this question. His memorandum is attached. I</p>

	Issue	Raised by	Discussion and Recommendation
			<p>interpret his advice as casting doubt on the legal validity of the clause sought by Federated Farmers. In particular I note his advice that:</p> <p><i>“The advisory note appears dubious in its accuracy as a statement of the present law. For example whether or not activities conformed with standards of the time, there may be an obligation to remediate sites with leachate that have ongoing adverse effects since such discharges are illegal unless expressly authorised by a resource consent.”</i></p>
Section 3.6 Anticipated Environmental Results			
12.	<p>Please re-evaluate Meridian Energy Ltd’s submission (363/41) regarding a new Anticipated Environmental Result relating to “efficient use and development of renewable energy resources” in light of the recommended Objective 3-1A in the “Green Version” of Tracked Changes. (Planning Evidence and Recommendations Report, p227.)</p>	Hearing Panel Question	<p>Meridian Energy Ltd sought an additional anticipated environmental result under submission point 363/41. I also note that Meridian Energy Ltd’s submission points 363/42, 363/43 and 363/44 are also relevant to this re-evaluation. Although these submission points were rejected in the Planning Evidence and Recommendations Report (July 2008), the formulation of a separate Objective 3-1A for energy as presented in the Introductory Statement and Supplementary Recommendations Report (May 2009) provides an opportunity to revisit the original recommendation.</p> <p>Recommended Objective 3-1A reads:</p> <p style="padding-left: 40px;"><i>“There will be an increase in the use of renewable energy^ resources and an improvement in energy efficiency*.”</i></p>

	Issue	Raised by	Discussion and Recommendation
			<p>The anticipated environmental results sought by Meridian Energy Ltd are:</p> <p>363/41 – “Efficient use and development of the Manawatu-Wanganui Region’s renewable energy resources contributing towards an increased proportion of New Zealand’s energy consumption being derived from renewable sources.”</p> <p>363/42 – “Establishment of renewable energy generation facilities in appropriate locations and ensuring their ongoing efficient operation in a manner that avoids or mitigates adverse effects.” (363/42)</p> <p>363/43 – “The processing of applications for infrastructure and renewable energy developments within statutory timeframes.”</p> <p>363/44 – “Increased efficiency of energy use within the Region.”</p> <p>If Objective 3-1A is achieved, I would expect evidence of an increase in production of energy from renewable sources (at all scales) in the Region in combination with an improvement in the efficiency of the end use of energy. Neither of these aspects is currently identified in anticipated environmental results, but they are relevant given the nature of the most recently recommended objectives. I therefore recommend that a new anticipated environmental result be included in Section 3.6 stating:</p> <p><i>“There will be an increase in energy generated from renewable sources in the Region.”</i></p>

	Issue	Raised by	Discussion and Recommendation
			<p>The indicator would be "<i>the amount of energy generated from all renewable sources.</i>" Data for this indicator should be readily available from industry sources.</p> <p>I note that Meridian Energy also sought a new anticipated environmental result stating: "increased efficiency of energy use within the Region" and proposed "reduction in energy use within the Region" as an appropriate indicator. I do not consider this indicator helpful because according to submitter evidence, energy use is likely to increase despite our best attempts to use energy efficiently. I therefore recommend against accepting submission point 363/44.</p> <p>However, I note that the recommended definition of energy efficiency is "an increase in the net benefits per unit of energy used" and this may be a useful indicator should the Panel wish to include an energy efficiency anticipated environmental outcome. This is the definition used in the Energy Efficiency and Conservation Act 2000 so it has some status. Determining what data is required to measure the indicator is more problematic and I will need to seek advice about this should the Panel wish to include an anticipated result for energy efficiency.</p>

	Issue	Raised by	Discussion and Recommendation
13.	Please re-evaluate Transit New Zealand's submission (336/14) regarding a new Anticipated Environmental Result relating to "strategic integration of infrastructure, particularly transport" in light of the recommended Objective 3-1 in the "Green Version" of Tracked Changes. (Planning Evidence and Recommendations Report, p229.)	Hearing Panel Question	<p>Objective 3-1 in the "Green Version" Tracked Changes states:</p> <p>"The benefits of <i>infrastructure</i>[^] will be recognised by providing for the establishment of new <i>infrastructure</i>[^] and allowing the <i>operation</i>[*], <i>maintenance</i>[*] and <i>upgrading</i>[*] of existing <i>infrastructure</i>[*]."</p> <p>The anticipated environmental result sought by Transit New Zealand is:</p> <p>336/14 – "New land use generated by growth and development is strategically integrated with local, regional and national infrastructure, particularly transport, so as to avoid an unsustainable approach to infrastructure provision and funding."</p> <p>I do not consider this anticipated environmental result is an appropriate summary measure of the objective, nor can I cannot determine how an indicator could be developed to measure it. I therefore confirm my earlier recommendation to reject this submission point.</p>
General			
14.	Please provide a copy of the National Policy Statement on Electricity Transmission and a copy of the Proposed National Policy Statement for Renewable Electricity Generation.	Hearing Panel Request	A copy of the National Policy Statement on Electricity Transmission and a copy of the Proposed National Policy Statement for Renewable Electricity Generation has been forwarded to the Panel.

	Issue	Raised by	Discussion and Recommendation
Class I & II Land			
15.	In relation to Class I and II land, would a submission by the Regional Council to a district plan review carry any weight if it has no policy provisions about that matter in its RPS? (Addendum, January 2009, second to last paragraph, page 10)	Hearing Panel Question	<p>I note that any submission made to a proposed district plan would be dealt with on the merits of the resource management issues it raises. A submission made by the Regional Council would carry more weight if the issue is dealt with in its Regional Policy Statement, however, not having it in the Regional Policy Statement would not be fatal to the submission point if adverse effects could be demonstrated. At present, the Regional Council does not consider it has evidence that loss of Class I and II land is a priority issue for the region and it is therefore unlikely make a submission to a district plan review unless such evidence becomes apparent.</p> <p>I also sought advice from John Maassen on this question. His memorandum is attached. I interpret Mr Maassen's advice to generally support my view on this matter in terms of submissions to district plan reviews. I interpret the last paragraph of his advice to mean that if loss of Class I and II land is a local resource management issue it is expected that it would be addressed in a district plan irrespective of whether it is addressed in the Regional Policy Statement.</p>

MEMORANDUM

TO: Hearing Panel

FROM: John Maassen

DATE: 3 August 2009

RE: Questions from General Hearing Panel – Infrastructure, Energy and Waste

Purpose

The purpose of this memorandum is to provide legal advice to the Hearing Panel for the General Hearing on questions raised during the presentation of Horizons Planning Officer's evidence for Chapter 3: Infrastructure, Energy and Waste. In each case I have set out the question. The advice is under the heading "John Maassen's response".

Panel's Questions/Requests

Question 1

Please ask John Maassen to review the response given to Question 8 regarding use of the term "functional constraints" in new Policy 3-3.
(Hearing Panel's Preliminary Questions 22 June 2009, Question 8, page 3)

The Panel's original question and the planning officer's response was as follows:

Question	Response
<p>Please comment further on the point raised about the term "functional constraint" not being tested in the courts. (Planning Evidence and Recommendations Report July 2008, page 154.)</p>	<p>The term "functional constraint" was used in the original wording of Policy 3-3 as follows: "...unless functional constraints require them to locate in those areas..." It would form a key test under this policy wording and was highlighted as a term that had not been tested in Environment Court proceedings during a legal review of the policy by John Maassen. He suggested it may be more appropriate to use a term that had been tested by the Court. A note to this effect was made in the Planning Evidence and Recommendations Report for the Panel's information.</p> <p>Substantial change is recommended to Policy 3-3 in Recommendation IEW 11A of the Introductory Statement and Supplementary Recommendations Report. The term functional constraint is used in the new recommendation as follows: "...unless this is impracticable due to functional, operational and technical constraints..." I do not consider the term functional constraint holds such a key role in this phrase and therefore the fact it has not been tested in the environment Court is no longer a concern.</p>

John Maassen's Response

- i. *By way of opening comment, it is noted that the policy wording in this chapter is important. This is because the region is likely to experience significant demand for infrastructure, including renewable energy infrastructure, during the life of POP.*
- ii. *The approach in Policy 3-3 in respect of effects of infrastructure that are more than minor is set out in subparagraph (c). Namely, to avoid, remedy or mitigate effects in the same manner as for other activities except if the proviso applies.*
- iii. *The proviso in Policy 3-3(c) is that where functional operational or technical constraints exist which make the avoidance remedy or mitigation*

impracticable, the assessment is different from that of other activities. In such a case, the matters in sub-clauses (i)-(iii) are to be considered. The order of those sub-clauses ((i) - (iii)), may itself be considered to indicate priority i.e. (i) is more important than (iii).

- iv. Therefore, as presently framed, the qualifying conditions for the proviso in Policy 3-3(c) are "functional, operational or technical constraints". They are an important gateway to a different approach to evaluation. As a minimum such a gateway should be as precise as possible. The other approach (and one I prefer) would be to make these matters (i.e. functional, operational and technical constraints) relevant to the consideration of an application as opposed to a gateway to a different approach to evaluation.*
- v. In my experience, the terms 'functional, operational or technical constraints' are difficult to pin down and therefore poor terms or qualifying conditions. For example, in the renewable energy context, quality of the wind resource may be an operational or technical constraint on one argument and therefore justify location of turbines on all ridgelines. However, it is not always the case that wind farms are located in these areas nor is it clear that this should warrant a different evaluation process. Similarly with other infrastructure, it is unclear what would qualify as functional, operational or technical constraints.*

Question 2

In relation to Class I and II land, would a submission by the Regional Council to a district plan review carry any weight if it has no policy provisions about that matter in its RPS? (Addendum, January 2009, second to last paragraph, page 10)

John Maassen's Response

- i. It is difficult to determine whether the present absence of a significant problem with the management of class 1 and class 2 soils is in spite of or*

because of the present provisions of the Operative RPS.

- ii. A regional council would find it difficult without a policy on class 1 and class 2 soils in its RPS, to successfully argue that that is a significant factor to be considered in the evaluation of an application for resource consent which was likely to have significant effects associated with the loss of class 1 and class 2 soils.*
- iii. The absence of a policy would not remove that from being a consideration under Part 2. However, the reality is that regional and district plans are the most specific planning instruments of a community and therefore will be expected to identify issues likely to be considered relevant and important in the evaluation of applications.*

Question 3

Is it appropriate to use the term "recognise and provide for" in Policy 3-1(b) given this is a term used in Section 6 of the RMA? (Tracked Changes "green version", Policy 3-1(b), page 3-5)

John Maasen's Response

- i. Interpretation of plans is carried out in a purposive manner having regard to the context. Use of the term "recognise and provide for" will be interpreted as intending to elevate infrastructure to a high level of importance. That is because it echoes the language in S.6 which case law has recognised is the strongest direction to decision makers in Part 2. The policy 3-1(b) in its present form is very likely to be interpreted by decision makers including the Environment Court as a deliberate direction to elevate the importance of infrastructure to a matter of very high importance in the Horizons region through the equivalent direction as a matter of national importance in Part 2.*
- ii. The consequence of doing so is encapsulated in the following decision by Jackson ECJ which addresses the significance of S.6. but which has some relevance if a policy in POP uses similar wording. In short once there is a*

direction to recognise and provide for a matter, it becomes a matter which is not lightly to be set aside. This appears to be an inappropriate direction in respect of infrastructure generally in Horizons region and likely to have unintended consequences. However, I have not had the benefit of hearing the evidence.

- iii. *The case referred to above is Memon v. Canterbury Regional Council¹ where the Court said at paragraph 95.*

Part II may not provide a particular hierarchy, but it does provide a general hierarchy in which matters under section 5(2)(a) and (b) and section 6 are not easily over-ridden. Those matters must be provided for unless there is:

- (1) A matter of greater national importance (for discussion of this see NZ Rail v Marlborough District Council²). Though such a matter is not identified in the RMA it seems implicit in section 5 of the RMA that net benefits of a project may be so important they should prevail; or*
- (2) A remedy³ in the form of serious and appropriate environment trade off or compensation. A remedy is "a means of counteracting or removing anything undesirable⁴ - the undesirable effect being in such a case the adverse effects on the matter of national importance. So the remedy usually takes the form of substantial enhancement of the same (but geographically displaced), or another, section 5(2)(a) or (b), or section 6 matter: Arrigato Developments Limited v Auckland Regional Council⁵, Just One Life Ltd v Queenstown Lakes District Council⁶. Or;*
- (3) Avoidance or appropriate mitigation of the adverse effects (the majority of cases where consent is granted probably come in this category);*

¹ EC C116/2003

² [1993] 2 NZRMA 449

³ Section 5(2)(c) of the RMA

⁴ *The Concise Oxford Dictionary* Eighth edition (Clarendon Press, 1990)

⁵ [2000] NZRMA 211 (Environment Court)

⁶ Decision C163/2001

- (4) Possibly, a situation in which a resource consent must be granted so a not to dis-enable people or a community from providing for their wellbeing, or health, or safety’.

Section 5(2)(a) and (b) and section 6 matters are, of course, still subject to the ultimate purpose of the Act – sustainable management of the identified resources. But they should not be lightly traded away. This case, and indeed most resource consents which are granted where a matter of national importance is adversely effected (rather than mitigated) comes within category (2) above.”

- iv. It is not difficult to see the implications if a similar approach was adopted, as in *Memon*, in respect of Policy 3-1(b) POP in its current form.

Question 4

Is use of the Part II, section 5 wording (“social, economic, cultural and environmental”) of the RMA appropriate in this Policy 3-4? (Tracked Changes “green version”, Policy 3-4, page 3-7)

John Maassen’s Response

- i. *Section 7 talks about the benefits of renewable energy. There are definitely social, economic and environmental benefits of renewable energy. I am not aware of any cultural benefits and have been involved in several energy projects in this region and elsewhere. In fact, in relation to hydro-energy (which is a form of renewable energy) the effects culturally tend to be negative in respect of water bodies valued by tangata whenua. I do not consider that the proposed wording improves ones understanding beyond section 7 and may be misleading.*
- ii. *In addition, I have some doubts as to the accuracy of the inclusive list of benefits. Greenhouse gases are not generally reduced by renewable energy*

¹ Section 5(2): definition of ‘sustainable management’

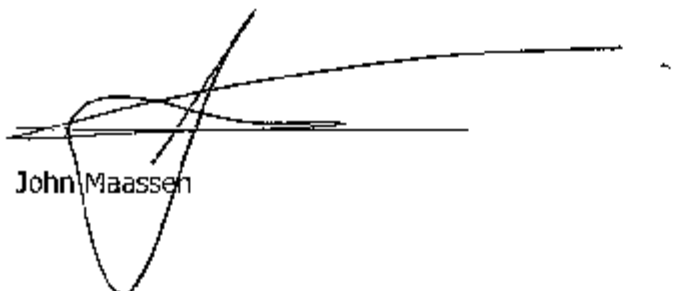
infrastructure. New renewable energy infrastructure is generally a substitute for thermal generation which would otherwise be required to meet forecasted growth in demand for electricity. In addition, I am not aware that New Zealand's present electrical energy generation is supported by imported fossil commodities. Rather it utilises existing resources in New Zealand such as gas and coal. Renewable energy infrastructure, without doubt, improves security of supply.

Question 5

Please advise whether it is vires to incorporate the clause sought by Federated Farmers into Policy 3-13 Management of priority contaminated land.

John Maassen's Response

An advisory note has no status. The advisory note in question purports to be a statement of legal obligations. It is not the function of the RPS to specify legal responsibilities or limit legal responsibilities. The advisory note appears dubious in its accuracy as a statement of the present law. For example, whether or not activities conformed with standards of the time, there may be an obligation to remediate sites with leachate that have ongoing adverse environmental effects since such discharges are illegal unless expressly authorised by a resource consent.



John Maassen