in the matter of	the Resource Management Act 1991
and in the matter	An inquiry pursuant to Schedule 1 RMA into the provisions of the proposed One Plan notified by Horizons Regional Council.

FINAL SECTION 42A LEGAL REPORT ON WATER HEARINGS

Dated 6 April 2010

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Regulation of Intensive Agriculture

1. The submitters have presented useful information that justifies refinement but certainly not abandonment of the regulatory regime proposed in POP. The evidence has not challenged:

   (a) The existence of a serious environmental problem which will in all likelihood worsen over time. As Fonterra acknowledged:

   > "Fonterra accepts that some nitrogen loss (N-loss) reduction is required, for the future sustainable management of the region's water bodies."[1]

   (b) The need for an effective regulatory action plan to ensure the problem is addressed. As Federated Farmers acknowledged:

   > "The question is not whether councils should or shouldn't regulate, the question is how much regulation councils should impose."[2]

2. The Prussian soldier, von Clausewitz, famously said, "The greatest enemy of a good plan is the dream of a perfect plan.[3]" Voltaire said a similar thing.[4] This saying is apt for the task of developing plans to manage complex environmental issues such as addressing hypertrophic conditions in waterways. Such issues not only involve complex biogeochemical processes, but also are affected by human activities of varying types and to varying degrees.[5]

3. A good plan to address these issues will always have limitations and the task of building a good plan is not excused on the basis a perfect plan cannot be achieved. For example some will argue a plan lacks sufficient certainty while others that it lacks flexibility: a perennial dispute! Fortunately, the permissible contents of plans (which includes not only rules but also policies, default classes and discretions) under the RMA are

[1] McIndoe submissions for Fonterra, paragraph 24
[2] Gardner submissions for Federated Farmers, paragraph 46
[3] Author of Vom Kriege *On War*
[4] Voltaire is attributed the saying "The perfect is the enemy of the good" (*Il meglio e l'inimico del bene)*
[5] See generally Roygard SOE

sufficient to make good plans to address complex environmental problems. Consequently where there is a demonstrable environmental problem affecting life supporting capacity of aquatic ecosystems (as is this case in respect of nutrient leaching from intensive agriculture in the specified water management zones) then failure to establish a credible plan of action is probably indefensible in the sense that such a decision does not meet the statutory requirements of the RMA and therefore cannot be successfully defended in the Environment Court. Further, it will merely consign the main protagonists (eg Fish & Game, Fonterra and Federated Farmers and HRC) to ongoing litigation as the problem and the desire for a practical and effective solution will not vanish.[6]

4. An arguable fault with Rule 13-1 and Table 13.2 is that they collectively try to do too much or rather cover too many situations in a single rule and are too inflexible in their application.

5. Fonterra agrees with HRC that all new intensive agriculture (after POP becomes operative) should be caught by the requirements of a consent to farm with explicit N caps.[7] It is imperative that 'new entrants' have a clear regulatory framework to work under so that investment is not made on incorrect assumptions about sustainable nutrient leaching. Otherwise the region will confront 'legacy' issues that are more intractable.[8]

6. The evidence challenging the provisions of the One Plan relating to control of existing intensive agriculture rests on the following non-exclusive list of issues:

   (a) The POP rests on an unjustified expectation of a dairy boom in the Manawatu region and therefore unrealistic assumptions as to potential risk;[9]

   (b) The suitability of the LUC classification system as a basis for setting N limits;[10]

[6] What is evident from the evidence is growing concern at the lack of action to address poor water quality.
[7] See SOE by Mr Willis and his "A" and "B" values for Table 13.2
[8] From answer to question by Cr Meads by Neil Deans from Fish & Game.
[9] See SOE's by Newland & Matthews for Fonterra.

(c) The suitability of the Overseer model as a tool to calculate compliance with the N limits specified as conditions of controlled activity classification;[11]

(d) The practicality of achieving the specified targets;[12]

(e) Insufficient information as to the potential economic impact on farming operations.[13]

(f) Requires farmers to engage in expensive consenting processes when RMA has bias towards minimal regulations or PA rules.

7. It is important to restate what the POP's objectives are in relation to intensive agriculture. The objectives are:

(a) To regulate existing and future intensive agriculture particularly in the specified catchments through a farmer friendly consenting process that ensures BMP's are adopted in farming operations with a view to progressively reducing nutrient leaching using specific targets; and

(b) To enable active engagement between HRC and farmers at the farm scale through resource consents to achieve BMP's over time; and

(c) To recognise that changes in farming practice to achieve BMP's do not need to be made at a rate and in a way that makes farming unviable; and

(d) To consequently achieve measureable reductions in total kilograms of N and P per year to reduce the potential for periphyton growth at times when N or P is the limiting nutrient (particularly in water management zones exhibiting poor ecosystemic health as a result of intensive agriculture), as well as reducing faecal contamination.

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[10] Issues with LUC were raised by a number of submitters. Sean Newland's SOE from Fonterra is a useful compendium of the concerns raised.
[11] The usefulness of Overseer where there is mixed use farming with pastures and cropping was raised.
[12] See for example Smeaton SOE
[13] See McIndoe, Newland for Fonterra

8. Below is an examination of each of the major planks on which the challenge to POP's provisions on intensive agriculture are based.

9. The POP does not rest on the assumption that there will be exponential growth in dairying but rather that present land use is having unacceptable adverse effects that will be exacerbated by incremental growth. The key evidence in that regard is:

   (a) The actual evidence of compounding growth over the last 20 years and its effect on both the total number of dairy cows and average stocking rates.[14] In that regard it is noted that the percentage growth figures supplied by Mr Hoggard are inaccurate and also do not present the 20 year period of growth where the effect of compounding growth can be seen;[15]

   (b) The s.42A report of Dr Mackay demonstrated considerable potential for more dairying in the Manawatu; and

   (c) The report of Dr Parfitt on the consequences of compounding growth.[16]

   In the face of the consequences of growth, there is a clear and present danger of further significant environmental degradation over the life of the plan if a do-nothing approach is adopted. The consequences of those risks are real as is demonstrated by the recent declines in water quality in the Otago and Southland regions. Risk predictions over the life of the plan are an essential part of the plan making inquiry.[17]

10. The central purpose of using LUC classification to set N values is to adopt "natural capital" framework to the future management of nutrients. The natural capital approach to achieving ecological sustainability is not new.[18] Whether or not framework is sufficiently precise for a standard for activity classification, is a separate question dealt with below. The LUC

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[14] See Roygard statement in reply
[15] The calculations are on their face wrong
[16] Dr Parfitt s.42A report paragraphs 9-14
[17] See *Long Bay-Okura Great Park Society Incorporated v. North Shore City Council* ENV A078/2008
[18] See for example *Restoring Natural Capital: An Action Agenda to Sustain Ecosystem Services* World Resources Institute: Washington DC.

classification is (even allowing for potentially slight[19] elements of uncertainty and subjective assessment on the margins) plainly on the evidence a comprehensive and scientific classification system for discriminating between the productive nutrient absorption capacity of landscapes. There is no serious challenge to this assertion on the expert evidence but there were two outliers put forward by farmers where the LUC system may not be appropriate i.e irrigation on soils where water (w) is the limiting factor and large scale modification of coastal soils through earthworks. Both of these situations are sufficiently rare, they hardly call into question the overall framework proposed. In addition, increased production on such landscapes is still going to result in N loss at the root zone because of the inherent qualities of those soils. The real question is what are the consequences if such farming activities do not fit within the framework. Are the policies for assessment of farms that fall into the default category sufficient to identify and address such situations?

11. It is interesting to note that the natural capital approach is endorsed by Fonterra. Fonterra wishes to see use of land reflecting existing natural capital of a resource rather than historical patterns of land use. This would appear to align comfortably with section 7(b) RMA:

> "The efficient use and development of natural and physical resources."

At paragraph 46 of his SOE Gerald Willis stated:

> "The LUC approach is appropriate to the extent that all attempts to manage N according to the level of productivity appropriate to the natural capital of land (setting aside for the moment issues associated with the LUC classification system as discussed by Mr Newland)."

12. The Hearing Panel asked questions of certain Fonterra witnesses as to why the LUC system should be used at all if it had some of the problems they mentioned. The answer was consistent across all those witnesses. The LUC system was useful for setting targets.[20] The question between HRC

[19] Mr Smeaton put it no more highly than this

and Fonterra therefore is not whether the LUC system should be used at all but its function in the plan. Bluntly, should LUC be part of the rules and standards of activity classification or should Table 13.2 be targets in the policies. Depending on the wording the difference between these two options are marginal. Targets and policies can after all be set so they operate similar to rules.[21] Nevertheless, for the vast majority of farming operations the ascertainment of the LUC system is sufficiently precise for use of LUC (and consequently the permissible N in kg/ha/yr) for use as a standard in activity classification. In that regard it is useful to reflect on the following passage from McGechan J in *McLeod Holdings Limited v. Porirua City Council*[22] where His Honour, dealing with the sufficiency of terms in a permitted activity (and therefore equally applicable to controlled activities), said:

> "I do not quarrel with unwillingness to permit predominant uses to be conditioned by concepts as vague as "amenities". However, it is important matters do not progress too far. There is to be no automatic importation into such objectively phrased situations of the rule established in relation to subjective decision formula. Further, and importantly, a description of, and condition attached to, a predominant use is not to be condemned simply because there is some element of degree, judgment, or "value judgment" involved in its ascertainment. There will usually be some element of judgment involved in application of descriptions to factual situations. There will usually be some element of degree. Some matters can be ascertained without undue difficulty and debate. There is a difference, after all, between "substantial" and "beautiful". The law does not require predominant uses to be defined ("specified") with scientific or mathematical certainty. Some degree of flexibility is permissible. A decision making body frequently must hear evidence, and reach a conclusion after weighing competing factors. In the end, the question reduces to one of degree: is the subject description too wide, or too vague, to have "some measure of certainty"? That is not an inquiry assisted by imported references to "discretion" and "value judgments". It is not a situation for automatic condemnation because some degree of evaluation is involved."

13. It is therefore considered that the requirement for compliance with Table 13.2 (as it presently is) to achieve controlled activity status and in particular, compliance with the maximum cumulative nitrogen leaching values for the 4 (5 year) periods over the life (20 years) based on LUC class is not necessarily invalid. But the potential difficulty over precise ascertainment may be a good reason amongst others to shift Table 13.2

[21] *Auckland RC v. North Shore City Council* [1995] NZRMA 424
[22] High Court Wellington Registry CP949-89 dated 19 September 1990

into the policy framework rather than as a standard for activity classification.

14. There was evidence of some examples of existing farming enterprises where the LUC classification would encounter difficulty if part of the rule suite. These were typically coastal farms where irrigation or earth works had eliminated or significantly ameliorated natural limiting conditions.[23] As stated these relatively unusual situations do not present a serious challenge to the use of the LUC system or the natural capital methodology generally. These situations do however point to the need for sufficient flexibility in the planning framework to recognise these changes rather than straightjacket farmers into a nutrient management regime as if these changes had not occurred. Achieving this flexibility is a comparatively straightforward exercise and achieved by making Table 13.2 part of the policies and providing additional policies recognising these rare examples.

15. Dr Ledgard gave uncontradicted evidence that the Overseer model, if correctly operated and accurate input are entered, closely approximates actual nutrient leaching values from pastoral farming. He also gave evidence that the software model is in a process of refinement and new modules are added including modules relating to cropping. As a tool to predict likely nutrient leaching from intensive agriculture and as a tool to manage and monitor achievement of environmental objectives relating to nutrient leaching, Overseer has received explicit recognition in the case law. In *Carter Holt Harvey Limited v. Waikato Regional Council*[24] the Environment Court said:

> "[45] Mr Stewart Ledgard, a soil scientist, described the application of OVERSEER and the nitrogen leaching sub-model. In pastoral fanning systems the major contributor to nitrogen leaching is animal urine along with minor amounts from animal dung, dairy effluent and fertiliser". The model uses the long-term average rainfall data for each site and therefore estimates the long-term average nitrogen leaching rate rather than the more variable actual leaching rate for a particular year.
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> [46] Mr Ledgard presented validation data from seven dairy farms showing a highly significant agreement between the

[23] The evidence of Mr and Mrs Barber regarding Himatangi Station is a good example of large scale modification of natural landscapes.
[24] Decision No A 123/2008 [EC]

measured and calculated amounts of nitrogen leaching using OVERSEER he acknowledged that there is some uncertainty in the model calculations and estimated this to be of the order of±20% although this variability would be less when assessing alternative practices for a particular farm. Mr Ledgard explained that it would be impractical and expensive to measure nitrogen leaching from farms except for ongoing model validation and testing of new mitigation practices.

[55] The OVERSEER model provides an estimate of the nitrogen leaching from the root zone of farming systems. This is an established model and its precision and accuracy have been confirmed by a considerable body of research. The long-term equilibrium approach of OVERSEER considers the impact of changes in land use or management approaches and expresses those impacts immediately in the newly calculated leaching rate. Thus any change in nitrogen inputs is immediately reflected as a change in outputs even though the actual leaching rates will trend up or down (depending on the changes made) over a period of years.

[107] It is worth repeating that OVERSEER is a long-term equilibrium model. As such it does not estimate the actual leaching rate of nitrogen at the present point in time. Instead it calculates the long-term equilibrium leaching rate for a given set of farm management practices, using the long-term average rainfall. Where farm management practices are unchanged over many years and for average rainfall, this estimated equilibrium rate will be the same as the actual rate of nitrogen leaching. Where farm management practices are changing, the actual rate of nitrogen leaching will lag slightly (depending on a number of factors, including the magnitude of the change and the soil conditions), taking time to trend up or down to the new equilibrium rate. Thus a farmer can immediately see the consequences of any changes in the inputs and/or pathways of nitrogen in the newly calculated equilibrium leaching rate of nitrogen.

"[144] Although joint caucusing between the planning experts resulted in a draft proposed permitted activity version of the rule, we find that it falls well short of the requirements for a permitted activity. No doubt some further re-drafting could improve it. But we do not accept that it can achieve certainty, or comprehensibility, or reduce the need for expert judgement, to satisfactory and adequate levels. Although the same procedure is to be followed throughout the catchment, the application to each property requires discretion to recognise site specific variations. We find that overall the task required of any rule to implement Policy 3(b), in particular, is too complex and requires considerable."

16. The evidence to the Hearing Panel is broadly consistent with the findings of the Court with the consequence that:

(a) Overseer is a reliable tool for monitoring ongoing compliance with nitrogen management plans; and

(b) Overseer requires expert use; and

(c) Optimal utilisation of computer models requires council oversight.

17. In light of these conclusions it is considered that the performance conditions as expressed in the recent and latest (pink) versions of Rule 13-1 can be problematic in that they require the Overseer model to be used to predict compliance or otherwise with targets (which change suddenly at specified time periods in accordance with Table 13.2) as a result of improvements in management systems and farming methodology. The Overseer model is however perfectly adequate:

(a) To determine what steps will achieve nutrient leaching targets;

(b) Monitor the long term achievement of nutrient leaching targets.

18. Some farming interests questioned the practical ability of farmers to achieve the N limits contained in Table 13.2. In particular it was contended:

(a) That Table 13.2 contains incorrect assumptions about the effectiveness of some technologies to deliver reductions in N leaching, for example, N inhibitors may not be as effective as some manufacturers claim in certain landscapes e.g. high rainfall areas.

(b) The cost of some capital works is sometimes too great relative to the environmental benefits; and

(c) Achievability is far more farm specific than Table 13.2 recognises.[25]

19. Risks that the targets in Table 13.2 are not achievable based on best management practice is a risk to be considered in deciding whether or not Table 13.2 should be a performance condition for controlled activity status or a target to be achieved in conjunction with policy recognition that conditions will require no more than best management practice informed by what is reasonably achievable. An ideal regulatory regime will:

[25] This is a point of emphasis. See Smeaton SOE paragraph 14.

(a) Set targets over a reasonable timeframe that are consistent with the ethic of sustainability; and

(b) The policy suite recognises that achievement of the targets will be at a way and at a rate that is reasonable in cost/benefit and achievability terms.

20. A regime can be created that provides the necessary flexibility. It is considered this need for flexibility is supported by comments in the Environment Court in the *Carter Holt* decision which also recognised the farm specific nature of achieving solutions which consequently may not support the approach of setting N limits as rules.

21. Gerald Willis summarised his view on this issue in this way:

> "Although the science tells us there are many ways to reduce N-loss, experience has shown that there are practical and financial barriers to the adoption of many of these measures "on-farm." While some of these barriers are surmountable they do suggest a realistic transition period is required.[26]

22. There is a significant logical flaw in Fonterra's argument that was not explored in questions by the Hearing Panel. Mr Smeaton said that reduction of up to 10% of N leaching is achievable immediately on most farms.[27] Incidentally, given this hasn't already been implemented it may indicate something about the effectiveness of industry education to change practice. Then, Mr Willis gave evidence suggesting the plan let farmers demonstrate through a voluntary regime modest improvements to achieve more relaxed levels (in the year 1-10 period) to show voluntary methods will work. However, those levels will not achieve the reductions that can be achieved without cost on Mr Smeaton's evidence. Therefore Mr Willis is wrong that the achievement of the easy '10%' will prove that voluntary controls will work. What it will prove is that farmers will change practice that doesn't affect the bottom line. However, improvement beyond that is the difficult

[26] Paragraph 30(b) Gerald Willis SOE
[27] See paragraph 20 Smeaton SOE

part and that is one reason why it is considered regulation over the life of the plan is required.[28]

23. The question of disproportionality between capital cost and environmental benefits isn't a significant issue. The examples of bad farm management identified by Alison Russell are egregious examples where capital works including river crossings are justified to avoid nutrient enrichment of waterways and faecal contamination. It is however conceivable that to achieve N limits set in rules capital works may be required which have a cost disproportionate to their environmental benefit. This potential risk can be solved by appropriate policy informing the setting of conditions.

24. Fonterra argued there was insufficient information as to potential economic impact on farming operations arising from Rule 13-1 and Table 13.2. In relation to that argument it is considered that:

(a) The evidence of Jeremy Neild and Tony Rhodes provides a very robust statement of the likely order of magnitude of economic cost associated with the imposition of Rule 13.-1 and Table 13.2; and

(b) Fonterra, despite being the largest company in New Zealand and the recipient of at least 90% of farming supplies did not present credible evidence of an alternative assessment of the economic effects; and

(c) If Fonterra was unable to do (b) above this raises questions in my mind as to its capacity as an entity to orchestrate voluntary improvements.

25. It is considered that there is a solution for the problem identified by Fonterra. That is, a policy that ensures in setting the conditions the rate of change and cost of change does not exceed a reasonable level. This is consistent with the approach recommended by Gerald Willis who recommended new Policy 13-2b.[29]

26. In this context it is appropriate to consider an underlying theme of some individual submissions which one may call 'agricultural environmental

[28] This is further reinforced by the "shutting out" concern in Smeaton's SOE at paragraph 25. Farmers will try and achieve the economic performance benchmarks of their peers in other regions unless regulated.
[29] See Willis SOE, paragraph 84

exceptionalism'. By this it is meant a view that because the activity being undertaken is agriculture (and therefore food supply) it is to be treated differently from any other industry in terms of its management of pollution and should not bear the cost of pollution management. The term 'pollution' is used non-emotively and means anthropogenic causes of physical changes to the environment that have adverse effects on ecosystems.

27. Industries of all types have to meet additional costs associated with improved environmental performance.[30] The general approach of the Courts has been that the cost of addressing the externalities of industry could be typically borne by the industry not the community. This is only limited by the statutory protection from unreasonable restrictions on land use with the fundamental pressure that controls to achieve sustainability do not trigger rights to compensation.[31]

28. Incidentally, Fonterra has not advanced the view the community should meet the cost of the externalities of its suppliers, it rather challenges the rate of change required.

29. Some farmers and their representative bodies have expressed a strong desire to avoid requiring resource consents. Some submitters have also suggested that there was either a statutory or case law bias towards permitted activity rules. There is no such bias expressed in the RMA or case law other than the general theme that regulation must be tailored to achieving sustainability and sufficient (but no more than necessary) to address potential effects. Some people wrongly regard the term "efficiency" in section 32 RMA as a code for less regulation forgetting that the word 'effectiveness' is also required. Efficient does not mean or imply a bias towards market controls as opposed to regulation. The Concise Oxford English Dictionary definition of efficiency is as follows: "working productively with minimum wasted effort or expense."

30. Rules governing agricultural activities of a land use nature fall within section 9, part 3 RMA. Section 9 is drafted differently from, for example, section 15. The difference in presumption is said to indicate a higher threshold for

[30] Consider for example the significant upgrade costs associated with point source discharges in the Manawatu over the last six years.
[31] See section 85 RMA.

intervention in respect of land use. Again, there is no support for that view within the RMA or expressed in case law. For example the differences between section 9 and section 15 do not translate into materially different responsibilities for plan making. For example, while the functions are different the tests (including section 32) remain the same. Judge Sheppard considered the differences in provisions in part 3 in *McKay v. The Whangarei District Council*[32]. At paragraphs [7] and [8] the Court simply noted that the difference created a difference in presumption.

> "[7] We accept that the provisions of Part III of the Act governing activities can be divided into two classes. The effective provision of those in the first class is typically in these words or to the like effect:
>
> > "*No person may ... in a manner that contravenes a rule in a ... plan or a proposed ... plan unless the activity is expressly authorised by a resource consent ...* "
>
> The effective provision of those in the second class is typically in these words or to the like effect:
>
> > "*No person may ... unless ... expressly allowed by a rule in a ... plan and in any relevant proposed ... plan or a resource consent ...* "
>
> [8] The essential difference between the two classes of provision is that those in the first class prohibit activity that contravenes a rule in a plan or a proposed plan unless the activity is authorised by resource consent, and those in the second class prohibit activity unless it is expressly allowed by a rule in a plan and any relevant proposed plan or a resource consent. The effect is that activities to which provisions in the first class apply only require resource consent if they contravene a rule in a plan or a proposed plan; but activities to which provisions in the second class apply require resource consent unless expressly allowed by a rule in a plan and any relevant proposed plan."

31. It is considered that the fact that rules governing intensive agriculture address land use:

    (a) Does not affect the obligation to achieve the overarching objective of sustainability but does recognise effects on patterns of existing land use are a relevant part of the environment in assessing the sustainable outcome; and

    (b) Does not affect the functions of the Regional Council; and

[32] Decision no. A5/2002 dated 21 January 2000.

(c) Does not affect the statutory tests against which alternatives are measured in section 32.

32. In the *Carter Holt* decision a controlled activity rule was preferred by the Court to a permitted activity rule because:

(a) A proposed permitted activity rule was not drafted with sufficient certainty or comprehensibility; and

(b) A discretion to recognise site specific variations was regarded; and

(c) The Regional Council had a role to play ensuring quality control of a complex implementation process.

33. All of the grounds identified in the *Carter Holt* decision are relevant to the assessment of the best activity classification in the POP. Submitters advancing a PA rule did not provide a drafted let alone certain or comprehensible rule. Point (b) above was emphasised by many submitters. Namely, each farm is special in the circumstances and controlled to apply to it need to be farm specific. Point (c) above is interesting and seems to have been highly persuasive for the Environment Court. The Court saw a need for Regional Council oversight and monitoring and saw such a role in a positive light.

34. Under section 68(1) RMA rules are to assist the Regional Council's performance of its functions. Regional Council functions include "control of the use of land" for the purpose of maintenance and enhancement of ecosystems and water bodies.[33] Control as defined in the Shorter Oxford Dictionary is "constraint, limitation, restriction, check or curb". Given that presently land use in the specified water management zones (leaving to one side the consequences of future growth) is not being managed in a way that safeguards the life supporting capacity of the waterways in the specified water management zones (HRC contends that this is demonstrably the case) then a PA rule without control of nutrient leaching does not amount to "controlling" for the purpose of the Act and within the meaning of section 68(1). A PA rule that does not control nutrient leaching creates a permitted baseline of effects (i.e. unlimited nutrient leaching) that does not safeguard

[33] See section 30(1)(c)(iiia) which was inserted by the Resource Management Amendment Act 2003

life supporting capacity of acquatic ecosystems and the environmental consequences of the baseline is to be assessed in light of its operation over the life of the plan. The risk prediction by HRC is that such a permitted baseline will grievously worsen already degraded health in the specified aquatic ecosystems.

35. The amendment of section 30 RMA by the addition of section 30(1)(c)(iiia) in 2003 was significant. It was added alongside section 30(1)(ga) that related to biological diversity. Both provisions were added by section 9 of the Resource Management Amendment Act 2003. As stated previously in relation to POP chapters on biodiversity these provisions were in direct response to Crown obligations under treaties and in response to national recognition of unacceptable declines in terrestrial and aquatic species distribution and population sizes. Furthermore it is submitted that the legislative amendments were made within a social milieu where it was recognised in New Zealand/Aotearoa that land use was a significant cause of declining water quality and consequently declining ecosystemic health.[34]

36. Functional metrics of aquatic ecosystemic health are central to measuring life supporting capacity of water. It is an internationally recognised methodology used in conjunction with physiochemical and biological indicators.[35] Dr Young's evidence demonstrated through measuring respiration rates and gross primary production that in several management zones poor ecosystemic health was indicated. The overall monitoring within

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[34] Non point source contamination is not a new issue as some people claim and is considered in *The State of New Zealands Environment* (1997) which amongst other things in Chapter 7 provides estimated tables of yearly nitrogen loads in our waterways and in figure 7.9 the picture is the same as presented at the water hearings that agriculture is the dominant source of nitrogen loading by a considerable margin. Diffuse contamination from agricultural activity was also identified almost ten years ago as a significant contributor to adverse effects on freshwater biodiversity in *The New Zealand Biodiversity Strategy* (February 2000) page 48 with the consequence that objective 2.1a was inserted to ensure the Resource Management Act adequately provided for the protection of freshwater biodiversity from the adverse effects of the activities on land and water. The Local Government and Environment Committee in reporting back on the 2003 amendment to the RMA recommended that section 30(1)(c)(iiia) be retained for the purpose of emphasizing that Councils can control land use to maintain and enhance ecosystems in water bodies. At page 25 of the Committee's report it said: "On the other hand, we recommend the retention of the provisions in the Bill that give regional councils responsibility for maintaining and enhancing ecosystems in water bodies and coastal waters. This will emphasise that regional councils can control land use for the purpose of maintaining and enhancing ecosystems in water bodies."

[35] See for example the recent decision of the District Court of West Virginia in a judicial review proceeding *Ohio Valley Environmental Coalition v. United States Army Corps* CA No. 3:05-0784 dated 23 March 2007 Chambers J. As Chambers J said a distinction between structures and functions is similar to attributes of a person such as height and weight whereas functions are akin to blood pressure and heart rate.

the Horizons region and the supporting scientific interpretation presents a coherent picture of life supporting capacity being compromised with notable areas such as the upper Manawatu being very poor.

37. It is considered that the combined effect of s. 5 and s. 30(1)(ga) and related provisions is that where activities materially compromise the life supporting capacity of aquatic ecosystems then regional councils must (unless there are exceptional circumstances) 'control' the land use for the purpose of maintaining and enhancing water quality and must set policies and rules that effectively and efficiently achieve this.[36] This is broadly consistent with the conclusions of the Board of Inquiry on the Proposed National Policy Statement for Freshwater Management.[37] While that document is not something the Hearing Panel must have regard to it is a statement by an august panel of their assessment, after receiving national submissions of the policy direction, required to achieve the RMA's requirements and therefore a significant intellectual resource.

38. Therefore after considering the information presented to the Hearing Panel, it is considered that the preponderance of evidence demonstrates that:[38]

    (a) Control of intensive agriculture to reduce nutrient leaching is required to maintain and enhance freshwater quality and safeguard life supporting capacity of freshwater ecosystems; and

    (b) A permitted activity rule that does not set measurable limits on nutrient leaching and does not give HRC the ability to impose BMP's (and this power is fundamentally inconsistent with the concept of a permitted activity) does not represent 'control' within the meaning of the RMA and would effectively create a baseline of environmental effects over the life of the plan that cannot be justified given the statutory directions in Part 2; and

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[36] As Jackson ECJ said in *Memon v. Canterbury Regional Council* [2006] NZRMA 244 at paragraph 95 protection of life supporting capacity in section 52b is part of the part 2 hierarchy and not easily overridden.

[37] *Report and Recommendation of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management* (January 2010) and in particular paras 205-208 on different source discharges

[38] The term 'preponderance of evidence' comes from the *Long Bay – Okura Park Society Incorporated v. North Shore City Council* decision

(c) There are justifiable resource management grounds for distinguishing in the policy and rule stream between existing intensive agriculture and new intensive agriculture;

(d) That in respect of existing intensive agriculture production the existing discretionary default classification arising from non compliance with Table 13.2 is inappropriate and that the 'right to farm' should be recognised by a default class no less favourable than 'controlled'.[39]

(e) General policies should be included in the plan to the effect that:

> Nutrient management will be undertaken within a framework that recognises the natural capital of landscapes and the landscape's ability to absorb nutrients from intensive agriculture using the New Zealand Land Resource Inventory System.
>
> The plan recognises a distinction between existing and future intensive agriculture on the basis that existing patterns of land use have developed in good faith without the present scientific understanding of nutrient leaching processes and their consequences with the result that:
>
> (a) Conversions to intensive agriculture on any land in the Manawatu-Wanganui region after the plan becomes operative, must achieve sustainable nutrient values from the date of their commencement; and
>
> (b) In the case of existing intensive agriculture, the plan seeks to place nutrient limits in specified catchments where the intensive agriculture is a major contributor to nutrient enrichment in waterways

[39] The concept of the 'right to farm' derives from North American experience which operates within a different legal construct where highly developed nuisance laws would authorise class actions for farming activity that contaminates waterways and specific legislation is passed protecting farmers from that litigation (called 'Right to Farm' laws) subject to compliance with GAAMPS which are state authorised best management practices. See for example *Lessons from Michigan: Strategies for Regulating Intensive Livestock operations – right to farm and the role of the state:* Caldwell Ball and Williams (September 2002) A paper presented to the national conference: "Integrated Solutions to Manure Management"

and there is demonstrable poor ecosystemic health as a result. This is to be achieved by means of conditions in resource consents to manage nutrient leaching.

(c) Conversions to intensive agriculture will require resource consent throughout the region.

(d) Resource consent applications for conversion must include all activities likely to occur in conjunction with the land use and that contribute to the potential for nutrient leaching; and

(e) To qualify as a controlled activity, the conversion must meet sustainable nutrient leaching values; and

(f) Conversions not meeting sustainable nutrient leaching values will generally not be granted consent unless there are special circumstances that demonstrate:

(i) Any deviation from sustainable nitrogen leaching values are minor; and

(ii) The activity is proposed to be carried out using best management practices available.

(f) There should be a full policy suite informing the conditions to be imposed on any controlled activity for existing intensive agriculture that address the following matters:

Existing intensive agriculture in specified catchments will require consent and that consent must be granted.

Existing intensive agriculture will not be required:

(a) To reduce the stocking rates for pastoral farming applicable at the time the plan becomes operative; or

(b) To reduce the intensity and area of cropping applicable at the time the plan becomes operative; or

(c) To undertake nutrient management measures beyond what is reasonably practicable based on current best management practice.

Conditions of consent will be set to ensure as far as practicable, existing intensive agriculture in conjunction with any other consented activities carried out as part of the intensive agriculture enterprise will achieve the cumulative annual nitrogen maximum targets for the relevant periods as set out in Table 13.1 over the life of the consent and to meet other reasonable conditions required to manage phosphorus leaching and to limit faecal contamination.

In setting conditions for existing intensive agriculture the following specific policies will guide decision makers in imposing conditions:

(a) The practical achievability of meeting the targets in Table 13.1 based on current technologies and best management practice.

(b) Conditions must set BMP's that are reasonably practicable and must recognise special limitations on the achievability of targets for farming activities especially where:

(i) Average rainfall exceeds 1200mm/annum; and

(ii) At least 50% of the land is LUC iv or less (i.e: v, vi, vii, or viii); and

(d) Monitoring and information requirements will be imposed to monitor compliance with consent conditions.

(g) The policy suite should require achievement as far as practicable of the nutrient leaching values in an equivalent of table 13.1 as set out below.

Period when nitrogen leaching values apply	LUC I	LUC II	LUC III	LUC IV	LUC V	LUC VI	LUC VII	LUC VIII
Period 1 this is the period from the date Rules 13-1 and 13-1A come into force based on table 13.2 to the fifth anniversary after the rules come into force	32 (kg of N/ ha/year)	29 (kg of N/ ha/year)	22 (kg of N/ ha/year)	16 (kg of N/ ha/year)	13 (kg of N/ ha/year)	10 (kg of N/ ha/year)	6 (kg of N/ ha/year)	2 (kg of N/ ha/year)
Period 2 From the 5th anniversary from the date Rules 13-1 and 13-1A come into force based on table 13.2 to the 10th anniversary after the rules come into force	27 (kg of N/ ha/year)	25 (kg of N/ ha/year)	21 (kg of N/ ha/year)	16 (kg of N/ ha/year)	13 (kg of N/ ha/year)	10 (kg of N/ ha/year)	6 (kg of N/ ha/year)	2 (kg of N/ ha/year)
Period 3 From the 10th anniversary from the date Rules 13-1 and 13-1A come into force based on table 13.2 to the 15th anniversary after the rules come into force	26 (kg of N/ ha/year)	22 (kg of N/ ha/year)	19 (kg of N/ ha/year)	14 (kg of N/ ha/year)	13 (kg of N/ ha/year)	10 (kg of N/ ha/year)	6 (kg of N/ ha/year)	2 (kg of N/ ha/year)
Period 4 From the 15th anniversary from the date Rules 13-1 and 13-1A come into force based on table 13.2 to the 20th anniversary after the rules come into force	25 (kg of N/ ha/year)	21 (kg of N/ ha/year)	18 (kg of N/ ha/year)	13 (kg of N/ ha/year)	12 (kg of N/ ha/year)	10 (kg of N/ ha/year)	6 (kg of N/ ha/year)	2 (kg of N/ ha/year)

39. HRC contends that 80% of farms in the specified management zones will be able to achieve the target cumulative nitrogen values through the introduction of BMP's. That is the premise on which it presented POP. The risk that that prediction is inaccurate should not fall on existing farmers without a new plan. Therefore the policy suite should emphasise that

conditions will require implementation of BMP's rather than the achievement of specified N limit targets.

40. It is contended by HRC that 60% of the dairy farms in the specified management zones can comfortably meet the N limits in Table 13.2 using BMP's. There is an argument that in respect of that group, provision should be made for a PA rule similar to that suggested by Mr Willis. This would involve performance conditions for the farming activity that provided:

(i) Information to be supplied regarding the farm and farming activity in the same manner as for controlled activities;

(ii) All discharges pursuant to section 15 associated with the farming activity must already be consented;

(iii) The person carrying out the farming activity must ascertain the nutrient leaching values for that farming activity and the associated discharges must be based on the information supplied in (i) above using the Overseer model by an approved operator; and

(iv) The data sets for the use of the Overseer model shall be provided to HRC

(v) The Overseer predicted nutrient leaching levels for that farming activity and associated discharges during the relevant periods must meet the cumulative nutrient leaching values in Table 13.1; and

(vi) The farming activity must be carried out in accordance with the information supplied.

(vii) A biennial farming activity report must be supplied to HRC confirming compliance with farm management practice assumed in the Overseer model.

This is an 'opt out' rule rather than a mandatory rule controlling all farming activity. This 'opt out' rule enables those farmers that wish to do so and are able to do so to avoid the need for a resource consent subject to

provision of the necessary information. It assumes that all discharges are consented as it is not intended that the discharges also be treated as permitted. It will apply to 'vanilla' dairy farming operating on a standard platform and where there are no significant landscape challenges. In such cases both the farmer and HRC accept the outcome of the Overseer model as definitive in achieving the necessary environmental outcomes.

41. This paper has steered away from such terms as 'cap and trade' and 'grandparenting' simply because there is no statutory basis and a solution applicable in one place may not be relevant to another. For example, if 'grandparenting' means excusing farming activities from improving management and thereby continuing unsustainable levels of nutrient leaching then it is difficult to see the RMA justification for this in the present regional context. The policy suite can provide an adequate 'grandparenting' of existing farming activity, for example, by explicitly not requiring de-stocking as an outcome of the regulatory regime.

Proposed Rule 15-1 (Minor Takes and Uses of Surface Water and the Meaning of 'Individual')

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42. A number of submitters presented legal submissions on the meaning of the term individual in section 14(3) RMA. It is important to remind oneself of the context in which that issue has arisen. The issue has arisen in the context of proposed Rule 15-1 that reads in the pink version:

Rule	Activity	Classification	Conditions/Standards/Terms	Control/Discretion Non-Notification
15-1 Minor takes and uses of surface water^	The taking and use of surface water^ pursuant to s14(~~21~~) and s14(3)(b) RMA~~- excluding those rivers^ protected under Rule 15-7 and except where the water^ take is controlled under Rule 13-1.~~	Permitted	(a) The rate of take shall not exceed: (i) 30 m3/d per property* where the water^ is required for an individual's reasonable domestic needs and/or the reasonable needs of an individual's animals for drinking water^, (ii) 15 m3/d per property* where the water^ is for any other use. The rates of take allowed under subsections (i) and (ii)	

			cannot be added: the maximum allowable rate of take under this rule^ is 30 m3/d per property*. (b) The rate of take shall not exceed 0.5 2.0 l/s.30 (c) An intake screen with a mesh aperture size not exceeding 3 mm in diameter shall be used and the intake velocity shall not exceed 0.3 m/s. (d) The take shall not be from any wetland^ that is a rare habitat* 2 or threatened habitat*. (e) The water^ shall be used on the subject property*. The Regional Council shall be notified in writing of the location of the take, the maximum instantaneous rate of take and the intended use of water^.	

43. The issue falls into two distinct questions:

(a) Can a rule derogate from the statutory exemption in section 14(3)(b); and

(b) What does the statutory exemption mean.

44. A rule cannot override a statutory exemption but it may set rules at the boundaries where the exemption ends. In this case that is a quantification of what takes meet reasonable needs without adverse effects. The reference to 'individual' in performance condition (a)(i) should be substituted with the word 'person' as it is intended to cover not simply individuals but also 'persons'. It is also considered that the word 'reasonable' in performance condition (a)(i) is unnecessary as the plan determines what is an acceptable take for domestic needs or for animal's drinking without triggering the need for a consent and the word 'reasonable' adds nothing to the performance condition.

45. In relation to the second question, it is still considered that 'individual' does not extend to a partnership, group of persons or body corporate as argued in my first section 42A report. Further support for that view has been found in the following sources:

(a) The first reading of the Resource Management Bill contained a section 11 (now 12) that authorised the taking of water:

"(c) In the case of freshwater, the water, heat or energy is required for –

(i) reasonable domestic needs; or

(ii) the reasonable needs of animals –

And the taking or use does not have an adverse effect on the environment."

The amended Resource Management Bill as reported back from the Local Government and Environment Committee struck out the above provision and replaced it with the following:

"(b) In the case of freshwater, the water, heat, or energy is required to be taken or used for –

(i) an individual's reasonable domestic needs; or

(ii) the reasonable needs of an individual's animals for drinking water, -

And the taking or use does not, or is not likely to, have an adverse effect on the environment."

The purpose of this change originated from the Ministry for the Environment Departmental Report on the Resource Management Bill dated June 1990 that says in respect of the exemptions (and in particular exemption (c) as it then was):

"In paragraph (c) it is necessary to phrase the exemption more tightly and control significant takes of water by groups of people and for stock watering purposes."

Thus *extra-* statutory material supports the view that substantial takes for stock watering purposes by large corporate entities was to be controlled under the RMA.

(b) The laws of New Zealand in the *Environment Volume* at paragraph 67 states:

> "Domestic water use must now be for 'individuals' and the animals for which water may be taken or used must be owned by 'individuals'. Animals owned by farm companies therefore do not seem to be covered."

46. It is considered that Mr Gardner's submissions for Federated Farmers are incorrect including for the reasons that:

    (a) As the RMA was intended to be "an Act to restate and reform the law relating to the use of land, air and water"[40] it is a weak form of statutory interpretation to contend that Parliament did not intend a change from the Water Soil Conservation Act and it certainly would not override the statutory principles of interpretation set out in our earlier section 42A report; and

    (b) The passage from the *Water Volume* of The Laws of New Zealand paragraph 41 is contradicted by the *Environment Volume* referred to above.

47. It is considered the arguments by Ms McIndoe for Fonterra are similarly incorrect and in addition the case referred to by Ms McIndoe called *Chatham Islands Seafoods Limited v. Wellington Regional Council*[41] is not on point.

48. HRC therefore maintains that body corporates or partnerships taking water are not entitled to the benefit of the statutory exemption in section 14(3)(b). HRC's position is that:

    (a) A person who is not an individual and who is taking water in excess of that permitted by Rule 15-1 for that person's animals will be contravening the RMA; and

    (b) An individual that takes an amount more than that permitted by Rule 15-1 will be taking an amount that creates an adverse effect.

Policy 15-5: Common Catchment Expiry and Allocation of Surface Water

[40] See RMA heading dated 22 July 1991
[41] ENVC, A018/2004

49. This section is in response to submissions from Meridian Energy Limited dated 10 February 2010 on Policy 15-5. The two issues arising from Meridian's submissions are summarised below:

(a) **Issue 1** concerns the introduction of the common catchment expiry (CCE) mechanism in accordance with Table 11.1; and

(b) **Issue 2** concerns the priority or preference regime based on end use or existing priority.

50. The context is important. The policy is in Part 11 of POP and therefore part of the regional plan intended to inform a section 104 assessment of resource consent applications for the take and use of water pursuant to section 14 RMA. Policy 15-5 in the pink version states:

> "Policy 15-5 Consent review and expiry
>
> Resource consents to take water shall generally be reviewed, and shall generally expire, in accordance with the dates set out in Table 11.1. At the time of consent review or expiry the Regional Council will allocate water resources within each Water Management Sub-zone. In accordance with Policy 15-1 and in a manner which:
>
> (a) Allows for the taking of water within the allocable limits and minimum flow provisions set in this Plan for the subject Water Management Sub-zones.
>
> (b) Allows takes in the following order of priority:
>
> (i) Takes permitted under Rule 15-1 of this Plan and takes for the purpose of fire-fighting
>
> (ia) resource consents for takes or portions of takes for public water supplies which are predominantly for domestic use, that are due for review or that are expiring.
>
> (ii) Current *resource consents* that are due for review taking into account records of past actual water usage.

(iii) Current *resource consents* that are expiring and have been reapplied for at least 6 months prior to the expiry date for that consent, taking into account records of past actual water usage.

(iv) New *resource consent* applications for essential takes, being takes providing for the reasonable need for domestic or stock drinking water, hospitals, other facilities providing medical treatment, marae, schools or other education facilities, defence facilities or correction facilities.

(v) All other new *resource consent* applications based on the date of lodgement of the application.

This policy implements Objective 15-1."

51. Section 104(1) RMA states:

"(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–

(a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of—

(i) a national environmental standard:

(ii) other regulations:

(iii) a national policy statement:

(iv) a New Zealand coastal policy statement:

(v) a regional policy statement or proposed regional policy statement:

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application."

52. Environment Waikato proposed variations to its plan called Variation 6 to address intense competition for water resources in the Waikato catchment. There are similarities between Policy 15-5 and Variation 6 in broad terms although there is also differences. The submissions of Meridian on POP

contained a similar flavour to those presented on Variation 6. In considering Meridian submissions in this case, the following information has been considered:

(a) Relevant case laws including *Fleetwing Farms Limited v. Marlborough District Council*[42], *Central Plains Water Trust v. Ngai Tahu Properties Limited*[43], *Central Plains Water Trust v. Synlait Limited*[44] and *PVL Proteins Limited v. Auckland Regional Council.*[45]

(b) The decision of the commissioners' on Variation 6

(c) The submissions for MRP Limited, Genesis Energy Limited, Trust Power Limited and Waikato Regional Council.

53. In addressing issues 1 and 2, the principal authoritative legal sources are the RMA itself and the Court of Appeal decision *Central Plains Water Trust v. Synlait Limited*. It is not intended to go through Meridian's submissions in detail by paragraph as it is considered that those submissions have one or more of the following failings:

(a) They ask the wrong question; or

(b) Apply case law dealing with different points or fail to acknowledge the subtleties in the relevant case law; or

(c) Proceed on an incorrect understanding of the effect of Policy 15-5.

54. The following can be said about the common catchment expiry mechanism in Policy 15-5 POP:

(a) The CCE mechanism is in the regional plan and is intended to inform a decision on any resource consent application pursuant to section 104(1)(b) and does not and cannot purport to 'fetter' as opposed to 'inform' a discretion under section 104;

(b) The mechanism is not expressed in mandatory terms. The word 'generally' makes this plain; and

[42] [1997] NZRMA 385
[43] [2008] NZRMA 200
[44] CA 544/08, 18 December 2009
[45] ENCA61/2001

(c) The policy is a management tool to enable the regional council to meet the Act's purpose and fulfil its statutory function of integrated catchment management (see for example section 30(1)(a) RMA).

55. Consequently Meridian submission that the CCE policy is unlawful is flawed because:

(a) Plainly the CCE mechanism is not a 'fetter' in section 104 but regional councils can develop policies that inform a section 104 assessment; and

(b) The *PVL* decision did not decide that a CCE policy is unlawful it merely identified relevant considerations influencing a determination of the appropriate term on the facts of that particular case.

56. The CCE mechanism is considered by numerous regional councils as an important management tool so that water allocation issues do not become intractable by enabling:

(a) HRC to develop a clear picture of resource demand as the catchment expiry date approaches; and

(b) Avoid multi dimensional legacy issues associated with non-derogable unexpired consents; and

(c) The ability if necessary to amend in a convenient way the regional plan in anticipation of the catchment expiry date including inserting rules if appropriate to allocate the resource to best achieve the overarching objective of sustainable management particularly where demand is intense.

The issue is not one of the lawfulness of the CCE mechanism but whether it best achieves the purpose of the Act and assists HRC in fulfilling its functions.

57. The second issue concerns the effect of Policy 15-5 in instituting a priority regime based on matters of end use and existing priority. In addressing

this issue a convenient starting point is a consideration of the Court of Appeal decision in *Central Plains Water Trust v. Synlait Limited.*[46]

58. The *Central Plains Water Trust v. Synlait Limited* decision is the last in a long line of cases involving priority arguments over surface water. The particular context was competing claims to surface water in the Waimakariri and Rakaia rivers. The two protagonists were CPWT, a joint venture entity involving local authorities and Synlait Limited with dairying interests in Canterbury. Both contestants had in mind similar end uses of the water, namely irrigation.

59. The Court of Appeal held that there were two distinct themes in the RMA. These themes were:

(a) Efficient allocation of resources without unreasonable delay[47]; and

(b) The imperative of sustainable management.[48]

60. Based on those two themes, the Court separated the priority issue into <u>two</u> different priorities and understanding the distinction between the two is important. At paragraph 84 the Court said:

> "We have concluded that two different priorities need to be separated. One is *priority of hearing.* That is a matter of vital public concern because without it there can be no order in dealing with the essentials of life-land, water, air and the rest. Other legal systems have found it necessary to do more than provide principles and to stipulate rules so that people can manage their affairs; Justinian's Pandects provide one example of many. The other is *priority of merits."*

61. In relation to priority of hearing, priority is to be determined based on the time a complete application is lodged. In relation to a priority of merits, the determination is made in accordance with section 104. Priority of

[46] See A544/08, 18 December 2009
[47] See for example paragraphs 75 and 76
[48] See sections 77-83

lodgement is a relevant but not decisive factor in determining whether or not to grant consent.[49]

62. To illustrate the point. If there is an application to irrigate land that precedes an application by territorial authorities for surface water to supply an urban population then priority of hearing is determined on the basis of lodgement. However, the presence of an urban population in need of water is a relevant environmental factor that may inform a decision (presuming it's a relevant consideration that may be considered by virtue of the activity classification) whether or not granting consent would serve sustainable management. Generally where the application is for the same end use, such issues do not arise and the priority of hearing becomes a presumptive (but still not decisive) factor determining rights to allocation.

63. The authoritative case law therefore does not:

(a) Set up the 'first in first served' principle as a definitive basis for priority for allocation of the resource so much as the definitive basis for priority for determination of the application; and

(b) Does not purport to determine the rights and powers of regional councils to make policy informing determination of applications pursuant to section 104(1)(b) RMA;

(c) Is consistent with s. 124A as passed by RMA Amendment Act 2005 that determines priority of hearing but requires substantive decisions to have regard to all parts of the RMA.

64. Consequently, the largely flawed or incorrect discussion by Meridian on the priority case law can be put to one side.

65. Issue 2 therefore narrows down to a simple question. Can the regional council set policy on priorities for water to inform the exercise of powers

[49] Baragwanath J in *Central Plains Water Trust v. Ngai Tahu Properties Limited* (2008) NZCA 71 made it very plain in paragraphs 37-39 that the priority line of cases did not endeavour to set principles of law in relation to the evaluative exercise of the specialist jurisdiction of consent authorities in the Environment Court to determine whether or not in any particular case consent should be granted. In paragraph 37 Baragwanath J said: "While those Courts, in performing their task of construing the RMA is a matter of law may properly have regard to the principle in *Northland Milk,* we must take care not to allow that process to interfere with the fact-finding and policy evaluation roles of the council and the Environment Court."

under section 104. It is considered that the answer to that question is plainly, yes. That conclusion is consistent with the position contended for by Mr Cowper on behalf of Mighty River Power Limited in respect of Variation 6 in the Waikato although the answer to the question is approached in a slightly different way.

66. Sections 30(fa) and (fb) and section 30(4) were introduced by the Resource Management Act 2005 enabling rules to allocate natural resources. Those provisions do not mean policies concerning priorities intended to inform a determination of applications may not be used. The new provisions from the Resource Management Act 2005 do not state that. What they do is give explicit rule making power concerning allocation as a dimension of the general power in section 30(1)(e):

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

67. A rule is a regulatory instrument through which particular takes and use of surface water may be excluded or limited. In such cases the power to grant consent is affected. Policies have a different consequence although on the margins, the difference between rules and policies may be slim such as where a policy is expressed in very unequivocal terms. Policies inform the discretion but are not determinative of the power under section 104. A statement of priority in policy can be useful and in some cases highly desirable to assist decision makers to determine what outcome best serves sustainable management having regard to the overall environmental context in the particular case. Without some assistance in a community plan, the decision maker is left with no guidance. For example, expressing priority for local authority demand in Policy 15-5 is hardly surprising given the plain terms of s. 5 RMA.

68. Despite what is stated above the Policy 15-5 could benefit from some wording refinement. Nevertheless as a policy informing s.104 decision making Policy 15-5 appropriate and workable.

Policies and Schedules: In Part I POP or Part II POP?; That Is The Question!

69. An issue for the Hearing Panel is where particular policies and schedules should be located in the POP. This is ultimately a planning question to be answered consistent with the statutory requirements and appropriate to the particular regional context. This section of the Section 42A report examines the statutory context and looks at in particular two points:

(a) **Point 1:** the statutory provisions provide for a hierarchy of planning instruments and section 104 enables a consideration of them all but one would expect greater specificity lower down the hierarchy; and

(b) **Point 2:** the phenomenon of combined plans and how they are made makes traditional planning views of how plans are presented and where provisions are located somewhat outmoded.

70. In relation to Point 1 it is submitted that the RMA provides for a hierarchy. It is not possible to say that that is necessarily a movement from the general to the specific as National Environmental Standards are high in the hierarchy (being the first planning instrument identified in Part 5) yet can be (and are anticipated to be) very specific. Section 104 enables reference to all documents in the hierarchy. The documents lower in the hierarchy should give effect to the high order instruments and provide increasing guidance on the particular outcomes and relevant considerations in the plan expected in a section 104 assessment. It is difficult to do better than quote the decision of Fogarty J in *Whangamata Marina Society Incorporated v. the Attorney General of New Zealand*[50] where His Honour said at paragraphs 44-46:

[50] [2007] 1 NZLR 252

"[44] Having identified any actual or potential effects, and their relevant factual aspects, the next task of the consent authority is to examine those effects against a large number of statutory criteria. Those criteria are set out principally in Part 2 of the RMA comprising ss 5-8. They are also set out in a hierarchy of derivative statutory instruments usefully captured, at present, in s 104(1)(b):

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–

...

(b) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

[45] The concept of a hierarchy of instruments was approved by the Court of Appeal in *Canterbury regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189, 193-194. The scheme of the Act is that instruments which are subordinate within a hierarchy must not be inconsistent with superior instruments. This requirement limits the discretion of the subordinate authority. Delivering the judgment of the Court McKay J said:

> We agree that the Act provides what may be described as a hierarchy of instruments, to the extent that regional policy statements must not be inconsistent with national policy statements and certain other instruments (s 62(2)), and district plans must not be inconsistent with national policy statement or regional plan (s 75(2)). It does not follow, however, that there can be no overlap between the functions of regional authorities and territorial authorities. The functions of the latter are set out in s 41, and there is no need to read that section in any restricted way. To the extent that matters have been dealt with by an instrument of higher authority, the territorial authority's plan must not be inconsistent with the instrument. Beyond that, the territorial authority has full authority in respect of the matters set out in s 31. Its decisions can, of course, be contested by appeal to the Planning Tribunal under the provisions of the First Schedule. (at 194)

> [46] Consideration of these instruments is "*subject to Part 2*". This does not mean that these statutory instruments can be ignored, allowing the decision-maker to do a "green fields" analysis, simply from the statutory provisions of Part 2. For the statutory instruments that the decision-maker "*must, subject to Part 2, have regard to*" are themselves the product of Part 2 analysis. Each one of these statements and plan or proposed plans are themselves produced from a rigorous process designed to give effect to the criteria contained in Part 2. For more details see *Wilson v Selwyn District Council* [2005] NZRMA 76 at paragraphs [75]-[80]."

71. Combined plans will become increasingly common in the RMA scene as part of a search for regulatory simplification and ease of use. That is Parliament's wish as is evident in the Resource Management (Simplifying and Streamlining) Act 2009. While POP is to be determined as if that Act had not been passed, it is desirable to have an eye to that amendment. The amendment provides further encouragement of combined plans and does provide (in section 80(8)) specific direction for clarity in such instruments. The summary of the changes between the *pre* 2009 and *post* 2009 amendments are listed below:

(a) Section 80 RMA "Local authorities may combine, etc, plans" was repealed and replaced with a new section 80 "Combined regional and district documents".

(b) Former 78A "Combined regional and district documents" was repealed and inserted as new s 80(2) RMA.

(c) New section 80 is broadly a combination and expansion of former s 78A and s 80 RMA.

(d) The cabinet paper *Reform of the Resource Management Act 1991* (February 2008) produced by the Office of the Minister for the Environment state the reasons for the amendments to combined plans:

> "I propose to amend the RMA to enable all local authorities within the same region to combine to prepare a single document that fulfils the requirements of a regional policy statement, regional plans, and districts plans. Existing provisions regarding the ability of local authorities to

produce combined plans already exist in the RMA, but are unclear in respect of combining the regional policy statement into such a document. I propose that this lack of clarity be rectified also. Together these amendments will enable and encourage local authorities to produce a single document for their region that fully integrates regional and district council functions, obligations and powers, while reducing the cost burden to each local authority by encouraging them to share these costs of policy statement and plan preparation."

(e) It is therefore clear that the specificity introduced to section 80 with respect to the type of documents that may be produced jointly and who may produce them is a response to the perceived lack of clarity of the combined plan provisions under the former sections 78A and 80.

(f) The report of the Local Government and Environment Committee recommended few changes to the Bill, however it did recommend the introduction of s 80(7A) (ultimately becoming section 80(8)), for the following reason:

"... We recommend that clause 57 be amended to require that combined planning documents identify clearly the provisions in the document that are to be treated as provisions of a regional policy statement, regional plan, regional coastal plan, or district plan, and the local authority responsible for enforcing the respective provisions."

(g) S 80(8) states:

"(8) A combined document prepared under this section must clearly identify—

(a) the provisions of the document that are the regional policy statement, the regional plan, the regional coastal plan, or the district plan, as the case may be; and

(b) the objectives, policies, and methods set out or described in the document that have the effect of being provisions of the regional policy statement; and

(c) which local authority is responsible for observing, and enforcing the observance of, each provision of the document."

72. From the above information the following principles can be stated:

(a) An RPS is higher in the hierarchy than regional plans and has a region-wide lens; and

(b) An RPS may not contain rules; and

(c) Section 62 RMA sets out what an RPS must contain but does not state what it may not contain (other than rules) subject only to the preceding sections and it does not give permissible levels of specificity for objectives and policies. Section 59 describes the purpose of an RPS as follows:

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

The word 'overview' suggest a general summary but s. 59 has two legs. It provides for an overview as well as "policies and methods to achieve integrated management of the natural and physical resources of the whole region." This is a broad purpose enabling multiple levels of specificity;

(d) An RPS may not be amended by a private plan change; and

(e) An RPS must provide directions to local authorities regarding matters in s. 62(1)(c);

(f) If a regional plan contains non-complying activities it is necessary to have objectives and policies against which the second gateway can be considered although these may refer back to the RPS in a combined document.

73. Subject to and informed by the principles above it is considered that one would expect a decision of location of policies and schedules to be determined on the basis of which location most appropriately enable achievement of the purpose of the Act and HRC's ability to fulfil its statutory

functions efficiently and effectively. Dimensions of effectiveness and efficiency include:

(a) Finding assessment policies informing discretions under section 104 in the lowest document in the hierarchy; and

(b) The ability to adjust provisions relating to the management of particular resources by means of private plan change where this is intended to be possible. Thus standards should generally be in a regional plan as the recent Board of Inquiry on the RPS suggests (see E1) while resource inventories, methodologies and typologies can be in the RPS.

Standards: What's In a Name?

74. The question has arisen whether the standards in Schedule D should be called water quality standards or some other name. This question rests on the idea the term 'standard' may be interpreted as meaning a section 69 RMA standard, breach of which is impermissible. Incidentally, PNCC that was the principal party advancing this view conceded that such an interpretation was not available on the document (POP) read as a whole. At paragraph 2.5 of the legal submissions it was stated:

> "It is clear that this was not the Regional Council's intention since the rules do not work in that way. There are no rules stating the prohibitions that would be required if the rules in the Plan were to be interpreted as triggering section 69."[51]

75. Section 69 RMA was inserted from the RMA's inception. That provision and Schedule 3 RMA harks back to the Water and Soil Conservation Act 1967. It contains both qualitative and quantitative standards, breach of which is sometimes precluded by rules in a plan. Schedule 3 has been largely superceded by more sophisticated measures of water quality. The use of rules precluding consents that pass the thresholds and standards has

[51] See legal submissions PNCC paragraph 2.5

proved particularly ineffective as the provisions of the Manawatu Water Quality Catchment Plan demonstrated where one wants a trajectory of water quality improvement without declining all existing users.

76. The term 'standard' has a spectrum of meanings including; objective, benchmark, guideline or goal.[52]

77. A workable definition of a standard in the environmental context is:

> "A qualitative or quantitative statement of what is required to achieve an intended environmental outcome."

In the present case, Schedule D is a quantitative statement of what is required to meet the values applicable to each Water Management sub-zone.

78. To suggest (as PNCC does) that the term 'standard' implies the existence of a rule that does not countenance its breach is not only implausible given the plain and ordinary mean of POP but not supported by the RMA meaning of a 'standard' from which such an implication is said to be drawn. It is submitted that the RMA uses the term 'standard' in the sense described in the paragraph above. In particular:

(a) Section 69 refers to the standards in schedule 3 which are quantitative and qualitative requirements but for section 69 to apply there is a second leg required (section 61(1)(b)) that there are rules in a plan requiring observance of those standards; and

(b) The Board of Inquiry on the Proposed National Policy Statement for Freshwater Management similarly does not treat the term 'standard' as necessarily implying the existence of a rule as it proposes the use of a rule to prescribe the attainment of standards (see policy E1); and

(c) The term 'standard' has another meaning in the context of National Environmental Standards that includes (under section 43(2)(a)):

> "Qualitative or quantitative standards."

[52] See OED 11th Edition

79. It is considered that the term 'water quality standards' to refer to the quantitative measures in Schedule D is correct and well understood in the environmental law context. It sits within a framework (particularly Policy 6-3 and 6-4) which is subtly different depending on whether the existing water body meets the standard or not. In the case of the former, the Schedule D standards operate as benchmarks not guidelines and in the case of the latter, as goals or objectives. The spectrum of meaning in the term 'standard' is therefore particularly useful.

Chapter 15 and Hydro Electricity

80. This section responds to MRP Limited's submission on Chapter 15 and its desire for specific recognition of hydro electricity in POP with a clear consenting pathway.

81. It does not appear to be in dispute that hydro electricity is a take and use for the purpose of the rule suite.[53]

82. A central thesis of the MRP submission is that hydro electricity is different because of:

    (a) The provisions of section 7(j) RMA; and

    (b) The advantage of hydro electricity is that it is non consumptive and therefore should be treated differently than consumptive 'takes'.

83. The response to this argument is:

    (a) POP achieves section 5(a) and (b) by setting core allocations and environmental (minimum) flows;

    (b) Reading section 7(j) as mandating that section 5(a) and (b) may be overridden throughout the region is not only not consistent with case law, it fails to recognise the other elements of section 7 including

[53] While take and use are not defined, it would seem unarguable that these are elements of a hydro electricity scheme.

section 7(d); 'the intrinsic value of ecosystems' (a provision emphasised recently by the Board of Inquiry);

(c) It is not always the case that hydro electricity is non consumptive. This can be an inaccurate term. The proposed Wairau scheme in Marlborough involved a diversion of flow over 30 kilometres with water running through a channel that contained a series of generators. In such a case the scheme was (for that 30 kilometres at least) very much consumptive. It is generally true that a 'run of the river' scheme is non consumptive and is therefore not a 'take' in the same sense as other consumptive takes from an effects point of view as water is not permanently removed from the system; and

(d) MRP jibs at not only the core allocation trigger (which it says is not particularly applicable to non consumptive takes) but also the minimum environmental flow trigger for non complying status.[54] Suggesting that environmental flows should not apply to hydro electricity throughout the region purely on the basis of section 7(j) seems a long bow based purely on planning evidence (see Andrew Collins SOE). [55] It may be justified if hydro electricity was addressed separately but still had to meet environmental flows to qualify as discretionary;

(e) Given MRP has a project in mind, it is a pity in this process MRP has not been more specific as to the particular water body of interest. As an alternative Mr Collins suggested a statement at the start of Schedule Ba as follows:

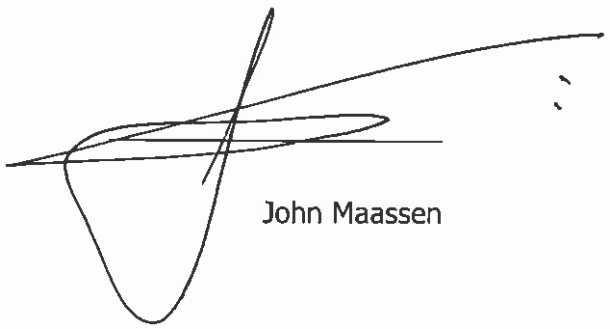
> "In addition to the values identified in Schedule Ba, water management zones and sub-zones throughout the Region

[54] See MRP legal submissions para 3.6(m) which state: "Mighty River Power seeks to have takes, uses, dams and diversions for hydro electricity purposes excluded from core allocation and minimum flow requirements."

[55] See for example MfE *Proposed National Environmental Standard on Ecological Flows and Water Levels* which states its objective: "Objective 1 – To ensure that all resource consent decisions on applications to take, use, dam and divert water from rivers, lakes, wetlands and aquifers are made in the context of a clear limit on the extent to which flows and water levels can be altered." And see also Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management and inn particular in relation to water quantity, policy D1 which reads: "By every regional council making or changing regional plans to the extent needed to ensure the plans allocate fresh water among types of activity in a manner and at rates that (having regard to reasonably foreseeable impacts of climate change) enable environmental flows and levels to be fully sustained.

(and particularly those with good head and flow available) may have value for hydro-electricity generation. Further site specific assessment will be needed in order to establish the locations where such values are the greatest and the degree to which they may be able to be realised having regards to all other values of the waterbodies concerned."

Such a statement tends to support the view that a plan change is required following site specific assessment and this is probably the best way forward rather than generic changes applicable throughout the plan.



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