IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2012-485-2004
CIV 2012-454-654
CIV 2013-485-165
CIV 2013-454-50
CIV 2013-454-253
CIV 2013-454-368
[2013] NZHC 2492

UNDER	the Resource Management Act 1991, s 299
BETWEEN	HORTICULTURE NEW ZEALAND
	FEDERATED FARMERS OF NEW ZEALAND INC Appellants
AND	MANAWATU-WANGANUI REGIONAL COUNCIL Respondent
AND	WELLINGTON FISH & GAME COUNCIL
	ANDREW DAY Interested Parties

Hearing:	29-31 July, 1 August 2013
Counsel:	H A Atkins for Horticulture New Zealand P R Gardner for Federated Farmers of New Zealand J W Maassen with N Jessen for Manawatu-Wanganui Regional Council R J Somerville QC with J A Burns and L S Fraser for Wellington Fish & Game Council A Day in person
Judgment:	24 September 2013

JUDGMENT OF THE HON JUSTICE KÓS

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[1] Nitrogen forms the greatest part of the atmosphere we live within. It is an essential element in the growth of plants and in the formation of proteins in plants and animals. That is the reason why nitrogen-based fertilizers are applied to aid the growth of crops, vegetables and grasses.[1] Animal feed and excreta also contain nitrogen. But plants and animals do not capture all available fixed nitrogen. Large amounts can run into the water system. There it can cause eutrophication (the overloading of waterways with nutrients, causing growth of algae) and hypoxia (depletion of oxygen, affecting fish and animal life adversely). The problems associated with nitrogen leaching greatly exceed those of other macro-nutrients.[2]

[2] These appeals concern the legitimacy of a combined regional policy statement and regional plan that sets out in part to tackle these problems.

[3] It is said by the appellants that the reforms go too far. One of the appellants describes the thrust of the new scheme as "too aspirational and distant from the reality of the Manawatu-Wanganui region – a region whose economy is based on its rural-based activities, most particularly farming". The appellants prefer the more limited and "more practical" version of the scheme recommended by an independent hearings panel in 2010. But that more limited approach was set aside by the Environment Court in 2012. The appellants identify what they say are a number of errors of law in that Court's decision.

[4] The respondent Council and the other parties disagree. They say that the Court did not err in law in reinstating the original scope of the scheme first notified by the Council in 2007. They say that in reinstating the scheme in that form, proper effect is given to s 5 of the Act: promotion of the sustainable management of natural and physical resources, while safeguarding the life supporting capacity of air, water, soil and ecosystems.

[5] A summary of questions posed in these appeals, and the answers given, appears at [184]. In short, save in one limited respect, the appeals are dismissed.

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1 Some plants (eg legumes such as clover) can capture nitrogen directly from the atmosphere.

2 Nitrogen, phosphorous and potassium are "macro-nutrients", vital in large quantities for plant propagation.

Background

[6] The Manawatu-Wanganui region is a large one. It runs from the Horowhenua area on the south west coast of the North Island up to Waitomo in the centre of the island, and across the Ruahine Ranges to the Tararua area on the east coast of the island. It includes a number of nationally important waterways. The Rangitikei and Manawatu rivers, its largest, for instance. Under the Resource Management Act 1991 (the Act), land, water and air quality are the regulatory bailiwick of the Manawatu-Wanganui Regional Council.

[7] The problems described earlier have been considered by the Council since at least 1997. In 2004 the Parliamentary Commissioner for the Environment issued a report.[3] The report is said to have greatly influenced the Council's thinking. It noted that farming in New Zealand was becoming more intensive. That is, it involved increasing use of inputs (fertiliser, energy, water, knowledge and capital). And it now produced more food from the same area of land. The report undertook a detailed examination of the issue of nitrogen in fresh water resources. It noted a substantial increase in synthetic fertiliser usage across most farming sectors in recent years. Use of nitrogen fertiliser was said to have soared. The report considered that intensive farming needed to be put on a more sustainable footing. Doing so would provide benefits to New Zealand both economically and environmentally. The report noted:[4]

> In the short term, New Zealand needs to move rapidly to a situation where all farmers are using nutrient management plans and tools which balance nutrient inputs with plant uptake and minimise nutrient outputs which cause environmental damage. A suite of tools, management practices and policy instruments are available ... Given the declining trends in the quality of the environment, particularly fresh water, it would appear that voluntary approaches used to date are not sufficient. Regulation will probably be required. The exact type of approach would best be developed with the characteristics of individual catchments in mind.

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3 *Growing for Good: Intensive Farming, Sustainability and New Zealand's Environment* (Parliamentary Commissioner for the Environment, October 2004).

4 At [7.4.1].

[8] On 31 May 2007 the Council notified the Proposed One-Plan (the POP). It is a combined regional policy statement and regional plan.[5] It is a "second generation plan", replacing six earlier plans that had been operative since the 1990s. The most immediately relevant aspects of the Notified Version were summed up by the Environment Court in this way:

> [5-12] The Notified Version of POP (NV POP) brought within a regulatory regime the four intensive land uses of dairying, intensive (i.e. involving the use of irrigation) sheep and beef farming, cropping, and commercial vegetable growing, both existing and new. The regulatory regime was based around Land Use Capability (LUC) classification with limits on nitrogen leaching varying according to the LUC class of the land in question. Further, the N leaching limits became more stringent from year 1 and thereafter at years 5, 10 and 20. It covered existing uses (except extensive sheep and beef farming) in 34 targeted water management sub-zones (WMSZ) within 11 catchments as well as new uses throughout the Region. The philosophy of this version was, and is, strongly supported by the Minister of Conservation and Fish and Game.

[9] After notification the process set out in Sch 1 of the Act was followed by the Council.

[10] A hearings panel was convened to consider submissions. It comprised elected councillors and independent commissioners. It recommended a number of significant changes to the Notified Version. Most significant for present purposes was the exemption of intensive sheep and beef farming, cropping and commercial vegetable growing from nitrogen leaching regulation. Only new dairy farming (and existing dairying in targeted water management subzones) would be regulated in this way. The number of these subzones was reduced from 34 to 24. And the Land Use Capability (LUC) control system was largely abandoned, in favour of "reasonably practicable farming practices".

[11] The Council adopted these recommendations and notified the Decision Version of the POP in August 2010.[6]

[12] Appeals were filed in the Environment Court by 21 parties. They included landowners, farmers, foresters, electricity generators, the Minister of Conservation

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5 Resource Management Act 1991, s 80(2). That version of the POP is referred to in this judgment as the "Notified Version".

6 This version of the POP is referred to here as the "Decision Version".

and regulatory agencies. Those that concern us directly were Horticulture New Zealand, Federated Farmers of New Zealand Inc, the Wellington Fish & Game Council and Mr Andrew Day, a farmer. In addition a number of parties filed notices of intention to appear.

[13] Prior to the Environment Court hearings, extensive negotiation, mediation initiatives and expert witness conferencing occurred. That resulted in many matters raised in the appeals being at least conditionally resolved.[7]

[14] The Environment Court substantially restored the management regime in the initial Notified Version of the POP. Cropping and commercial vegetable growing are included again in the regulatory regime. So is existing dairying. The LUC classification method is restored. Limits based on a calculation of cumulative nitrogen leaching values, assessed using that method, are set on a "step down" basis over 20 years.

Parties

Horticulture New Zealand

[15] Horticulture NZ is the "industry good" body for the horticultural sector. It was established in 2005. It combines the former New Zealand Vegetable and Potato Growers, New Zealand Fruit Growers and New Zealand Berry Fruit Growers Federations. It represents 5,600 growers, producing over $6 billion in revenue from domestic and export consumption. It was an original submitter on the POP before the hearings panel. And it was an appellant before the Environment Court.

[16] Horticulture NZ advances 11 questions, which it says are ones of law. As Ms Atkins for Horticulture NZ put it, the essence of the appeals by her client are that the Court was wrong in law to include commercial vegetable growing within the same regulatory framework as all other land uses defined by the POP as "intensive". The 11 questions are those numbered 1-11 below. Of them, Ms Atkins places most weight on Questions 5, 9 and 10. The 11th question was abandoned at the hearing.

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7 That expression is used by Horticulture NZ.

Federated Farmers of New Zealand Inc

[17] Federated Farmers needs little introduction. It represents over 26,000 farmers in 24 provinces, and across a range of arable, livestock and mixed farming activities. Along with Horticulture NZ it was a submitter on the notified POP, took an active part before the hearings panel, and was an appellant before the Environment Court.

[18] Federated Farmers generally supports the Decision Version of the POP. It is opposed to most of the changes described at [14] above, made by the Court. Originally it advanced 18 questions for this Court's consideration. But time, clearer thinking and palliative aspects of the implementation plan proposals since issued by the Council have whittled that number down to eleven. A number were abandoned at the hearing. Questions 1, 8 and 9 posed by Horticulture NZ were also posed by Federated Farmers. Albeit, in slightly different terms. However, Mr Gardner for Federated Farmers was content to adopt the form posed by Horticulture NZ.

[19] So that is 19 questions in all. Eleven from Horticulture NZ, three of which overlap with Federated Farmers, and then another eight from that appellant alone.

The Council

[20] The Council, before me, strongly supported the decision of the Environment Court. Thus to the extent that the Court overruled the decision of the hearings panel (which the Council had earlier resolved to adopt) and reinstated the more extensive water quality management provisions of the Notified Version, the Council largely acquiesced. Before the Environment Court, it had presented a modified version of the POP, based in part on the Decision Version but based otherwise on negotiations and Court-assisted mediations.

[21] The appellants were critical of the apparent apostasy of the Council. Ms Atkins acknowledged that this was not formally a question for the High Court. But she expressed concern that this "modified version" had not been through any formal consent order process. That is because some of the agreed positions were conditional rather than unconditional.

[22] This question is not directly before me. It is not suggested that the Council's qualified defence (at best) of the Decision Version raises a question of law for my consideration. Conceivably the conduct of a consent authority in the handling of a subsequent appeal may give rise to rights of review, within or apart from the appeal process itself. In *Waitakere City Council v Estate Homes Ltd*[8] McGrath J, giving the reasons of the Supreme Court, held that "considerable care" was required before the Environment Court should permit an application for a resource consent to be granted on a "materially different" basis from that put forward to the Council originally. Where the Council itself departs from its earlier decision (perhaps as a result of negotiation with an appellant) it is essential that it acts transparently, and gives other parties reasonable notice of its change of position. Natural justice may require that discovery be given of documents relevant to the consent authority's change of position.[9]

[23] In the present case, the Council filed a memorandum in February 2011 noting that Court-assisted mediation should be used intensively to resolve appeals on narrow disputes. As its counsel, Mr Maassen said, the position before the Environment Court was spectrally diverse: Wellington Fish & Game sought restoration of the Notified Version, Horticulture NZ supported the Decision Version (because that would take them outside the regulatory regime) and Federated Farmers either supported the Decision Version or asked that all controls over intensive food production be removed. The Council took the position that it would re-present all the scientific evidence presented in support of the Notified Version. It would call planning evidence that broadly supported the position of the hearings panel, without constraint on the independence of the planner in respect of changes arising in the course of the Environment Court hearing. And it would seek otherwise to assist the Court perform its statutory functions in conducting a de novo hearing into the POP.

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8 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [35].

9 *Canterbury Regional Council v Christchurch City Council* [2000] NZRMA 512 (EnvC) at [34]; *Mead v Queenstown Lakes District Council* EnvC Christchurch C061/09, 25 August 2009 at [14].

Wellington Fish & Game Council

[24] The Wellington Fish & Game Council is one of 12 regional councils of the New Zealand Fish & Game Council. The latter is a statutory body established under s 26B of the Conservation Act 1987. It manages, maintains and enhances New Zealand sport fish and game resources. These councils are elected by people who buy hunting and fishing licences. The Manawatu-Wanganui region falls within the Wellington Fish & Game's responsibility. Wellington Fish & Game was a submitter on the POP before the hearings panel. It was an appellant in the Environment Court.

[25] Wellington Fish & Game strongly supported the Notified Version of the POP. Likewise, it supported the reversionary changes made by the Environment Court to the Decision Version. It described the Notified Version as a "forthright and positive approach to resolving the serious threats to water quality and quantity" in the region. It considered the Decision Version:

> ... lacked certainty, did not place any limits on nitrogen discharges from intensive land uses (except for new dairy farming), would not prevent excessive intensification of land uses, would not reduce nitrogen discharges, would not maintain or enhance water quality, would not safeguard the life-supporting capacity of rivers and lakes, would not protect the habitat of trout and salmon, and ultimately would not enable the sustainable management of natural and physical resources as required by s 5.

Mr Andrew Day

[26] Mr Andrew Day is a sheep, beef and dairy support farmer from Pahiatua. His family has farmed land there since 1929. He was provincial president of Tararua Federated Farmers from 2006 to 2010, coinciding with notification of the POP. Mr Day supported the Notified Version of the POP. He appealed against the Decision Version of the POP. He considered it was unlikely to result in improved water quality in the region's most degraded catchments. And he did not approve of the grandparenting provisions for nitrogen loss allocation. He called evidence at the Environment Court stage, including planning and valuation evidence.

[27] Mr Day accepts that agricultural land use is largely responsible for the elevated nitrogen levels in the region's waterways. Secondly, he considers that efforts to address that need to be equitable for all landowners in the target

catchments. Thirdly, he is a strong supporter of LUC classification as a nitrogen loss allocation tool.

Approach on appeal

[28] The parties are in agreement on the approach this Court must take on appeal from the Environment Court. There is no general merits appeal right from that Court. Appeals under s 299 of the Act are confined to questions of law. The questions posed in this case are qualifying distillations from issues posed in notices of appeal that ranged in many cases well beyond such confines. There are strong policy reasons for constraining appeals on plan changes. As this Court has said:[10]

> Parliament has circumscribed rights of appeal from decisions of the Environment Court for an obvious reason. A Judge of this Court is not equipped to revisit the merits of a determination made by a specialist Court on a subject within its sphere of expertise. To succeed on appeal an aggrieved party must prove that the Court erred in law – never an easy burden where the presiding Judge has unique familiarity with the statute governing the Court's jurisdiction.

[29] The High Court will only interfere with a decision in the Environment Court if it considers that that Court:

(a) applied a wrong legal test;

(b) came to a conclusion without evidence or to one to which, on the evidence, it could not have reasonably have come;

(c) took into account matters which it should not have taken into account; or

(d) failed to take into account matters which it should have taken into account.[11]

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10 *McGregor v Rodney District Council* [2004] NZRMA 481 (HC) at [1].

11 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

[30] The principles to consider are summarised in *Nicholls v Papakura District Council*:[12]

(a) The High Court is not to concern itself with the merits of a case under the guise of a question of law.[13]

(b) The appellate Court's task is to decide whether the Court has acted within its powers.[14]

(c) The question of weight to be given to the assessment of relevant considerations is for the Environment Court alone.[15]

(d) Any error of law must materially affect the result of the Environment Court's decision before the appellate Court will grant relief.[16]

(e) To succeed, an appellant must identify a question of law arising out of the Environment Court's determination and then demonstrate that that question of law has been erroneously decided by the Environment Court.[17]

(f) On an appeal under s 299 it is not for the High Court to say whether the Environment Court was right or wrong in its conclusion but whether it used the correct test and all proper matters were taken into account.[18]

[31] Challenges to factual findings by the Environment Court face a "very high hurdle" before they may be considered to raise a true question of law.[19] The finding

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12 *Nicholls v Papakura District Council* [1998] NZRMA 233 (HC) at 235.
13 *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363 (FCA) at 371.
14 *Hunt v Auckland City Council* [1996] NZRMA 49 (HC) at 54.
15 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC) at 437. See also *McGregor v Rodney District Council* [2004] NZRMA 481 (HC) at [43].
16 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153; *BP Oil NZ Limited v Waitakere City Council* [1996] NZRMA 67 (HC) at 69.
17 *Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC) at 159.
18 *West Coast Regional Abattoir Co Ltd v Westland County Council* (1983) 9 NZTPA 289 (HC) at 296.
19 *Friends of Pakiri Beach v Auckland Regional Council* [2009] NZRMA 285 (HC) at [19].

must lack evidential underpinning to such an extent that it simply could not reasonably have been reached.[20]

[32] I turn now to the questions of law posed on appeal.

Question 1: Was the Environment Court correct in determining and interpreting that for the purposes of s 290A of the Act it only needed to consider those aspects of the Decision Version of the POP that had not been changed by the Council during the course of negotiations, mediations and witness conferencing?

[33] This question was advanced by both Horticulture NZ and Federated Farmers. The version above is that posed by Horticulture NZ. The version posed by Federated Farmers was only immaterially different.

[34] Between delivery of the Decision Version of the POP in August 2010 and the Environment Court hearing, negotiations were held and other attempts made to resolve the dispute. As a result there is a consensus that some parts of the Decision Version should be changed. Sometimes that consensus was conditional.

[35] The Court said:

> So what we are dealing with now is not, in many respects, the pure Decision Version of the POP, and for those issues s 290A is thus of limited or no practical effect. But some elements of the [Decision Version] remain and we shall have regard to it accordingly.

Submissions

[36] Ms Atkins submitted that the appellate body (here the Environment Court) must give genuine attention and thought to the original decision.[21]

[37] Here, she says, it had not done so. It had simply adopted the mediated, revised outcomes. But those were not necessarily unconditionally agreed, and the Court was not presented with consent orders. Further, she submits that in directing that the LUC classification system be used as the basis of leaching limits (including

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[20] *Centrepoint Community Growth Trust v Takapuna City Council* [1985] 1 NZLR 702 (CA) at 706.

[21] *Man O'War Station Ltd v Auckland Regional Council* [2011] NZRMA 235 (HC).

for commercial vegetable growing), the Environment Court failed to give reasons for departing from the Decision Version. That submission was also made by Mr Gardner, for Federated Farmers.

[38] Mr Gardner submitted that the approach taken in the passage above represented the Environment Court ignoring the opinion of the tribunal whose decision was the subject of appeal. That is, the hearings panel that produced the Decision Version.[22] The Court was required to have regard to the decision notified in August 2010 and "not any purportedly modified version thereof".

Evaluation

[39] Alternative dispute resolution is a valuable part of the Environment Court's armoury to resolve disputes in relation to plans and resource consents. It is provided for especially in s 268 of the Act. Sometimes the outcome of alternative dispute resolution is consensus amongst all parties to the appeal. In that case consent orders may be advanced. In other cases, substantial progress is made, but outright consensus or consent is not possible. This is one such case.

[40] I do not read s 290A as requiring that the decision under appeal be regarded as some sort of arresting anchor point. Rather, the provision was introduced in 2005 to clarify that, in the context of a de novo hearing, the Court must at least consider the preceding decision. It is a counsel of efficiency rather than obedience.[23]

[41] In this case, the Environment Court was under no misapprehension that the revised version of the disputed portions of the POP Decision Version presented to it by the Council was supported by some parties only. As it said:

> While [the discussions and negotiations and mediations] have not resulted in overall agreement, they have produced a further version of the debated portions of the POP which the Council, and some parties, to a greater or less extent, find acceptable.

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22 Citing *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [29].

23 *Man O'War Station Ltd v Auckland Regional Council* above n 21, at [63]; *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 (HC) at [70]–[72].

[42] The hearings panel decision is extensively referenced in the Environment Court decision. The core respects in which the Environment Court overturned the Decision Version – the reinclusion of commercial vegetable growing and regulation of existing dairying – are the subject of exhaustive attention in the Environment Court decision. There can be no suggestion that the Court failed to have regard to what the hearings panel had recommended on those matters. Indirectly, that consideration arose because the Court was considering changes to the Decision Version mooted by the Council and some parties. The methodology employed by the Environment Court in this case can therefore be distinguished from that of a differently constituted Court which had erred in making only passing reference (as a matter of record) to the earlier Council decision in *Man O'War Station Ltd v Auckland Regional Council*.[24]

Conclusion

[43] The answer to Question 1 is that the Court did not err in law in its traversal of the Decision Version.

Question 2: Did the Environment Court fail to consider and determine whether it had jurisdiction to include the deposited sediment limit in Schedule D of the POP?

[44] The Notified and Decision Versions of POP included a Sch D. In the Notified Version Sch D was headed "Values that apply to Waterbodies in the Manawatu-Wanganui Region". In the Decision Version it was renamed "Surface Water Quality Targets". Some of the material in Sch D shifted to different parts of the POP. This appeal question concerns the inclusion of a deposited sediment standard in Sch D.

[45] Neither the notified nor the Decision Version included a deposited sediment standard. The Notified Version of the POP originally contained a turbidity standard in Sch D, Table D.16. The Wellington Fish & Game Council supported that standard being included. However, the hearings panel in the Decision Version recommended its deletion. The deposited sediment standard was included in the Council version

[24] *Man O'War Station Ltd v Auckland Regional Council* above n 21, at [57] and [67].

offered to the Court. It was included in the version approved by the Environment Court, on the basis that it was requested by Wellington Fish & Game Council.

Submissions

[46] Ms Atkins submitted that there was no scope to include such a standard into the POP because the submission of Wellington Fish & Game on the Notified Version of the POP did not seek the inclusion of such a standard. Rather it sought that standard only later, in its appeal. Horticulture NZ lodged a s 274 notice in relation to this appeal point contesting scope. It pursued this issue in the Environment Court. But, she says, the Environment Court failed to make a ruling on scope. Ms Atkins submits that I should remit this point to the Environment Court. She accepts that Court might then exercise its power in s 293 to direct the Council to include the standard.

Evaluation

[47] The concern raised by Horticulture NZ is a question of jurisdiction, or scope. In *Mawhinney v Auckland Council* Wylie J held:[25]

> ... the [Environment] Court's jurisdiction on an appeal under clause 14 of the Act is not unlimited ... the Court is primarily a judicial body with appellate jurisdiction. It is not a planning authority with executive functions. When it is dealing with an appeal in relation to a plan change, it must consider whether any proposed amendment goes beyond what is reasonably and fairly raised in the original submission and the notice of appeal. After hearing the appeal, the Court may, instead of allowing or disallowing the appeal, exercise its discretion under s 293 to direct the local authority to prepare changes to the plan to address matters identified by the Court. It cannot go beyond that.

[48] So far as relevant, cl 14 of Sch of the Act provides as follows:

> **14 Appeals to Environment Court**
> (1) A person who made a submission on a proposed policy statement or plan may appeal to the Environment Court in respect of—
> (a) a provision included in the proposed policy statement or plan; or
> (b) a provision that the decision on submissions proposes to include in the policy statement or plan; or

[25] *Mawhinney v Auckland Council* (2011) 16 ELRNZ 608 (HC) at [111].

(c) a matter excluded from the proposed policy statement or plan; or

(d) a provision that the decision on submissions proposes to exclude from the policy statement or plan.

(2) However, a person may appeal under subclause (1) only if—

(a) the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan; and

(b) the appeal does not seek the withdrawal of the proposed policy statement or plan as a whole.

[49] This Court has said that the question of scope involves a three step test:[26]

(a) Did the appellant make a submission?

(b) Does the appeal relate to one of the four matters referred to clause 14(1)?

(c) If the answer to (b) is "Yes", did the appellant refer to that provision or matter in their submission?

[50] Narrow technical interpretations should be avoided. The words "provision" and "matter" should be given a liberal interpretation.[27] As Ronald Young J put it in *Option 5 Inc v Marlborough District Council*:[28]

> As long as it is clear the submitter has broadly referred to the provision or matter in issue this should be sufficient to give the Court jurisdiction to consider the appeal.

[51] The essential issue is one of natural justice. Is the matter contended for by the appellant fairly within the scope of that party's original submission (bearing in mind the broad approach that is required to be taken in accordance with the *Option 5* decision)? What prejudice might be caused?

[52] In this case the original Wellington Fish & Game submission supported the Notified Version. It did not say anything in particular about Table D.16. Wellington

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26 *RFBPS v Southland District Council* [1997] NZRMA 408 (HC).
27 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC) at [15].
28 At [15].

Fish & Game called evidence. The thrust of that evidence appears to be that there were difficulties with a turbidity standard as a measure of sediment loads. And that a deposited sediment standard was preferable. The hearings panel then removed the turbidity standard altogether from Table D.16. It suggested no replacement. The reasons for that are not readily apparent.

[53] In its appeal Wellington Fish & Game sought the inclusion of a quantifiable sediment standard to "ensure that the ... Council is in a position to determine whether voluntary mechanisms have worked to protect the life supporting capacity of the regions' rivers and streams impacted by sedimentation". It is important that the proposed standard was to monitor the state of the environment, and assist in the judging of the effectiveness of plan provisions in preventing excess sedimentation. It is not a control. It does not affect, at least directly, the status of activities. Nor does it control what persons may do.

[54] I accept Mr Somerville QC's submission that the monitoring of sediment in waterways is a central aspect of the water quality chapter in the regional plan part of the POP. Regional councils have a duty to monitor the state of the environment in a region to the extent appropriate to enable them to effectively carry out their functions: s 35(2)(a). Indeed that seems relatively uncontroversial from the perspective of Horticulture NZ. It accepts that it is likely that the Environment Court would direct such a standard under s 293.

[55] The Environment Court noted that the evidence from the Wellington Fish & Game's expert, Professor Death, was essentially undisputed in terms of the logic of including such a sediment standard. Horticulture NZ had the opportunity to call contrary evidence, but did not do so. The standard would apply only to state of environment monitoring. Compliance with it would not be a threshold condition for activity status. The Court accepted that the introduction of such a standard was "an appropriate step".

[56] Because the sediment standard is:

(a) responsive to the core responsibility of the Council under s 35(2);

(b) responsive to the deletion of the turbidity standard by the hearings panel (which standard the Wellington Fish & Game had supported in its submission); and

(c) not evidently causative of prejudice to any other party:

I conclude that the relief sought by Wellington Fish & Game from the Environment Court was not beyond the scope of its original submission for the purposes of clause 14(2).

Conclusion

[57] The answer to Question 2 is that the Court possessed jurisdiction to include the deposited sediment standard in Schedule D.

Question 3: Did the Environment Court fail to take into account relevant considerations and did it take into account irrelevant considerations when:

(a) it placed significant reliance on the joint witness conferencing statement in determining that there was agreement that all intensive land uses ought to be included in a leachate management regime; and

(b) then only included some but not all intensive land uses?

[58] A joint witness statement produced on 23 March 2012 by a number of experts (including Dr L E Fung, a witness for Horticulture NZ) included the observation:

> In some catchments, other land uses may present significant opportunities to make improvements to water quality. For example, commercial vegetable production, cropping.

That was the only reference in the joint witness statement in relation to commercial vegetable growing.

[59] The Court went through the joint statement. Then it said:

> Little more need be said. The case is plainly made out for including the intensive land uses of dairying, cropping, horticulture and intensive sheep and beef farming within a leachate management regime. Issues of equity

> also arise if only dairy farming is subject to controls, while other land use activities which also leach nitrogen are not, a point repeatedly made by Mr Day. All intensive land uses need to be brought into the mix in order for the regulatory regime to be efficient and effective.

Submissions

[60] Ms Atkins' submissions on Question 3 were in some ways a precursor to a more substantial point made under Question 7.

[61] Ms Atkins accepted that the joint witness statement was part of the evidence before the Court. The Court was entitled to rely on it. But apart from the exception noted in [58], it did not refer to commercial vegetable growing. Ms Atkins did not contest that commercial vegetable growing does result in nutrient leaching. The debate is about the extent of that leaching, both by activity and its relative proportion of the regional land area. She submitted that there was nothing in the joint witness statement supporting the conclusion that a case was "plainly made out for including commercial vegetable growing". Ms Atkins' complaint was that the Court did not ask itself a question as to what contribution commercial vegetable growing was making to nutrient leaching. Nor whether it was appropriate to include it in a scheme focused on pastoral land use.

Evaluation

[62] The difficulty with Ms Atkins' submission was that the Court was plainly entitled to place reliance on the joint witness and conference statement, as she accepted. The only reason why some intensive land uses (other than commercial vegetable growing) were omitted was because they were not within scope of the appeals being dealt with by the Court. But that cannot mean it was wrong for the Court to have included commercial vegetable growing in the provisions of the POP concerning land use activities affecting surface water quality.

[63] In the original Notified Version of the plan, four intensive land use activities were identified: dairy farming, cropping, market gardening and intensive sheep and beef farming. In the Decision Version that emerged from the hearings panel, these activities were confined to dairy farming. The Environment Court allowed appeals challenging that reduction. In essence the Environment Court's decision restores the

original scope in the Notified Version of the POP. There is really no substantial challenge to its entitlement to undertake that restoration.

[64] In the end Ms Atkins accepted that Question 3 had to be answered in the negative.

Conclusion

[65] The answer to Question 3 is "No".

Question 4: Did the Environment Court correctly apply s 32 of the Act when it concluded that it was both practical and cost effective to require all existing commercial vegetable growing activities in the specified water management zones and all new such activities everywhere else in the region to require resource consent?

[66] The Court considered the practicality and costs of obtaining consents and permits for horticulture. It noted a practice of crop rotation, in particular in relation to potato cropping. It also noted that crops may be grown on land not owned or leased, and that different lessees may lease land in successive years. It noted that the lease arrangements are "frequently quite informal, arranged at short notice and settled at a handshake". The Court noted the argument that such casual and short term arrangements could not reasonably be accommodated within a resource consent regime. But the Court said:

> [5.81] We have come to agree with Ms Helen Marr, the planner called by Fish and Game, that this concern has become overstated. If it was only to be the individual growers who could or would be required to seek the consents, we could see the basis for that argument. But, as was discussed at the hearing, it seems to understand that it would make far more sense for a landowner, who knew or hoped that some of his or her holding might be attractive for such a purpose, to make a *whole of farm* application for a resource consent, with leachate and other factors being assessed at the high but plausible end of the range. The application would be presented on the basis that only a finite portion of the farm would be so used at any one time, and thus be leaching at up to the defined rate, in any one year. Depending on the exact nature of the consent required, its term could be indefinite or for a finite but still ample period of years, and the cost of the consent could be amortised over that time.
>
> [5-82] We note too that, at present, (and there was no suggestion of changing them) to fall within the definitions of *cropping* and *commercial vegetable growing* in POP the areas occupied by those activities at any one

> time would have to exceed 40 ha and 4 ha respectively. That, we imagine, may move many such casual and short-term uses outside the requirements for resource consents. If a consent was required, we assume it would be treated the same as other land uses.

Submissions

[67] Ms Atkins explained that the principal concern of Horticulture NZ was the manner in which commercial vegetable growing was included in the nutrient management framework. That activity will require a resource consent, either as a controlled or restricted discretionary activity depending on the ability of the activity to meet relevant standards.

[68] It is accepted by Horticulture NZ that commercial vegetable growing does result in nitrogen leaching from that activity. Expert evidence on this ranged, but taking a crop of potatoes for instance, it had leach rates of between 44 and 92 kgN/ha/year, in contrast to dairying which had figures in the high 20s. Other evidence before the hearings panel modelled potatoes at 48, carrots at 18-19 and brussels sprouts at 30 kgN/ha/year.[29] While the figure for potatoes is high, what is important to remember is that relatively small areas of land are used compared to dairying, and use is intermittent because of crop rotation. Potatoes tend to be cropped in a particular location for two to three years, and then the land is allowed to lie fallow (grassed) for the next five or so.

[69] It is accepted by Horticulture NZ that commercial vegetable growing is an intensive land use. The Environment Court considered the risks associated with not acting were unacceptable. To be consistent, it was necessary to minimise the risk of serious damage. Horticulture NZ complains that the Court failed to consider an alternative regime proposed by Horticulture NZ and other parties.[30] The Court was however faced with jurisdictional limits in including all intensive land uses. That is because not all were the subject of appeals before the Court.

[70] Ms Atkins accepted that the Court clearly considered the costs of obtaining consents and permits for horticulture. But it was an area where there was conflicting

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[29] This evidence came from a notional study prepared in 2009 to show how the POP would work in practice. The author was a consultancy, Land Vision Ltd.

[30] See Question 7 below.

evidence before the Court, from Ms Marr (for Wellington Fish & Game) and from Mr Stuart Ford (for Horticulture NZ). Ms Atkins accepted that the Court was entitled to prefer the evidence of one expert over another. But she submits that Mr Ford's evidence (he being an expert agricultural economist) should have been preferred to that of Ms Marr (who is a consultant planner). It was submitted that Ms Marr had made substantial concessions in relation to the impact of a consenting regime for horticulture. Ms Atkins submitted that the Court came to a view on the evidence that it could not reasonably have come to in finding that the difficulties associated with the consenting regime for commercial vegetable growing were overstated.

Evaluation

[71] As has already been noted, the standard for an appellant to meet in challenging a conclusion based on a weighing of the evidence by the Environment Court is a very high one. In this case the position of the appellant is not assisted by the fact that the Environment Court was unable to produce a transcript of the proceedings before it. That is regrettable, but it cannot alter the onus lying on the appellants. Faced with this obstacle, they had two choices. First, an agreed account as to the evidence on this point. Secondly, affidavit evidence from counsel at the original hearing. Neither was done. However, as Ms Atkins accepted in reply, little really turned on this difficulty at the end of the day. I think she was right to say that.

[72] Ultimately, Ms Atkins was constrained to accept that the decision reached by the Court was one open to it on the evidence, and could not be disturbed on appeal by this Court. She accepted it was not a position she could take further.

Conclusion

[73] The answer to Question 4 is "Yes".

Question 5: Did the Environment Court fail to take into account relevant considerations when it determined that the LUC classification approach was applicable to commercial vegetable growing?

[74] The POP throughout has referenced particular land by land use capability classes. These are sometimes called LUCs. There are eight such classes. Class 1 is the most versatile, productive land, and the highest permissible nitrogen leaching maxima apply to it. Class 8 on the other hand is less productive land, hilly, prone to erosion and generally used for forestry and catchment protection. Classes 1 to 4 are suitable for arable and pastoral use. Classes 5 to 7 are most useful for pastoral grazing and forestry production. The nutrient management plan to be prepared for land use for intensive farming (including commercial vegetable growing) must, if the activity is to be controlled and not restricted discretionary, demonstrate that the nitrogen leaching loss from the activity will not exceed the cumulative nitrogen leaching maxima specified in Table 13.2. It is useful to set out that table in its present form:

Table 13.2 *Cumulative nitrogen leaching maximum by Land Use Capability Class*

Period (from the year that the rule has legal effect)	*LUC* I	*LUC* II	*LUC* III	*LUC* IV	*LUC* V	*LUC* VI	*LUC* VII	*LUC* VIII
Year 1	30	27	24	18	16	15	8	2
Year 5	27	25	21	16	13	10	6	2
Year 10	26	22	19	14	13	10	6	2
Year 20	25	21	18	13	12	10	6	2

The figures in the table refer to kgN/ha/year.

[75] In preparing the nutrient management plan, farm land affected may be divided into different classes. The systems now available are sufficiently sophisticated to do that.

[76] Horticulture NZ had submitted that an LUC-based regime was inappropriate for commercial vegetable growing, because it was a pasture-based classification system. The Court did not accept that proposition. It noted that it was an intended consequence of the proposed regime to encourage more intensive land use on higher

quality soils where fewer inputs such as nitrogen based fertiliser were required. Such soils would provide more options for production and more options for mitigating nitrogen loss. The Court found that the evidence strongly supported the use of the LUC approach as a plan tool for allocating nitrogen limits.

Submissions

[77] Ms Atkins submitted that the Court had clear undisputed evidence that the LUC classification regime was developed to apply to a legume-based pastoral farming system. She submitted there was no evidence before the Court that supported the application of the LUC approach to commercial vegetable growing. A Council witness, Mr Lachlan Grant, had confirmed that the LUC regime was a legume-based pastoral system. She submits that the Court's conclusion that the evidence supported the use of an LUC approach as a tool for allocating nutrient limits for a wider range of land uses was not based on any supporting evidence before the Court.

Evaluation

[78] I do not find Horticulture NZ's complaint (under the heading of Question 5) to be sustainable. The question as posed was whether the Environment Court failed to take into account relevant considerations. What were those relevant considerations? As Ms Atkins put it, it was the evidence that the LUC classification system was developed to apply to legume based pastoral farming. I cannot accept that criticism. In this case the Environment Court clearly had that submission in mind. It expressly referred to it at [5.19] of its decision when it said:

> [Horticulture NZ] opposes the position taken by the Minister and Fish and Game; in particular it regards an LUC based regime as inappropriate for vegetable growing because it regards LUC as a pasture based classification system. Its view is that if vegetable growing is brought within a rules framework, it should be as a permitted activity.

[79] The Court also expressly acknowledged the reservations of the horticulture industry over the workability of past and current versions of the OVERSEER tool for horticulture. It recorded Ms Atkins' submission that an alternative means of calculating leachate may be needed to be found for use in that industry. The Court

acknowledged that in its December 2012 decision. It noted that "possibly an interim tool for assessing N loss for horticulture may need to be considered."

[80] It is clear that the Court had before it the evidence of Horticulture NZ's experts in making its decision. In particular, the evidence of Dr Fung. That decision restored the scope of r 13.1.[31] To adopt a common scheme for different farming activities cannot be said to be irrational. That has not been suggested by Horticulture NZ in any case. I agree with Mr Maassen's submission that the Court clearly addressed the reasons why it adopted LUC classification as part of the rules regime for water quality.

[81] As Mr Maassen put it, the first question is, "how do you set limits?" The choice is between setting limits on the basis of the resources (and their qualities) or on the basis of the activities that occur on and within those resources. To set limits on the basis of resources and their qualities (which is what the Environment Court did) is logical. Resource qualities do not readily change, whereas activities do. The fundamental unit to be managed is the resource. The Environment Court had before it evidence that the LUC classification system was a robust one for classifying the productivity of the soil resource. Drs McKay and Douglas explained in their evidence that the LUC system is an adaptation of a United States Department of Agriculture system first published in 1961. It focuses on the capability – or versatility – of the land to support more intensive farming. Commercial vegetable growing and cropping tend to fall within the initial class groups (higher versatility soils). An entire farm may be treated as falling within a single unit, or the farm may be subdivided into different parts, each falling within a distinct LUC class.

[82] The second question to be asked is what amounts may be leached before the activity becomes a discretionary one. In the present case the choice in Rule 13.1 is between the controlled activity which meets (i.e. does not exceed) the cumulative nitrogen leaching maxima set out in Table 13.2 and those that do not (which will become restricted discretionary activities). I note the Council expressly does not accept that it is inevitable that commercial vegetable growing on all soils will exceed

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[31] Changing the activity "market gardening" to "commercial vegetable growing" – a change which it has not been suggested before me to have made any material difference.

those maxima. Whether that activity does or does not will depend to a significant extent on the extent of fertilisation, and whether the total levels of nitrogen available to the vegetable variety exceeds its ability to absorb that element. That is a scientific assessment beyond the scope of this question of law. But as Mr Maassen says, even if Horticulture NZ is correct, and commercial vegetable growing cannot meet those maxima, the result of that regime is that it will be a restricted discretionary activity. There is no non-complying class for intensive farming activities. They remain restricted discretionary whatever the extent of excess of the maxima. As Mr Maassen put it:

> [The Council] does not consider it plausible for [Horticulture NZ] to suggest that commercial vegetable growers would not obtain a consent if they exceed Table 13.2, despite adopting all available measures to operate as nitrogen-efficiently as possible. That is a fanciful proposition. If [the Council] adopted that position in respect of any resource consent application there is a right of appeal to the Environment Court.

[83] No compelling case of an error of law of the kind suggested has been made out under this heading. The concerns expressed by Horticulture NZ and its experts were plainly considered by the Court. There was an evidential underpinning for the conclusion reached by the Court. Its conclusion could not be said to be irrational. What methodology should be adopted for a regulatory regime, including nitrogen leaching limits for specified activities, is a matter of assessment and evaluation. It is a merits decision for the Environment Court as a specialist Court. It is not for this Court to alter it under the guise of an error of law.

Conclusion

[84] The answer to Question 5 is "No".

Question 6: Did the Environment Court fail to take into account relevant considerations in relation to assessment of the social and economic costs of the regime it determined was applicable to commercial vegetable growing?

[85] I need not spend any time on this question. The same considerations apply to it as applied to Question 4. Ms Atkins dealt with the two questions together. She accepted in the case of both of them the approach taken by the Environment Court was one open to it.

Conclusion

[86] The answer to Question 6 is "No".

Question 7: Did the Environment Court take into account irrelevant considerations and fail to take into account relevant considerations when it determined that the leachate management regime for commercial vegetable growing ought not to be by way of a permitted activity rule?

[87] Horticulture NZ had proposed a permitted activity framework for commercial vegetable growing in its closing submissions. The Court rejected that proposal. After discussing why a permitted activity framework would not be suitable for dairy farming, it went on:

> [5-200] We find the logic of that line of thought compelling and agree that a controlled activity status would better give effect to the purpose of the Act. We do not accept the *permitted* activity rule put forward by Horticulture NZ in closing for similar reasons. We note that Fish and Game submitted that we have no scope to impose *permitted* activity status in any event, but we do not need to decide the point, given our decision that *permitted* activity status is not justified.

Submissions

[88] Ms Atkins submitted that in rejecting a permitted activity rule for commercial vegetable growing, the Court took into account irrelevant considerations. For example, the reasons why a permitted activity regime ought not to apply to other land uses. The Court failed to take into account relevant considerations, such as the reasons set out in the case for Horticulture NZ and the acceptance by the planner for Wellington Fish & Game that a permitted activity rule for commercial vegetable growing could meet the same objective as a controlled activity rule.

[89] Ms Atkins criticised the analysis of the Court in finding a number of reasons why the permitted activity rule would not work in relation to dairy farming, and then concluding that the same logic applied to all intensive farm activity. She submitted that the Environment Court had wrongly treated commercial vegetable growing as the same as all other land uses, even though it accepted that there were significant differences in other parts of its decision. One such was the perceived potential

limitation of the OVERSEER modelling tool to calculate nitrogen leaching for commercial vegetable growing.

Evaluation

[90] I do not think it can be said that the Environment Court erred in law in this respect. In [5-199] it examined at length reasons why a permitted activity rule would be inappropriate for dairy and intensive sheep and beef farming. Some 12 reasons were given. A number of those apply also to commercial vegetable growing, as the Court noted at [5-200]. Managing nitrogen leaching effectively would require significantly more interaction between local authority and farmer than a permitted activity would allow. The control of land use to identify water quality outcomes was best achieved by a consent identifying the metes and bounds of farming activity, available from inspection of public records. A resource consent provides greater certainty for a farm than permitted activity status (which can be changed). Another was s 70. It requires that before a rule can be included in a regional plan that allows, as a permitted activity, discharge of a contaminant into water, or onto land in circumstances where it may enter water, the Court must be satisfied that, after reasonable mixing, certain adverse effects are unlikely to arise. Those effects include, under s 70(1)(g), "any significant adverse effects on aquatic life". There was, the Court found, no evidential basis on which it could conclude that that high requirement would be met.

[91] I also accept Mr Maassen's submission that there is an inconsistency in Horticulture NZ's submission. It asserts that there are special complexities associated with commercial vegetable growing, and with preparation of annual nutrient management plans for it. If that is indeed the case, greater interaction with the regional council will be beneficial. I agree, too, that it does point to the need for greater monitoring, able to be undertaken on a costs recovery basis, where monitoring is provided for as a condition of consent. That is not possible with a pure permitted activity rule. That was another point that the Environment Court noted in [5-199] of its decision.

Conclusion

[92] The answer to Question 7 is "No".

Question 8: Did the Environment Court fail to consider the extent to which the POP gave effect to the National Policy Statement on Freshwater Management?

[93] The POP was originally notified in May 2007. Submissions were received by the end of that year. Hearings took place between July 2008 and April 2010. The hearing panel Decision Version was notified in August 2010. Appeals had to be filed by November 2010, and s 274 notices by the end of January 2011. The National Policy Statement on Fresh Water Management (NPSFM) was gazetted only on 12 May 2011.

[94] The Environment Court noted that s 55 of the Act requires operative and proposed regional policy statements and regional plans to be amended to give effect to a national policy statement. That must be done as soon as practicable, or within the time specified in the national policy statement. The NPSFM provided that regional councils were to implement the policy "as promptly as is reasonable in the circumstances, so it is fully completed by no later than 31 December 2030." It also provided that where it was impracticable to complete implementation of the policy fully at the end of 2014, a council might implement it by a programme of "defined time-limited stages" up to the end of 2030. That programme was required to be formally adopted within 18 months of the gazetting of the NPSFM. At the time of the Environment Court hearing the Council had taken no decisions under those provisions. If it decided full implementation by the end of 2014 was impracticable, it had until 12 November 2012 to adopt time-limited stages of implementation.

[95] The Court then said:

> [5-189] All of which rather begs the question of what effect should be given to, or what account taken of, the NPSFM now – in the course of considering the appeals about the POP with the purpose of it becoming operative. That it must be given some status appears clear from the direct and mandatory command of s 62(3) in respect of regional policy statements:
>
> > A regional policy statement ... must give effect to a national policy statement ...

And the matching provision of s 67(3) in respect of regional plans:

> A regional plan must give effect to –
>
> (a) Any national policy statement

> [5-190] That may mean that unless steps are taken to modify them sooner, when these documents become operative at the end of the appeal process, they will not comply with s 62 and s 67 because so far, in the Schedule 1 process for the POP, no effort has been made to address the NPSFM. This is a matter the Council will need to turn its mind to. While we had evidence about the extent to which different versions of the provisions met the policy directives of the NPSFM we cannot give this any weight. That is not intended as a criticism – the NPSFM (as noted above) only came into force long after the POP was well advanced.

Submissions

[96] This point was not advanced, said Ms Atkins, as a "big hit" (let alone a "king hit"). But it was nonetheless important. She submitted that regional policy statements and plans must be amended to give effect to a national policy statement, either as soon as practicable or within the time period specified in the statement.[32] Ms Atkins submitted that all the parties before the Environment Court (apart from Fonterra) had been of the view that the Act required the Court to use the appeal opportunity to consider the NPSFM. The Court's failure to consider whether the POP gave effect to the NPSFM was, she said, an error of law. It was inappropriate for the Court not to determine the matter and just leave it to the Council to attend to.

[97] For Federated Farmers, Mr Gardner advanced the point rather differently. He submitted that the approach taken by the POP (relying on the OVERSEER model, "inextricably linked" with LUC classifications) was incompatible with the NPSFM. The nub of his point as to inconsistency was that the POP encouraged development, through Table 13.2, in LUC classes 1 and 2. The result of that was, potentially, over-allocation. That was inconsistent with the NPSFM. By focusing on potential, rather than actual, productivity of given land, the "maximum amount of the water resource calculated as being available for the disposal of leached nitrogen in the case of any given water body may be less than, or more than, the limit which the Council has yet to set as directed by the NPSFM".

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[32] Resource Management Act 1991, s 55.

Evaluation

[98] It is convenient to start with Horticulture NZ's submission. Section 55 requires a local authority to make amendments to plans required to give effect to any provision in the NPSFM that affects a plan.[33] Those amendments must be made either as soon as practicable, or within the time specified within the NPSFM (if applicable), or before the occurrence of any event specified in the statement.[34] That provision is responsive to the NPSFM, as is s 65(3)(g) which provides that a regional council is to consider the desirability of preparing a regional plan when the implementation of a NPSFM arises, or is likely to arise.

[99] It is also important to bear in mind that the Environment Court's jurisdiction is functionally limited. It is confined by the scope of appeals, and in turn further limited by the scope of submissions and further submissions.[35] I agree with Mr Maassen's submission that the Environment Court does not sit in an executive plan-making and plan-changing role. That is the local authority's role.

[100] In this case the NPSFM was gazetted only after appeals and s 274 notices had been filed. I consider that the Council (and the Court) was not obliged then to attempt to give effect to the NPSFM in the course of the appellate process. The NPSFM contains its own implementation timetable, including a series of default steps where it is impracticable to complete implementation of the policy fully by the end of 2014. I accept this is such a case. As the implementation guide associated with the NPSFM notes, "implementing the NPSFM will take time, will involve new approaches, and will not necessarily be achieved in one step".[36]

[101] Policy E1 of the NPSFM anticipates decisions being made by regional councils. Implementation must be undertaken using the process in Sch 1.[37] Notification and consultation is a key part of that process. There is no justification for that to be short-circuited through a hurried implementation exercise in the course

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33 Section 55(2B).
34 Section 55(2D).
35 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).
36 *National Policy Statement for Freshwater Management 2011, Implementation Guide* (Ministry for the Environment, Wellington, 2011) at [1.2].
37 Section 55(2C).

of a party-confined, and jurisdictionally confined, appellate process that commenced before the NPSFM was gazetted.

[102] I do not, therefore, find that the Environment Court erred in failing to consider the extent to which the POP gave effect to the NPSFM in the paragraphs complained of. Implementation of the NPSFM will need to be addressed in accordance with its own terms, and under Sch 1, separately. Should the Council fail to give effect to the NPSFM, then the appellants may seek declaratory relief from the Environment Court under Pt 12 of the Act, or seek judicial review in the High Court.

[103] I turn now, and briefly, to Mr Gardner's submission. I think Mr Maassen is right to say its premise is incorrect. As he put it:

> OVERSEER is not inextricably linked with LUC any more than the single Nkg/ha limit (irrespective of LUC) proposed by Federated Farmers and measured by OVERSEER are inextricably linked.

[104] The NPSFM does not identify an allocation mechanism. It cannot be said that the LUC allocation regime reflected in table 13.2 is contrary to and incompatible with the NPSFM. But in any event, the point is taken prematurely. It is a point that can be made during the Sch 1 process for the implementation of the NPSFM in that region, in due course.

Conclusion

[105] The answer to Question 8 is "No".

Question 9: Did the Environment Court correctly apply clauses 30 to 35 of Schedule 1 of the Act when it determined that it was open to the Council to have a generic reference to OVERSEER?

[106] OVERSEER is a computerised model developed in New Zealand to predict farm nitrogen losses, amongst other things. What the Environment Court said in the relevant part of its judgment is as follows:[38]

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[38] At [5-100].

> However, OVERSEER is a computer model, and a tool or technique, to measure potential N leaching and achievement of the cumulative nitrogen totals in Table 13.2 (accepting the limitations pointed out at the hearing). As such, it may not be the type of written material referred to in Clause 30, and although arguably it may be a recommended practice it does not appear to be prescribed in NZ (for example there is no National Enviromental Standard or mention in the National Policy Statement for Freshwater management 2011, prescribing it.) There is also the question of ongoing changes that may be made to the computer model software to update information on inputs and outputs and problems that might be identified with its running. It may in fact be difficult to find, and to run version 5.4, it being older software which may not be supported.

[107] A preliminary point is what reference in fact is made in the POP to that system. The principal, relevant reference in the POP to the OVERSEER system is the definition of "nutrient management plan" in the POP glossary. The definition is an important one, because it appears within performance conditions in rr 13-1 to 13-1C, which are the heart of the present appeals. That definition provides:

> **Nutrient management plan** means a plan prepared annually in accordance with the Code of Practice for Nutrient Management (NZ Fertiliser Manufacturers' Research Association 2007) which records (including copies of the OVERSEER input and output files used to prepare the plan) and takes into account all sources of nutrients for intensive farming and identifies all relevant nutrient management practices and mitigations, and which is prepared by a person who has both a Certificate of Completion in Sustainable Nutrient Management in New Zealand Agriculture and a Certificate of Completion in Advanced Sustainable Nutrient Management from Massey University.

[108] The Code of Practice referenced in the definition does not however compel use of OVERSEER. Rather, it says:

> There are several ways to produce a nutrient budget. One popular approach is to use the nutrient budgeting software "OVERSEER".

[109] There are other references to OVERSEER in other rules, but they are not the subject of the present appeals, or within the scope of these appeals. Certainly none are concerned with commercial vegetable growing.

Submissions

[110] Ms Atkins accepted that it was appropriate that OVERSEER be referenced as a "recommended practice" as provided for in cl 30 of Sch 1 of the Act. Indeed no party took issue with that. As she puts it:

> The issue before this Court is whether, in order to comply with the requirements set out in clauses 30 to 35, the POP needs to refer to a specific version of OVERSEER. We say that it does for the reasons that follow.

Ms Atkins submits that the effect of cl 30(3) is that material incorporated by reference in a plan has legal effect as part of that plan. As a result, OVERSEER is part of POP. Because a specific version of OVERSEER is not referenced, subsequent versions of OVERSEER will therefore be deemed to be part of the POP. But without any consideration being given to the difference between versions, and without the variation or plan change process being followed. The figures in Table 13.2 were based on version 5.40 of OVERSEER. Following the Environment Court decision in August 2012, version 6 became available. That, Ms Atkins submits, may result in different outcomes for plan users – because of changes inherent in the new version. Yet those plan users will not have had the opportunity to submit on the effects of that particular version on their interests. That too, she says, mandates the precise version of OVERSEER being correctly referenced. A generic reference to OVERSEER is not sufficient.

Evaluation

[111] Section 67(6) of the Act provides that a regional plan may incorporate material by reference under Pt 3 of Sch 1. That takes us to cls 30-35 of that schedule. Clause 30(3) provides that material incorporated by reference in a plan or proposed plan has legal effect as part of that plan.

[112] As Ms Atkins acknowledged in her closing submissions, the discussion before the Court proceeded on the basis that there is no requirement that OVERSEER must be used in producing a nutrient management plan. That was also the position taken by the Council before me. It must be right, given [107] – [108] above. That acknowledgment is seen as one of particular benefit by Horticulture NZ.

[113] In this context some focus in argument was also given to Policy 13-2D:

> **Resource consent decision making for intensive farming land uses**

When making decisions on resource consent applications, and setting consent conditions, for intensive farming land uses the Regional Council must:

(a) Ensure the nitrogen leaching from the land is managed in accordance with Policy 13-2C.

(b) An exception may be made to (a) for existing intensive farming land uses in the following circumstances:

(i) where the existing intensive farming land use occurs on land that has 50% or higher of LUC Classes IV to VIII and has an average annual rainfall of 1500mm or greater; or

(ii) where the existing intensive farming land use cannot meet year 1 cumulative nitrogen leaching maximums in year 1, they shall be managed through conditions on their resource consent to ensure year 1 cumulative nitrogen leaching maximums are met within 4 years.

(c) Where an exception is made to the cumulative nitrogen leaching maximum the existing intensive farming land uses must be managed by consent conditions to ensure:

(i) Good management practices to minimise the loss of nitrogen, phosphorous, faecal contamination and sediment are implemented.

(ii) Any losses of nitrogen which cannot be minimised are remedied or mitigated, including by other works or environmental compensation. Mitigation works may include, but are not limited to, creation of wetland and riparian planted zones.

...

I do not need to say anything about this Policy, other than to record that the Council stated, expressly, that they consider the exception in (c) to be a separate exception from (b). I record that submission because it too was seen as important to the appellants.

[114] I return now to the substantive issue. What is required, by way of performance condition in rr 13-1A to 13-1C, is a nutrient management plan prepared "in accordance with" the 2007 Code of Practice. The sufficiency and adequacy of that plan will be determined in accordance with the code. No particular version of OVERSEER need be used. Other models – such as SPASMO and APSIN – may be

used for commercial vegetable growing, for instance.[39] Nothing in this offends the Act.

Conclusion

[115] The answer to Question 9 is "Yes".

Question 10: Was the Environment Court correct in determining that the definition of Nutrient Management Plan should not be amended as requested by Horticulture NZ without providing an opportunity to address the concerns the Environment Court had about the definition?

[116] Question 10 is related to Question 9. Horticulture NZ had submitted to the Environment Court, following its August 2012 decision, that a change should be made to the definition of nutrient management plan in the glossary.[40] Specifically, Horticulture NZ sought a definition which removed the word "annual" from the requirement. It would also require it to be prepared by a person with certain specific tertiary qualifications.

[117] The Court found the changes sought by Horticulture NZ went too far. A change from an annual plan was not accepted by the Court. And it did not think that the specific tertiary qualifications needed be added. The Court went on:

> [91] The *nutrient management plan* is a key component of the policy and rule approach in the Plan. Horticulture NZ should have put forward such changes, and their evidential basis, at the hearing and it is too late to propose them now.
>
> [92] Given the timeframe before the targeted Water Management Sub-zones come into effect for those catchments with vegetable cropping, and the ability of the Council to promote a plan change providing for an alternative approach if it sees fit, we see no reason to amend the requirement of the use of OVERSEER input and output files.

Submissions

[118] Ms Atkins submitted that the Court appeared thus to have found that the changes Horticulture NZ was seeking were beyond scope, in terms of cl 10(2) of Sch 1. That is to say, it went beyond a "consequential alteration arising out of

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[39] Evidence before me, however, suggested these are more research oriented systems.
[40] See [107] above.

submissions". She submitted that while Horticulture NZ's appeal did not specifically request an amendment to the definition of "nutrient management plan", it did challenge the use of OVERSEER for commercial vegetable growing. An amendment to the definition to recognise the concerns Horticulture NZ had with the use of OVERSEER for commercial vegetable growing was, she submitted, "a form of consequential relief". All parties had an opportunity and did comment on Horticulture NZ's definition. The primary focus at the hearing had been whether commercial vegetable growing was within the nutrient management regime. Only after the interim decision was issued could the flow-on consequences be fully assessed, considered and addressed. The Court failed to take into account a relevant consideration, and therefore approved a definition which was "not the most appropriate" in terms of s 32.

Evaluation

[119] I do not think there is anything in this further point advanced by Horticulture NZ. Indeed it largely falls away because of the consensus achieved at the appeal hearing before me that the definition of "nutrient management plan" did not mandate the use of OVERSEER only. The primary position taken by Horticulture NZ before the Environment Court was that commercial vegetable growing should not be included in the regulatory regime. Although the passages quoted from the Court's judgment at [117] above suggest that it saw Horticulture NZ's proposed amendments as beyond scope, the reality is that earlier at [89] and [90] of its decision the Court considered the merits of Horticulture NZ's specific proposals. No justification was found by it for removing the word "annually". Nor is it apparent to me in what respect the Court can be said to have erred in law in rejecting the other amendment suggested concerning the qualifications of the person to prepare the nutrient management plan.

Conclusion

[120] The answer to Question 10 is that the Court did not err in law in rejecting the amendments proposed by Horticulture NZ.

Question 11: Was the Environment Court correct in not providing an alternative for conversion and changes in land use from extensive to intensive outside the targeted Water Management Subzones?

[121] This question was abandoned by Horticulture NZ.

Question 12: Was there jurisdiction for the Environment Court to direct that Policy 6-7(a)(iaa) be included in the POP?

[122] Policy 6-7 is part of a suite of policies in the POP setting the regional strategy for the management of discharge and land use activities that affect water quality. Policy 6-7(a)(iaa) now provides:

> **(a) Nutrients**
>
> (iaa) Nitrogen leaching maximums must be established in the regional plan which:
>
> (1) Take into account all the non-point sources of nitrogen in the catchment, and
>
> (2) Will achieve the strategies for surface water quality set out in Policies 6-2, 6-3, 6-4 and 6-5, and the strategy for groundwater quality in Policy 6-6, and
>
> (3) Recognise the productive capability of land in the *Water Management Sub-zone*, and
>
> (4) Are achievable on most farms using good management practices, and
>
> (5) Provide for appropriate timeframes for achievement where large changes to management practices or high levels of investment are required to achieve the nitrogen leaching maximums
>
> ...

[123] This wording was included in the POP by the Environment Court in its second decision dated 24 December 2012. It followed receipt of the Council's report dated 2 November 2012 following consultation with the parties after delivery of the Court's first decision on 31 August 2012. The particular policy wording appears to have drawn on consultation with Wellington Fish & Game.

Submissions

[124] Mr Gardner submitted that the Court lacked jurisdiction to direct the inclusion of that policy. It exceeded, he said, anything requested in any submission or requested by Wellington Fish & Game in its appeal to the Court. Its inclusion was, therefore, an error of law.

Evaluation

[125] This is a purely jurisdictional question. Wellington Fish & Game had supported Policy 6-7 in the Notified Version. The Decision Version of the POP split Policy 6-7 into 6-7 and 6-7A. In its appeal the Wellington Fish & Game Council sought a return to the Notified Version, Policy 6-7, or "such other or further relief as addresses the issues raised by this appeal point". As Mr Maassen submits, those "issues" were the ability of the policy to address the issues and objectives identified in the POP and the purposes and principles of the Act.

[126] There is force in the submission by Mr Somerville QC for Wellington Fish & Game that policies to establish nitrate leaching maxima were always a potential outcome of his client's appeal in the Environment Court. Indeed, he points out, Federated Farmers had suggested its own maxima during the course of the hearing. All of this was then the subject of a great deal of evidence.

[127] I repeat my reservations at [50] and [51] above. No surprise or prejudice is pointed to by Mr Gardner. I am satisfied there is nothing in this point.

Conclusion

[128] The answer to Question 12 is "Yes".

Question 13:

(a) Did the Environment Court correctly conclude that Federated Farmers raised questions about the robustness of the LUC/OVERSEER based approach to leaching losses in the comments it made to the Council, as reported to the Court by the Council?

(b) Did the Environment Court correctly conclude that it was "too late" for questions about the robustness of the LUC/OVERSEER based approach to leaching losses to be raised?

(c) Did the Environment Court, in rejecting the argument that the policy and rule approach was not robust because the Council's regime was based on an earlier version of OVERSEER, come to a conclusion without evidence, take into account matters which it should not have taken into account, or fail to take into account matters which it should have taken into account?

[129] Question 13 is in a sense related to Question 10 advanced by Horticulture NZ.

[130] After release of its initial decision in August 2012, the Court directed that the Council, conferring where necessary with affected parties, redraft the relevant provisions of the POP to conform to its decision and present them to the Court for approval. The Court made it clear that the redrafting process was "not ... an opportunity for any party to relitigate issues".

[131] Federated Farmers retained concerns as to the robustness of the LUC/OVERSEER-based approach to leaching losses. Specifically, Federated Farmers said, in its comments to the Council:

> Given that OVERSEER6 has been shown to produce N leaching loss values significantly higher than version 5.4 which was used to calculate table 13-2. The limits as set in table 13-2 are not now as achievable as previously and in fact are inaccurate in the light of more robust scientific analysis.

It maintained that to include the limits in Table 13-2 in these circumstances was a "serious flaw" in the redrafted rules.

[132] The Council took the view that those comments went beyond scope of the matters that the Court had referred for redrafting by the Council.

[133] The Court accepted that response. It said:

> The questions being raised by Federated Farmers about the robustness of the approach are matters that should have been raised at the original hearing and in evidence. It is too late to raise them now.

Submissions

[134] Mr Gardner submits that the comments made by Federated Farmers concerned a flaw in the redrafting of the provisions. OVERSEER version 5.4 was used to set the nitrogen leaching limits, but using version 6 to estimate the subsequent leaching losses from farms. He submitted that the Court's decision was expressly an interim decision. The Court had sought comments from parties on errors or omissions. The Court might alternatively address the matter under s 294, on the basis that new and important evidence had become available. The Court had recognised that OVERSEER 6 needed to be trialled, particularly in the context of horticulture. But it did not have version 6 at the time it made its interim decision in August 2012.

[135] In the end the point was in substance abandoned. Mr Gardner sought instead a direction from this Court as to whether Federated Farmers could make application under s 294 for review of its earlier decision, given the availability of "new and important evidence".

[136] I should therefore record that Mr Maassen's submission to me was that as far as the Council is concerned, it was not too late for Federated Farmers to make application under s 294. What Mr Maassen said was:

> If FF considers version 6 does ... have materially different outputs from version 5.4 then the best avenue is to apply for a rehearing based on new evidence pursuant to RMA, s 294. In that way all parties can consider whether there is any evidential basis for the issue to be readdressed and [the Council] could make its own informed decision based on that technical and scientific evidence.

Evaluation

[137] It is not for the High Court to pre-empt the jurisdiction of the Environment Court on such an application. I decline, therefore, to give the direction sought by

Federated Farmers. But given the Council's attitude, there does not appear to be any obstacle in the way of Federated Farmers making an application under s 294.

[138] I need say no more about Question 13.

Question 14: Was there jurisdiction for the Environment Court to direct that the phrase "reasonably practicable farm management practices", or phrases containing words to that effect, be removed from the surface water quality objectives, policies or rules of the POP?

[139] This question was abandoned by Federated Farmers.

Question 15: Was there jurisdiction for the Environment Court to direct that the glossary term "intensive sheep and beef farming" be amended to refer to properties greater than 4 ha engaged in the farming of sheep and cattle, where any of the land grazed is irrigated?

[140] One of the activities to which the new water quality regime applies is "intensive sheep and beef farming". Its original definition was as follows:

> **Intensive sheep and beef farming** refers to properties greater than 4 ha mainly engaged in the farming of sheep and cattle, where the land grazed is irrigated.

[141] The Minister of Conservation submitted that that definition was ambiguous. Potentially it gave scope for disputed interpretation. Was it required that *all* of the land used to graze sheep and cattle be irrigated to trigger the definition? It was highly unlikely that all such land would be irrigated in fact.

[142] In the Court's second interim decision of December 2012 the Court said:

> It was not the Court's intention that the whole of a farm needed to be irrigated to trigger the provisions. The Court directs the glossary term be amended to read:
>
> > **Intensive sheep and beef farming** refers to properties greater than 4 ha engaged in the farming of sheep and cattle, where any of the land grazed is irrigated.

Submissions

[143] Mr Gardner noted that in its first (August 2012) decision the Court had rejected a submission by Mr Day that land used for *extensive* sheep and beef farming could also be brought within the POP water quality regulatory regime. The Council opposed that proposition on the basis of *Estate Homes Ltd v Waitakere City Council*.[41] The Environment Court agreed that there was no scope to bring extensive sheep and beef farming into the regime as an appellate outcome.

[144] Mr Gardner submitted that given that that was the case, the Environment Court lacked necessary jurisdiction to direct that the glossary term "intensive sheep and beef farming" be amended to refer to properties greater than four hectares engaged in the farming of sheep and cattle, where *any* of the land grazed was irrigated. In essence his argument was that if the extensive sheep and beef farming was beyond scope, then what would otherwise be extensive and sheep and beef farming could not be brought into scope as "intensive" because some parts were irrigated.

Evaluation

[145] Intensive sheep and beef farming had been removed as a regulated land use from the Decision Version of the POP. The Environment Court reintroduced regulation of that activity. A definition was again required. The Environment Court had directed redrafting of the POP provisions in accordance with its decision. The Council had prepared a definition of "intensive sheep and beef farming", in consultation with the parties. That was provided to the Court with its report on 2 November 2012. The definition provided to the Court raised the problem of potentially disputed interpretation referred to earlier. Did the words "where the land grazed is irrigated" require that all the land used be irrigated, or only some? The Court made clear its view in the passage quoted above. It had the jurisdiction to direct clarification under s 292(1)(a) of the Act.

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41 *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA).

Conclusion

[146] The answer to Question 15 is "Yes".

Question 16:

(a) Did the Environment Court take into account matters which it should not have taken into account, or fail to take into account matters which it should have taken into account in reaching its decision that cultivation on slopes greater than 20 degrees should be a restricted discretionary activity?

(b) Did the Environment Court correctly apply s 32 of the Act when it reached that decision?

[147] Question 16 was abandoned by Federated Farmers.

Question 17:

(a) Did the Environment Court take into account matters which it should not have taken into account when it reached its decision to direct that the words "any increase in" be deleted from Policy 5-2A(a)?

(b) Did the Environment Court correctly apply s 32 of the Act when it reached that decision?

[148] Policy 5-2A(a) had read:

> In order to achieve Objective 5-2, the Regional Council must regulate vegetation clearance, land disturbance, forestry and cultivation through rules in the Plan and decisions on resource consents, so as to minimise the risk of *any increase in* erosion, minimise discharges of sediment to water, and maintain the benefits of riparian vegetation for waterbodies.

[149] Wellington Fish & Game sought amendments to reflect the Court's August 2012 decision on Chapter 12 (land use rules). Specifically, the regime to ensure that land use activities which have the potential to exacerbate land erosion, or are likely to release sediment to surface water, are managed to reduce that risk. Wellington Fish & Game sought deletion of the italicised words in Policy 5-2A(a) quoted above. The Court agreed with that submission.

Submissions

[150] Mr Gardner submitted that what was permitted was minor drafting changes only, and this represented a substantial change. Removal of the words "any increase in" implied that the risk of erosion needed to be minimised, rather than requiring only any increase in the risk of erosion to be minimised. The Environment Court's minute of 21 September 2012 directed that the Council was to redraft the provisions of the POP to accord with the Court's 31 August 2012 decision. While offering parties the opportunity to make written submissions on any "significant error or omission", the Court had made it clear that the redrafting process was "not ... an opportunity for any party to relitigate issues". Further, the Court had not, contrary to s 32, assessed the costs of the policy to farmers who may undertake activities which may result in erosion. Nor had it assessed the benefits to farmers of being able to undertake such activity.

[151] In response, Mr Somerville submitted that minimising the risk of erosion is a reasonably practicable means of avoiding accelerated erosion and increased sedimentation in water bodies. That is a reference to Objective 5-2 of the POP. It provides that:

> Land is used in a manner that ensures ... accelerated erosion and increased sedimentation and water bodies ... caused by vegetation clearance, land disturbance, forestry or cultivation are avoided as far as reasonably practicable, or otherwise remedied or mitigated.

Mr Somerville submitted that the amendment made by the Court in its 24 December 2012 decision was a necessary drafting change to achieve that objective.

[152] Further, the Court was not required to specifically refer to s 32 in respect of each determination it made throughout its decision. Nor was it obliged to include a specific s 32 analysis of whether or not to include the words "any increase" in Policy 5-2A. The exclusion of those words was an exercise of planning judgment by the Court, based upon evidence, and did not give rise to any question of law.

Evaluation

[153] I accept, immediately, the second of Mr Somerville's submissions. Section 32 does not require a cost-benefit analysis to be undertaken on consequential changes made by the Environment Court in the course of determining appeals on the duly notified proposed plan.

[154] I do not, however, accept his first submission. In [4-4] of its 31 August 2012 decision, the Court noted that Objectives 5-1 and 5-2 (which Policy 5-2A is calculated to support) concern "managing accelerated erosion" and "regulating potential causes of accelerated erosion". The expression "accelerated erosion" appears throughout those objectives. The expression "erosion" simpliciter does not. "Accellerated erosion" is a defined term. It means:

> ... erosion which is caused or accelerated by human activity.

It does not include naturally-caused erosion. Methods identified in Chapter 5 of the regional policy statement part of the POP are all focused on "accelerated erosion", including catchment strategies for hill country land in certain areas. So too is Objective 12-1 within the regional plan part of the POP.

[155] Policy 5-2A logically should reflect that same terminology. To provide that the Council must regulate these activities to "minimise the risk of erosion" is inconsistent with the more limited nature of Objective 5-2. There is also an inconsistency in the current terms of Policy 5-2A in its use of the word "erosion" simpliciter. In those terms it would include erosion from natural causes. That goes beyond what is necessary to achieve Objective 5-2.

Conclusion

[156] The answer to Question 17(a) is that the Environment Court erred in law in deleting the words "any increase in" in Policy 5-2A(a). Either the original wording should have been retained, or the words "accelerated erosion" should have been used in Policy 5-2A.

[157] Mr Somerville suggested that I could remit that matter back to the Environment Court for further consideration. He did not press the point strongly. In my view the proper outcome in this case is plain, and it is not necessary to remit the matter back to the Environment Court.

[158] Pursuant to r 20.19(1)(a), I allow the appeal in this limited respect. I hold that for the maintenance of consistency within Chapter 5 of the regional policy statement part of the POP, the word "accelerated" is to be substituted for the words "any increase in" before the word "erosion" in Policy 5-2A(a).

[159] The answer to Question 17(b) is "Yes".

Question 18:

(a) Was there jurisdiction for the Environment Court to direct that Policy 13-2C, in particular Policy 13-2C(d), be included in the POP?

(b) Did the Environment Court correctly apply s 32 of the Act when it reached its decision?

[160] Policy 13-2C(d) provides that:

> Existing intensive farming land use regulated in accordance with (b)(i) must be managed to ensure that leaching of nitrogen from those land uses does not exceed the cumulative nitrogen leaching maximum values for each year contained in Table 13.2, unless the circumstances in policy 12-2D apply.

How it came to be included is discussed below.

Submissions

[161] Mr Gardner submitted that the Notified Version of the POP included a number of matters to which the Council is required to have regard when it makes decisions about consents for any discharge to land. There is no reference in former Policy 13-2 to the need to have particular regard to Table 13.2. No submissions to Council requested that the nitrogen leaching maximum specified in Table 13.2 be referred to directly in the matters to which the Council is required to have particular regard in Policy 13-2. The hearings panel then divided Policy 13-2 into a number of other policies, including Policy 13-2C which specifically related (then) to the

management of dairy farming land uses. The nitrogen leaching maxima specified in Table 13.2 were not referred to directly as matters which the Council was required to consider. Rather Policy 13-2C(c) required decision makers to:

> Ensure that nitrogen leaching from new dairy farming land does not exceed nitrogen leaching rates based on the natural capital of each LUC class of land use for dairy farming.

[162] Mr Gardner submitted that in this case there was "no hint anywhere in the POP as notified, nor in any submissions on it, that Table 13.2 might be applied at a policy level to existing dairy farms". He therefore submits that the Court did not have jurisdiction to direct that Policy 13-2C(d) be included.

[163] In addition Mr Gardner contended that the Court failed to assess the costs and benefits of including Policy 13-2C, contrary to s 32.

Evaluation

[164] Federated Farmers' complaint is not sound.

[165] Table 13.2[42] appeared in the rules section of chapter 13 of the regional plan part of the Notified Version. Apart from the heading, it was not formally described as a rule. But there was an introductory comment:

> Table 13.2 sets out the maximum nitrogen leaching/run-off date allowed for land within the specified land use capability classes after the specified date. The year 1 date is the date from Table 13.1 for the particular water management zone in which that land class is situated. The following dates in the table are the number of years after the year 1 date.

However, Table 13.2 was expressly referenced in Rule 13-1 of the Notified Version which states:

> When calculating the maximum nitrogen leaching/run-off values allowed for the whole farm in accordance with preparing a FARM Strategy as required by (b), the values for each land use capability class (LUC) in Table 13.2 shall be used.

[166] The Wellington Fish & Game submission said:

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[42] See [74] above. The values stated in the Notified Version of Table 13.2 are the same as those set out in [74], except that the values for year 1 were generally higher in the Notified Version.

> The status of this table is confusing. Water management zones or subzones have been the entity on which the water quality standards, with respect to nutrients and intensive farming, are based ... This table introduces land use classes and sets nitrogen limits on each of these classes – how is this to reconcile against the objectives, policies, Table 13.1 and the standards for SIN in Table D17? The obscurity of the relationship between the different values used confuses the link between objective, policy and standard.

[167] Federated Farmers submitted expressly in opposition to r 13-1 in the Notified Version. It said:

> FFNZ is concerned at the proposed policy approach given the lack of robust information at a catchment and farm scale.

It sought a redraft of r 13-1 based on a set of principles, including:

> Clarity and capacity: include policies and methods that are clear and achievable and within the capacity of individuals to deliver within the timeframe.

[168] I accept Mr Jessen's submission for the Council that either of those submissions provided scope for the hearings panel to insert policy 13-2C into the Decision Version of the POP.

[169] Policy 13-2C commences with the words "in order to give effect to Policy 6-7A and policy 6-7 ...". Those policies are found in the regional policy statement part of the POP. But having made policies there for dairy farm land use activities and other rural land use activities affecting ground water and surface water quality, the plan part of the POP was sparse as to the policy framework for the plan rules. I accept Mr Jessen's submission that s 67(3)(c) required the policy statement provisions to be given effect to, and Policy 13-2C does that. In other words, the regional policy statement was there, the regional plan rule was there, but the regional plan policy framework was deficient.

[170] There can be no jurisdictional error here by the Court in incorporating this policy. Wellington Fish & Game's submission had expressly noted the inadequacy of the objectives and policy support for Table 13-2. Policy 13-2C provides that underpinning. Federated Farmers in their submissions had, as I have said, sought the deletion of r 13-1. Alternatively, its redrafting, together with "policies and methods

that are clear and achievable". That invited, at least jurisdictionally, Policy 13-2C(d).

[171] Finally, there is no basis for the contention that the inclusion of this policy element specifically triggered s 32. No authority for such a proposition was advanced by Mr Gardner. I refer to what I said at [153] above.

Conclusion

[172] The answer to Question 18 (both parts) is "Yes".

Question 19:

(a) Was there jurisdiction for the Environment Court to direct that matter to which discretion is restricted (ab) in Rules 13-1A and 13-1C be included in those rules in the POP?

(b) Did the Environment Court correctly apply s 32 of the Act when it reached its decision?

[173] Rule 13-1 concerns existing intensive farming land use activities where the nutrient management plan demonstrates that the nitrogen leaching loss from the activity would not exceed the cumulative nitrogen leaching maxima specified in Table 13-2. Such a land use activity is a controlled activity under the POP. Likewise new intensive farming land use activities that meet that standard: r 13-1B. The two rules at issue in this question are rr 13-1A (existing intensive farming land use activities that do not comply with the condition in Rule 13-1) and 13-1C (new intensive land use activities that do not comply with that condition). They are restricted discretionary activities under the plan. And the discretion is restricted, inter alia, to:

> (ab) The extent of non-compliance with a cumulative nitrogen leaching maximum specified in Table 13.2.

Submissions

[174] Mr Gardner submits that in the case of r 13-1A in the Decision Version of the POP, the nitrogen leaching maxima specified in Table 13.2 were not referred to as

matters over which discretion was reserved. In the case of new dairy farming discretionary activity under r 13-1C, the nitrogen leaching maxima specified in Table 13.2 were referred to as matters over which discretion was reserved. Table 13.2 in the Decision Version contained no requirement to "step down" the nitrogen leaching rates over time.

[175] In appealing to the Environment Court, Wellington Fish & Game had sought reinstatement of the Notified Version of Table 13.2, the reinstatement of r 13-1 as notified "including the requirement to meet nitrogen loss standards specified in Table 13.2", or the amendment of rr 13-1A and 13-1C to require specified cumulative nitrogen leaching standards as specified in Table 13.2. The latter course was adopted by the Environment Court. But Mr Gardner submits such relief was outside the scope of submissions made by the Council, which made no reference to r 13-1.

[176] Mr Gardner, again, submitted that the Environment Court had not considered the costs and benefits of including this matter, contrary to s 32.

Evaluation

[177] I do not consider the objections sound.

[178] In the Notified Version of the POP, all relevant intensive farming activities were covered within r 13-1. All were to be controlled activities. It was the hearings panel that made the decision to split r 13-1 into the component parts now featured in the Decision Version. And to change the classification for some of those component parts from controlled to restricted discretionary activity. So rr 13-1A and 13-1C derive from r 13-1 in the Notified Version. Rule 13-1 had reserved control over "the level of compliance with the FARM Strategy workbook (Horizons Regional Council, April 2007)". That provided for nitrogen leaching/run-off values maxima. Rule 13-1 also provided that:

> When calculating the maximum nitrogen leaching/run-off values allowed for the whole farm in accordance with preparing a FARM Strategy as required by (b) the values for each land use capability class (LUC) in Table 13.2 shall be used.

[179] It follows that both the Notified Version r 13-1 and the present versions r 13-1A and 13-1C reserved the control or discretion of the decision maker over the extent of compliance, or the level of non-compliance for the activity, by reference to values set out in Table 13.2.

[180] Wellington Fish & Game's appeal to the Environment Court against the Decision Version sought reversion to the Notified Version of r 13-1. As we have already seen, it sought strict provisions be inserted in relation to the leaching/run-off values in Table 13.2. However its original submission on the Notified Version did not include a specific reference to r 13-1. Federated Farmers contends that because of that absence of specific reference, the appeal against the Decision Version does not meet the requirements of cl 14(2) of the Sch 1 of the Act.

[181] There is a regrettable aridity about this argument. Wellington Fish & Game's submission, referencing Table 13.2 and seeking strict provisions in relation to the application of the values in that table, was in effect a submission on r 13-1. That, as I have said, carries Table 13.2 into regulatory (as opposed to objective or policy) effect. I repeat here what I said at [49] to [52] under the heading of Question 2. Narrow interpretations under cl 14 of Sch 1 are to be avoided. Secondly, and in any event, Federated Farmers' own submission seeking redrafting of r 13-1, on which I remarked in the context of Question 18, either alone or in conjunction with the submission by Wellington Fish & Game, provided the Environment Court with the jurisdiction to direct the inclusion of subclause (ab) in those rules.

[182] Finally, for reasons given earlier,[43] I reject the submission that the Court's approach infringes s 32.

Conclusion

[183] The answer to Question 19 (both parts) is "Yes".

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[43] At [153] and [171].

Summary

[184] The questions of law posed, and answers given, in this judgment are as follows:

> **Question 1:** Was the Environment Court correct in determining and interpreting that for the purposes of s 290A of the Act it only needed to consider those aspects of the Decision Version of the POP that had not been changed by the Council during the course of negotiations, mediations and witness conferencing?
>
> ***Answer:*** *The Court did not err in law in its traversal of the Decision Version.*
>
> **Question 2:** Did the Environment Court fail to consider and determine whether it had jurisdiction to include the deposited sediment limit in Schedule D of the POP?
>
> ***Answer:*** *The Environment Court possessed jurisdiction to include the deposited sediment standard in Schedule D.*
>
> **Question 3:** Did the Environment Court fail to take into account relevant considerations and did it take into account irrelevant considerations when:
>
> (a) it placed significant reliance on the joint witness conferencing statement in determining that there was agreement that all intensive land uses ought to be included in a leachate management regime; and
>
> (b) then only included some but not all intensive land uses?
>
> ***Answer:*** *No*
>
> **Question 4:** Did the Environment Court correctly apply s 32 of the Act when it concluded that it was both practical and cost effective to require all existing commercial vegetable growing activities in the specified water management zones and all new such activities everywhere else in the region to require resource consent?
>
> ***Answer:*** *Yes.*

Question 5: Did the Environment Court fail to take into account relevant considerations when it determined that the LUC classification approach was applicable to commercial vegetable growing?

Answer: *No.*

Question 6: Did the Environment Court fail to take into account relevant considerations in relation to assessment of the social and economic costs of the regime it determined was applicable to commercial vegetable growing?

Answer: *No.*

Question 7: Did the Environment Court take into account irrelevant considerations and fail to take into account relevant considerations when it determined that the leachate management regime for commercial vegetable growing ought not to be by way of a permitted activity rule?

Answer: *No.*

Question 8: Did the Environment Court fail to consider the extent to which the POP gave effect to the National Policy Statement on Freshwater Management?

Answer: *No.*

Question 9: Did the Environment Court correctly apply clauses 30 to 35 of Schedule 1 of the Act when it determined that it was open to the Council to have a generic reference to OVERSEER?

Answer: *Yes.*

Question 10: Was the Environment Court correct in determining that the definition of Nutrient Management Plan should not be amended as requested by Horticulture NZ without providing an opportunity to address the concerns the Environment Court had about the definition?

Answer: *The Court did not err in law in rejecting the amendments proposed by Horticulture NZ.*

Question 11: Was the Environment Court correct in not providing an alternative for conversion and changes in land use from extensive to intensive outside the targeted Water Management Subzones?

Answer: *This question was abandoned.*

Question 12: Was there jurisdiction for the Environment Court to direct that Policy 6-7(a)(iaa) be included in the POP?

Answer: *Yes.*

Question 13:

(a) Did the Environment Court correctly conclude that Federated Farmers raised questions about the robustness of the LUC/OVERSEER based approach to leaching losses in the comments it made to the Council, as reported to the Court by the Council?

(b) Did the Environment Court correctly conclude that it was "too late" for questions about the robustness of the LUC/OVERSEER based approach to leaching losses to be raised?

(c) Did the Environment Court, in rejecting the argument that the policy and rule approach was not robust because the Council's regime was based on an earlier version of OVERSEER, come to a conclusion without evidence, take into account matters which it should not have taken into account, or fail to take into account matters which it should have taken into account?

Answer: *This question in substance was abandoned.*

Question 14: Was there jurisdiction for the Environment Court to direct that the phrase "reasonably practicable farm management practices", or phrases containing words to that effect, be removed from the surface water quality objectives, policies or rules of the POP?

Answer: *This question was abandoned.*

Question 15: Was there jurisdiction for the Environment Court to direct that the glossary term "intensive sheep and beef farming" be amended to refer to properties greater than 4 ha engaged in the farming of sheep and cattle, where any of the land grazed is irrigated?

Answer: Yes.

Question 16:

(a) Did the Environment Court take into account matters which it should not have taken into account, or fail to take into account matters which it should have taken into account in reaching its decision that cultivation on slopes greater than 20 degrees should be a restricted discretionary activity?

(b) Did the Environment Court correctly apply s 32 of the Act when it reached that decision?

Answer: *This question was abandoned*.

Question 17:

(a) Did the Environment Court take into account matters which it should not have taken into account when it reached its decision to direct that the words "any increase in" be deleted from Policy 5-2A(a)?

(b) Did the Environment Court correctly apply s 32 of the Act when it reached that decision?

Answer to 17(a): *The Environment Court erred in law in deleting the words "any increase in" in Policy 5-2A(a). Either the original wording should have been retained, or the words "accelerated erosion" should have been used in Policy 5-2A.*

Answer to 17(b)*: Yes.*

Question 18:

(a) Was there jurisdiction for the Environment Court to direct that Policy 13-2C, in particular Policy 13-2C(d), be included in the POP?

(b) Did the Environment Court correctly apply s 32 of the Act when it reached its decision?

Answer: *Yes (both parts).*

Question 19:

(a) Was there jurisdiction for the Environment Court to direct that matter to which discretion is restricted (ab) in Rules 13-1A and 13-1C be included in those rules in the POP?

(b) Did the Environment Court correctly apply s 32 of the Act when it reached its decision?

Answer: Yes (both parts).

Result

[185] The appeals are dismissed, save in the single respect noted at [156]–[158], under Question 17(a), where the appeal of Federated Farmers is allowed.

[186] If costs are in issue, brief memoranda may be filed. By those applying, within 21 days. By those responding, within a further seven days.

Stephen Kós J

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And to: Mr Andrew Day