
BEFORE THE HEARING PANEL

IN THE MATTER

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

**S.42A REPORT BY JOHN MAASSEN
IN RELATION TO WATER HEARINGS**

Dated 28th August 2009

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Introduction

1. This is a short report for two reasons:
 - (a) The writer is presently before a Board of Inquiry and overseas in September 2009;
 - (b) The scope of any legal issues will be determined by the nature of expert evidence presented by submitters and it is inefficient to anticipate legal issues that may not arise.
2. Water quality and water allocation are of course two of the 'big 4' issues addressed by POP. Management of these matters is indisputably the function of Horizons under the RMA.
3. The starting point for any policy development is fact finding regarding the biophysical qualities of the resources in question including ecological characteristics and values. This has been the starting point for development of POP. As will be seen from the evidence, an array of projects has been conducted and analysis refined over a long period. Projects are all linked in some way to understanding the resources and the relationship between catchment activities and consequential impact on those resources¹.
4. The focus on resource assessment as the starting point for policy development is consistent with the following passage from *Longbay-Okura Great Parks Society Incorporated v North Shore City Council*² where Judge Jackson said:

"[20] The traditional fact/law/judgment division of civil cases inadequately describes the role of a local authority (or the Environment Court on appeal) in relation to a district or regional plan, a policy statement or a resource consent. We

¹ Other projects are associated with development and assessment of tools for management of activities including overseer and spasmo

² Decision A078/2008

consider there are not three but four general steps in most proceedings under the RMA:

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

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

5. The scientific analysis combined with improved technology including computerised cartography enables a more finely grained matrix of zones, sub-zones, values (including reach values) and water quality parameters. This will be a feature of many second generation plans.
6. The catchment categorisation and sub-categorisation and values assessments are to be contained in a new schedule Ba and are the engine room for the plan from which all objectives, policies and rules have been developed.

Cartography

7. A key objective of the POP project is the user friendly planning document. Thus, maps have been limited to A4 size. Consequently, the document is not encumbered by excess baggage. Nevertheless, spatial categorisation is a key to some aspects of the regulatory framework. This is particularly true of the water management framework.
8. In that regard, regulation 38 of the Resource Management (Forms) Regulations 1991 provides:
 - "Requirements as to planning maps**
 - (1) Where any plan prepared by a local authority contains a map of an area for the purpose of complementing or depicting the spatial extent of any rule, the map shall be drawn on a base which includes sufficient detail to enable the effect of any provision to be ascertained.
 - (2) Every map shall conform with accepted cartographic standards and shall be produced so as to make clear any detail intended to be shown. All notations used shall be explained by a conveniently placed key."
9. There is a tension therefore, between convenience/user friendliness and appropriate detail. To resolve this tension Maree Clark proposes (instead of 240 1:150,000 scale maps of the water management zones and sub-zones) an internet based tool that not only contains the relevant spatial detail of the water management zones and sub-zones but also other tools to extract relevant information to assist users.

10. This concept is an excellent one and it anticipates an ineluctable trajectory for plan management having regard to the increasingly pervasive nature of Web 2.0 applications and the more finely grained management framework of second generation plans. Happily the idea can be accommodated within the present legal framework.
11. Part 3, Schedule 1, RMA was introduced by the Resource Management Amendment Act 2005. Its purpose, in part, was to simplify plans and improve the efficiency of plan making. Incorporation of documents containing written material that deals with technical matters and is too large or impractical to include in or print as part of the plan or proposed plan is provided for in clause 30 Schedule 1. The term 'written material' refers to written information rather than representational information such as maps. Therefore, if the water management zones and sub-zones are to be represented in 'written material' it will require definition of the boundaries by coordinate lists. Material which is incorporated by reference must only be held by the local authority. It can once held, be represented in other ways including through an internet website. Clause 35 says that the local authority may:

"Make copies of the material available and any other way that the Chief Executive/Local Authority considers appropriate in the circumstances (for example on the internet website maintained by or on behalf of the local authority)."

12. It is contemplated that the written material incorporated by reference is the numerical coordinates of each water management zone and sub-zone. This material will then be represented through internet cartography which does not form part of the plan but is a representation of information contained within the plan. This enables the internet material to be regularly updated with information and tools that are not part of the plan but whose spatial

accuracy in relation to zone boundaries is referable to the source written coordinates.

S.32 analysis and the choice of methods of implementation

13. The management of water quality and water allocation is generally achieved in New Zealand through an RMA policy and rule framework. Most of the regulatory framework in POP is consistent with historical practice and has been demonstrably efficacious.
14. A fundamentally new policy platform in POP is the management of intensive farming activities in specified catchments to ensure that inter alia nutrient leaching is minimised. This regulatory framework and any alternatives must be assessed in accordance with S.32 RMA. This new framework is of particular interest to Fonterra who advocated at the Overall Plan hearings for a voluntary industry led regime.
15. In *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*³ the key tests for new plans was summarised and included the following:

"[34]

(B) Objectives (the s 32 test for objectives)

8. Each proposed objective in a district plan (change) is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act (s 32(3)(a)).

(C) Policies and methods (including rules) (the s 32 test for policies and rules)

³ EC A078/2008

9. The policies are to implement the objectives and the rules (if any) are to implement the policies.
10. Each proposed policy or method (including each rule) is to be examined having regard to its efficiency and effectiveness, as to whether it is the most appropriate method for achieving the objectives of the district plan taking into account:
 - (a) the benefits and costs of the proposed policies and methods (including rules); and
 - (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods."

(D) Rules

11. In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment."
16. The RMA is goal based. Objectives function as goals and the assessment of goals is against the purpose of the Act informed by Part 2 RMA.
17. Policies and rules (and any other methods proposed by submitters or otherwise) are tested for their efficiency and effectiveness and achieving the objectives. Despite several requests for information over the last 12 months to Fonterra's legal advisors, I have not received any information from Fonterra regarding a voluntary regime that will apply to farm management in the effective catchments. Horizons therefore has not been in a position to assess whether such a regime effectively achieves the objectives of POP. Consequently, I have reservations whether such a regime had been formulated at the time Mr Hutchings promulgated Fonterra's voluntary compliance program in his Overall Plan evidence.

18. The decision *New Zealand Shipping Federation v. Marlborough District Council* is relevant to the choice between the voluntary and regulatory approach. In that case, the Environment Court considered whether a rule controlling the wave effect of conventional ferries was necessary in order to achieve the purpose of the RMA. The options available were not to have a rule, reliance upon voluntary speed controls or alternative formulations of a rule. The principles that informed the Court's decision indicate a need to marry the logic behind the preference for one method back to the purpose and principles of the RMA. The Court found that a rule was necessary in that case to provide:

"[438] ...

- for the integrated management by the MDC of vessels over 500 tonnes in association with natural and physical resources ...
- for regulation of future vessels , which will be larger, faster, broader and which have the potential to create wake wash which may have adverse effects
- for economic efficiency and greater certainty for the shipping operators
- for future well-being and amenity of the wider community who work and play in the Sounds

for environmental sustainability of the natural and physical resources ..."

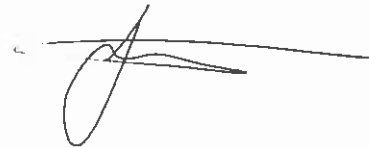
19. HRC as I understand it, regard the POP rules controlling intensive farming as effective and efficient because:

- (a) ICM⁴ requires a clear relationship between surface water quality controls and controls of activities within the catchment;

⁴ Integrated Catchment Management

- (b) The rule framework applies to all farming activities that may affect water quality not individual elements (such as FDE or stock movement) and is therefore consistent with the ethic of integrated management;
 - (c) Enables control across all intensive farming types and is therefore not industry or supplier specific;
 - (d) Provides clear and transparent outcomes the community can understand and which can inform investment decision making by industry participants;
 - (e) Provides for the wellbeing and amenity of the wider regional community in accordance with the communities aspirations as expressed through community plans;
 - (f) Achieves increased sustainability of natural and physical resources;
 - (g) Is targeted at catchments where environmental risks are most acute.
20. Care must be taken in assessing proposed voluntary controls for the following reasons:
- (a) Unless the regime has been sufficiently detailed in submissions to the notified plan, it is doubtful the regime has been evaluated by a public process in the same way as the regime promulgated in the notified plan;
 - (b) Unless the voluntary regime has a track record the effectiveness is unverifiable whereas regulation has a track record;
 - (c) Regulation by a supplier is tainted with an intrinsic conflict of interest. Professional body self regulation generally includes independent monitors who have compliance powers;

- (d) Voluntary controls are generally not effective where incentives for non-compliance are economic and the benefits of noncompliance are intangible improvements in the environmental quality of resource commons. Generally to manage effects associated with externalities that are costs to common resources such as water ways regulation has proved most effective⁵. The scientist Gareth Harding popularized the inefficiency of common property in his famous article "The Tragedy of the Commons"⁶. This article set out the way that lack of ownership led to overexploitation and eventual deterioration of resources which were unowned or commonly owned.



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⁵ As was famously said by Aristotle "What is common to the greatest number, gets the least amount of care"

⁶ G. Harding "The Tragedy of the Commons" 162 *Science* 1243-1248 (1968)