
**SUPPLEMENTARY SECTION 42A REPORT
ON LEGAL MATTERS IN RESPECT OF THE OVERALL PLAN**

**SUPPLEMENTARY SECTION 42A REPORT BY JOHN MAASSEN
FOR HEARING ON ASPECTS OF THE OVERALL PLAN**

COOPER RAPLEY

LEASWYERS

Palmerston North & Feilding

Solicitor: J W Maassen

Address: 240 Broadway Avenue
P O Box 1945
DX PP80001
Palmerston North

Telephone: (06) 353 5210
Facsimile: (06) 356 4345
Email: jmaassen@crlaw.co.nz

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Introduction

1. A number of issues have arisen in the hearing on the overall plan. This supplementary 42A Report addresses some of those issues having regard to the time available.

Chairperson's List of Issues

2. The Chairperson at the commencement of the hearing had a shopping list of issues. These are identified in italics below and a response is given in normal typeface.

In paragraph 70 of the Section 42A Report, there is reference to the Eldamos test as it relates to regional plans. Does it apply to a Regional Policy Statement (RPS)?

3. The *Eldamos* formulation summarises the statutory requirements in relation to the mandatory elements of plans, eg: objectives and policies. The *Eldamos* formulation (with modifications) is applicable to a proposed RPS. An RPS does not contain rules and that is a significant difference which requires a change to the *Eldamos* formulation for an RPS.
4. *Eldamos* is based on an examination of the effect of section 74(1) which relates to district plans and how they should be prepared. The formulation is purely statute based. Please refer to section 74(1) and compare it with section 66(1) that relates to regional plans. Then refer to section 61(1) relating to RPS. These provisions are for present purposes largely identical and relate in their totality to the full suite of local authority planning instruments.

Therefore, it is considered that the *Eldamos* formulation is valid for an RPS except that any reference to rules should be deleted. The formulation can be re-expressed this way:

- "A. An objective in a regional policy statement is to be evaluated by the extent to which:
1. it is the most appropriate way to achieve the purpose of the Act (section 32(3)(a)); and

2. it assists the regional authority to carry out its functions in order to achieve the purpose of the Act (sections 66 and 59); and
 3. it is in accordance with the provisions of Part 2 (section 66(1)).
- B. A policy or other method in a regional policy statement is to be evaluated by whether:
1. it is the most appropriate way to achieve the objectives of the policy statement (section 32(3)(b)); and
 2. it assists the regional council to carry out its functions in order to achieve the purpose of the Act (sections 62 and 59); and
 3. it is in accordance with the provisions of Part 2 (section 62(1))."

What is the authority for incorporating a document by reference in an RPS as opposed to a regional plan?

5. There is no authority in the RMA to incorporate documents by reference in an RPS. This contrasts with the specific provision in the RMA to incorporate documents by reference in a national policy statement, coastal policy statement or regional and district plan. Therefore, documents may not be incorporated by reference.
6. Ms Ongley said that the absence of provision in Schedule 1 to incorporate material by reference demonstrates that there is no restriction in respect of an RPS and this is because an RPS does not contain rules. I found that argument unconvincing given the express provision for material to be incorporated by reference in national policy statements (Schedule 1AA RMA). These documents also do not contain rules.
7. The absence of provision for material to be incorporated by reference in the RPS is probably explained by the fact that most material incorporated by reference in plans will be specific as to the practice in relation to particular activities and therefore too

specific to be found in an RPS. Where material by reference is incorporated in Part I of POP this may be an indicator that the material should be more properly contained within Part I.

8. There are as I understand it, few references to documents in Part I. An example is Chapter 3 (Policies 3-2 & 3-8). Perhaps the relevant policy should be changed so that it recognises the application of industry codes of practise in the regulation of activities in regional plans without specifying what those codes of practise are.
9. In relation to Ms Ongley's point about referencing Schedule B in the RPS so that it is in the regional plan. I do not consider that that is offending the rule regarding incorporation by reference. It is cross linking within a combined document authorised by section 78A RMA.

Ms Marr deals with submission No.327. The sole relief sought in that submission is the withdrawal of the plan. However, in the commentary in the submission other issues are identified. Is it appropriate for the submission to be considered in the overall plan section of the hearing rather than addressing the specific commentary in the submission?

10. Any person may make a submission on a notified plan in accordance with the prescribed form. The prescribed form is Form 5 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003. That regulation provides for the following to be included in a submission:

"I seek the following decision from the local authority:

[8 = give precise details of decision sought from local authority]"

The relief sought is the decision requested of the local authority. It is that component of the submission that is publicly notified. It is that part of the submissions that defines the scope of further submissions as well as the relief available.

While submissions should not be read too narrowly, the relief sought in submission 327 is unequivocal. The only relief sought is the withdrawal of the plan. Submission 327 says at the end:

"I seek the following decision:

Withdraw the whole plan and re-notify after readdressing Horizons functions under the RMA."

11. This submission has been coded as an overall plan request. I consider that it is appropriately coded and appropriately dealt with in the overall plan hearing. The other matters in the submissions are merely justification for the clear and specific relief sought and do not constitute discrete relief.

Ms Marr's report proposes that certain submissions should be accepted in part. Can the hearing panel accept in part a submission and is that the appropriate course of action when what is accepted is not included in the relief sought?

12. There is no provision in the RMA that precludes allowing relief in part. In many cases that can be an appropriate course of action. Particularly where the relief sought relates to different issues. That is likely in the case of submissions on a comprehensive planning instrument such as the Proposed One Plan incorporating both the RPS and regional plans. Clause 10, subclauses 1 and 2 of schedule 1 provide:

"[10 Decision of local authority

(1) Subject to clause 9, whether or not a hearing is held on a proposed policy statement or plan, the local authority shall give its decisions, which shall include the reasons for accepting or rejecting any submissions (grouped by subject-matter or individually).

[[(2) The decisions of the local authority may include any consequential alterations arising out of submissions and any other relevant matters it considered relating to matters raised in submissions.]]"

13. It has already been noted that the key part of the submission is the relief sought. That is the part of the submission that can be accepted or rejected. The purpose of clause 10(1) is to ensure a decision is either to accept or reject the relief sought. Your decision should reflect this fact. Therefore, unless you are allowing the relief in whole or in part then you are rejecting the submission, even though you may empathise with some of the sentiment in or behind the submission.

If a submission is withdrawn does the further submission remain? If so, what is the authority for that proposition?

14. There is no authority on this point. I have seen contradictory advice to various local authorities on this point.
15. The point is only relevant for practical purposes in respect of further submissions that support a submission.
16. The issue is whether or not a further submission depends for its existence on a submission that is not withdrawn.
17. A submission is defined as including a further submission. The definition is:

“Submission means a written submission and, in relation to the preparation or change of a policy statement or plan, includes any submission made under clause [8] of Schedule 1 in support of or in opposition to an original submission:”

18. Clause 8B requires a hearing on submissions as set out below:

“8B Hearing by local authority

A local authority shall hold a hearing into submissions on its proposed policy statement or plan, and any requirements notified under clause 4, and give at least 10 working days notice of the dates, times, and place of the hearings to—

- (a) Every person who made a submission or further submission, and who requested to be heard (and has not since withdrawn that request); and

(b) In the case of a district plan, every authority which made a requirement under clause 4.]”

19. Clause 10 requires a decision on a submission (see above).
20. As a submission includes a further submission and neither of these clauses are qualified in respect of further submissions then as a matter of plain ordinary reading of the statute a further submission has the status of a submission which must be heard and decided irrespective of whether or not the original submission is withdrawn.
21. I am not able to discern any policy reason to reach a conclusion that would be at odds with the plain and ordinary meaning of the statute. Given the participatory bias of the Act there is no reason to exclude a person in advancing an argument an original submitter raised but which the further submitter wishes to pursue.

If further legal submissions are sought by the committee should there be an opportunity for a right of reply by submitters counsel?

22. It is considered that the more information you have the better. If HRC’s legal reports relate to a specific submission and deal with an issue of importance then it is considered desirable a submitter has the opportunity to provide a written response limited to those legal issues. The chairperson can direct when the submissions should be provided to a submitter and the date within which submissions in reply should be provided.

Submission 180 - Ngati Kahungunu Iwi Incorporated

23. The question arose whether or not the provisions of a plan can direct notification. A plan cannot direct notification. It can direct when public notification and/or service on affected parties is not required but beyond that, there is no provision in the RMA for modification of the statutory code relating to notification.
24. It was suggested in an exchange with the submitter that a policy could be included relating to notification of iwi. There is

no express provision for policies to guide participation in decision making. The decision on public notification and service (and therefore standing) is controlled by the code in the RMA. The status of such a policy as was discussed is questionable and may lead to more problems than it solves (see s.94B).

Submission 354 - McKellar

25. This submission in part sought recognition of the importance of the productive capacity of class I and class II soils in the RPS. The request was for an amendment to the RPS to direct territorial authorities who control the subdivision of land which has class I and class II soils.
26. Section 30 RMA sets out the functions of regional councils and section 30(1)(b) says:

"The preparation of objectives and policies in relation to any actual or potential effects of the use, development, protection of land which is of regional significance."
27. Section 62(1) makes it plain that an RPS is to address significant resource management issues in the region.
28. Therefore, before the relief sought could be granted there would need to be credible evidence that the soils (preferably identified by location) were of regional significance and that the subdivision of that land was a significant resource management issue having regard to Part 2 RMA.
29. Subdivision of rural land has been the subject of considerable discussion by RMA commentators. At the libertarian end of the spectrum is people like Owen McShane whose thinkpiece commissioned by Mr Upton, the then Minister of the Environment, castigated controls on subdivision of versatile soils.
30. The only RPS known to address versatile soils is that of CRC. In a recent decision *National Investment Trust v. Christchurch City Council* the Environment Court noted:

"The CRC policy on versatile soils has been variously criticised by the Courts: *Canterbury Regional Council v Waimakariri District Council* and *Pegasus Bay Coastal Estates (Pegasus Bay)* [fn21 [2002] NZRMA 208], *Suburban Estates Limited and Muir Park Corporate and 21 others v Christchurch City Council* [fn22 C217/2001] and *J G and H Shaw, Halswater Holdings Limited and Apple Fields Limited v Selwyn District Council* [fn23 C67/2004]. In the more recent decision Judge Jackson has suggested that residential use may in fact be a productive use of land [fn24 C67/2004 at para 32] with versatile soils."

Submission 268 – Genesis Energy Limited

31. There are a number of matters Genesis Energy Ltd asked you to consider. The purpose of this advice is to inform you of the possible consequences of a particular decision, rather than to comment on the desirability or otherwise of a particular decision.
32. Mr Matthews for Genesis Energy proposed a replacement for policy 3 as follows:

"Policy 3-4: Renewable Energy

 - a. *The use of existing and development of new renewable energy generation, infrastructure and use of renewable energy resources shall be recognised and provided for in resource consent decision making."*
33. The words in that proposed policy "recognised and provided for" are the strongest decisional verb group found in legislation. The words mirror the formulation in section 6 which relates solely to matters of national importance. The verb group require decision makers not only to consider the matter but take active steps to provide for it.
34. Section 7 as it relates to renewable energy and the effects of climate change only requires "particular regard" to be had to those matters. This is a lesser direction in the overall hierarchy in Part 2.

35. If the wording suggested by Mr Matthews is adopted, then the wording would, of course, be regarded as deliberate. It could be interpreted as meaning provision of renewable energy is elevated to virtually equal status with other matters of national importance specifically provided for in the RPS. This interpretation, if adopted, would powerfully influence the Environment Courts' understanding of the meaning of sustainable management of natural and physical resources in the context of this region.
36. The consequence of adopting the wording could be to neutralise to a large extent the strong wording for example in objective 7-2(a) relating to outstanding landscapes. The intent at present is that renewable energy is not an appropriate development of those landscapes. A position that builds on the framework in the existing RPS relating to these landscapes.
37. If Mr Matthews' proposal is accepted, a credible argument could be mounted that the landscape protection elements of the RPS are of general application and that in the context of renewable energy development the specific policy (proposed policy 3-4(a)) should prevail or that it demonstrates renewable energy is appropriate development.
38. Most of the changes sought by Genesis Energy Ltd are changes to policies in the regional plans (see appendix 1 of Mr Matthew's statement) rather than the RPS. Thus for example, he proposes in chapter 11 under objective 11.2.2 the following additional policy 11.5:
- "Recognise the positive benefits that can arise from the use, development and protection of the regions natural and physical resources whilst ensuring that any adverse effects are avoided, remedied or mitigated."
39. An argument was put that this response balanced the strong statements of protection in various parts of the RPS. Reference was made to objective 4-1 Te Ao Maori and objective 7-2(a) Outstanding Landscapes.

40. The fact that most of the relief sought by Genesis Energy Ltd relates to regional plans is significant. The RMA recognises what is called the 'top-down' approach. The hierarchy of instruments go from the general to the specific¹.

In the hierarchy therefore the regional plan is more specific than the RPS. Policies that specifically enable and provide for renewable energy in a regional plan will be regarded as the regional council's evaluation of how to best give effect to the RPS as it relates to resources it controls. Renewable energy will be treated as the exception to the thrust of the RPS. When evaluating resource consent applications a credible argument can be made (if Genesis Energy Ltd proposals are accepted) that because the regional plan is by its nature more specific it should be given the greatest weight in the evaluation of applications.

41. In addition, the proposed amendments to the plan (as opposed to the RPS) has the result that it will open the gateway to renewable energy projects even if non complying. It would be difficult to argue that any particular renewable project would be inconsistent with a regional plan with the provisions proposed. The "avoid remedy or mitigate" formulation in proposed policy 11.5 is inspecific and indicates no preference for avoidance over mitigation or remediation.

Submission - Fonterra Limited

42. I confirm what is said in my section 42A Report regarding section 32 and ask you to consider that rather than Mr Roger's paraphrasing.
43. Fonterra's approach was generally constructive including confirmation that in broad terms the objective of the RPS in relation to water quality is not contested. It is the methodology for achieving the outcome and timing.

¹ See *Beach Road Preservation Society Incorporated v. Whangarei District Council* [2001] NZRMA 176

44. It has never been said, and I don't consider, that economic evidence is irrelevant. It's significance, weight and utility is however another matter and will depend on a range of factors.

45. In my original Section 42A Report at paragraph 37 I said:

"To a significant degree, the benefit and costs will be gauged by:

- (a) scientific analysis regarding the health and functioning of ecosystems;
- (b) the science on the impact arising from activities on the health and functioning of ecosystems; and
- (c) the science on the impact of controls on the effectiveness and efficiency of resource use."

I remain of that view.

46. However, I do see some utility in having an economic analysis of the alternatives (and that as Dr Layton says is the area where economic analysis is particularly beneficial) before the water quality hearing on rule 13-1 since it is a clearly defined issue capable of greater economic precision than the more broad scale economic analyses that some submitters propose. It appears common ground that with the base science and data from the benchmarked farm sample, a report could be compiled comparatively easily. This sort of information would assist the committee particularly in terms of the methodology for change and the pace of change.

47. I agree with Mr Rogers that the committee can usefully make directions or minutes relating to:

- (a) additional information;
- (b) caucusing of experts;
- (c) hearing management;

to facilitate the hearing process and ensure all relevant information is before the hearing panel.

48. One additional reflection is appropriate. As Mr Holdaway acknowledges the dairy industry (and other forms of intensive

agriculture) is dynamic. The rate of growth (and associated land conversion) in the industry means that the potential impact on water quality is significant. Fonterra has growth targets. Dr Clothier and others have done an analysis of the implications of that growth on water quality which raises real concerns. It will be necessary to understand how Fonterra proposes to reconcile its growth targets with the proposed voluntary mechanisms it puts forward and how that will achieve the functions of the regional council under the RMA.

49. It will be recalled that a key test for objectives and policies of the RPS and regional plans applying the *Eldamos* formulation are their effectiveness and efficiency in assisting the regional council to carry out its functions.
50. In the context of water quality, regional planning functions include under section 31(c) the control of land use, for the purpose of maintenance and enhancement of water quality and the maintenance and enhancement of ecosystems in water bodies. In addition, section 30(ga) requires maintenance of indigenous biodiversity which also includes aquatic biodiversity. These provisions unlike other provisions in section 31 set a minimum requirement. The enhancement conjunction is also significant.
51. In answering the tests in *Eldamos* one needs to examine:
 - (a) the extent to which the voluntary process provides control;
 - (b) the extent to which voluntary mechanisms combined with the rates of growth in particular land use will actually enable the basis statutory requirements to be met.

Submission 280 - TA Collective

52. There were three issues identified:
 - (a) certainty of the permitted activity rules;

- (b) linkages from rules to policies;
 - (c) overall structure of the plan.
53. There appears to be no basis for disputing the desirability of clear permitted activity rules. This is as old as *Ruddleston v. Kapiti Coast District Council*². This is largely a technical planning matter. It would be disappointing for the hearing panel to have to address issues of this type unless there was reasonable need to do so. Whatever the reasons are for the fact that this has not happened beforehand it is desirable that these issues are tackled as soon as possible. Minutes or directions on these matters is desirable and I have no doubt that the TA's and HRC will devote the necessary planning resources to achieve an appropriate outcome.
54. One cannot dispute the desirability of linkages. The same comments set out above apply. Equally the same comment can be made in relation to annotations to the RPS that help readers understand which objectives and policies are directed at TA's and which are not.
55. In relation to the overall structure of the plan. This is an innovative second generation plan and should not be measured against whether it looks similar to traditional formats of the past. Innovation including the fact that it is a composite plan does not appear to be an issue.
56. It would be disappointing to see replication of objectives and policies in the RPS and regional plans simply to address potential legal issues. It is not accepted that they arise. The reason it would be disappointing is that amendments since 2003 to the Resource Management Act have had as their aim simplification of planning instruments. In a country of 4 million people the complexity and number of instruments that exist is unnecessary. I remain of the view that the question is what are the planning and technical justifications for adding or subtracting objective and policies and the location of these

² (1986) 11 NZTPA 301

within the plan. That is a matter which can only be analysed in the context of detailed consideration of the relevant topics covered in the plan. Some indication to the parties in the form of a minute as to how the hearing panel can be assisted in that regard might be helpful. I agree with Mr van Voorthuysen that many of the provisions in the RPS are severable and could be placed where appropriate in the regional plan. I do not consider that there is sufficient evidence at this juncture to decide the desirability or otherwise of such a course of action.

57. In relation to the concern regarding the absence of economic analysis on the impact of the land chapter (as it relates to HEL) on rural communities. Again, it is not unforeseeable that the hearing panel might sooner or later decide that it might be assisted by some further information including economic information. The process does allow for that. In relation to hill country land specifically, any economic analysis is intrinsically contingent and time bound. For example, the economics of hill country farms fluctuates and is influenced by numerous factors including, transportation costs, market prices for stock, the price of inputs such as fertiliser. These farming operations are by their nature highly susceptible to these movements. Changes to these variables are more likely to have material impacts on farm economics than requirements to farm the land sustainably to conserve soil. A central thesis of One Plan is that environmental unsustainability (and in particular soil loss) leads to economic unsustainability in the medium and long term. Economic analysis which is no more than a snapshot cannot address this central proposition. To the extent there is a criticism HRC's focus is too 'environmental' may miss the point underlying the Act which is that ecological and environmental sustainability is the only pathway to a long term future.



John Maassen
Dated 3rd July 2008