ADJUDICATING SUSTAINABILITY

NEW ZEALAND'S ENVIRONMENT COURT AND THE RESOURCE MANAGEMENT ACT

Prepared by

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PREFACE

Adjudicating Sustainability: The Environment Court and New Zealand's Resource Management Act is the final report of my Ian Axford Fellowship programme. It reflects my interest, as an environmental litigator, in the legal framework and institutions under the RMA. I chose to focus on the Environment Court for two primary reasons. First, the environment Court is an institution quite unlike any in the United States and is therefore one from which lessons might be drawn. Second, as the primary adjudicator of legal and factual issues that arise under the RMA, it is well place to guide, through its decisions, a grand tour of the RMA and its mechanisms. Although this report is more a review than a critique of the RMA and the Environment Court, I hope this report--particularly the final chapter--will provide some useful cross-national insight into the nature of environmental adjudication in New Zealand.

In the closing weeks of my fellowship programme, my choice of topics proved to be somewhat fortuitous, if not prescient. The Minister for the Environment publicly announced that he intends to pursue significant changes to the Environment Court as part of a package of amendments to improve the implementation of the RMA. Having completed a study tour of the RMA through the eyes of the Environment Court, I share some thoughts about the Minister's proposals from my customary vantage point in the trenches of American environmental litigation. These views are contained in the concluding chapter.

All the views expressed in this report reflect my own work and opinions. They do not represent the views or positions of the Ian Axford (New Zealand) Fellowship in Public Policy or its public or private sponsors, the Parliamentary Commissioner for the Environment (my New Zealand host institution), or the United States Department of Justice (my employer).

The Ian Axford (New Zealand) Fellowship in Public Policy was announced by the New Zealand Prime Minister, Jim Bolger, on 4 July 1995. The Fellowship programme is named after Professor Sir Ian Axford, the eminent New Zealand astrophysicist. The Fellowship is a joint public sector-private sector initiative which provides mid-career opportunities for outstanding American professionals to study, travel, and gain practical experience in public policy in New Zealand. The Fellowship programme complements the long-standing Harkness Fellowship program funded by the Commonwealth Fund of New York. Both programmes are administered in New Zealand by the United States-New Zealand Educational Foundation in Wellington. The Foundation is also responsible for the administration of the Fulbright Programme in New Zealand.

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I. INTRODUCTION

With the passage of the Resource Management Act of 1991 ("RMA")[1] New Zealand put itself on the world's cutting edge of environmental management. Amidst a climate of deregulation, increasing reliance on market mechanisms, and devolution of central government powers to local authorities, New Zealand made promoting sustainable environmental management the law of the land. By all accounts, the RMA represents a sea change for environmental management in New Zealand. It has been variously described as a radical break from the past and a comprehensive new framework for environmental management.[2]

As 1998 draws to a close, the honeymoon that followed the RMA's enactment is over. A bumpy implementation period is lasting longer than expected and is still far from complete. Something of a seven year itch afflicts New Zealand, and the RMA is coming under close scrutiny by the professionals who work within its framework, some individuals and businesses who operate subject to its provisions, and by the Government. The Government has launched a wide ranging review of the RMA, focussing on issues as diverse as whether the law's scope ought to be narrowed to exclude the control of land and whether the process of determining resource consent applications (currently the province of local government) should be privatised.

New Zealand's Environment Court[3] stands as a key institution in New Zealand's bold effort to move toward sustainability. First, in some sense, it can be said to serve as judge, jury, and executioner over most of the fundamental aspects of the RMA regime. A specialised adjudicative tribunal, comprising judges and technically-oriented laypersons, and endowed with the power of de novo review of government decisions, it is a rarity in the world of environmental law.[4] As a reviewer of policies and policy-based decisions it is perhaps even rarer.

Second, the Environment Court represents the most active central institution engaged in shaping the implementation of the RMA. As will be discussed below, the RMA's framework for sustainability emphasises local government planning and rulemaking, as well

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[1] 32 Reprinted Statutes of New Zealand 131(1). Citations to the RMA herein are in the format "RMA s. __".

[2] Huey D. Johnson, Green Plans: Greenprint for Sustainability 76 (University of Neb. Press 1995) (RMA is a "truly radical break from traditional approaches to environmental planning."); Ton Bührs & Robert V. Bartlett, Environmental Policy in New Zealand: The Politics of Clean and Green? 113 (Oxford University Press 1993) ("comprehensive new framework"). But cf Bührs and Bartlett at 125 ("In most respects, however, [the RMA] is not a revolutionary departure from previous law, as it builds on the Water and Soil Conservation Act of 1967 and particularly the management planning approach developed in the Town and Country Planning Act").

[3] Before 1996 the Environment Court was called the Planning Tribunal. The Resource Management Amendment Act of 1996 renamed the Planning Tribunal the Environment Court. As used in the text of this report, "Environment Court" refers to both the Planning Tribunal and the Environment Court.

[4] Apart from New South Wales, Australia, and the Planning Board Tribunals in the United Kingdom, the author is unaware of other specialised tribunals with the status of courts of law that are particularly focussed on resolving environmental disputes.

as the quasi-judicial determination of particular resource consent applications at the local level. The Environment Court's influence throughout the country is marked by its status as a centralised judicial body and court of law which issues decisions of binding effect on particular disputes and potentially far reaching precedential effect on key legal and factual issues arising under the RMA.

Third, the Environment Court's importance is enhanced by the architecture of the RMA as public law. As will be further developed below, the RMA itself is more of a framework of broad concepts and processes than a blueprint for approaching sustainability.[5] The New Zealand Court of Appeal has remarked, "[n]otable though the Resource Management Act is for the aspirations and principles embodied in it, their very generality seems to have led in the drafting to an accumulation of words verging in places on turgidity."[6] As the primary adjudicator of disputes and a declarant of legal rules and principles under the RMA, the Environment Court is uniquely placed to define the shape of the framework itself as well as to sculpt many of the finer features that will be hung from that frame. It is placed, for example, to determine not only what Parliament meant when it legislated for sustainable management, but whether or not any particular proposal falls within that meaning.

This report explores the role of the Environment Court in New Zealand's scheme of environmental management under the RMA and reviews its contribution to the development of some of the essential concepts of the RMA's framework for sustainability. Part II, briefly outlines the RMA, its underpinnings in the global sustainability movement and New Zealand's history of environmental planning, its themes, and its major provisions. Part III describes the history, structure, and functions of the Environment Court under the RMA regime. Part IV then examines the contribution the Environment Court has made to the development of the law and practice of sustainability under the RMA, focussing on three themes which are central to the RMA: (1) the meaning of sustainable management of natural and physical resources; (2) management of the environment on the basis of effects, rather than uses or activities; and (3) the promotion of full public participation in the environmental management process. Part V concludes the paper with some "cross-cultural" analysis of the role of the Environment Court and offers some general thoughts on environmental adjudication in New Zealand.

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[5] See, e.g., Julie Frieder, Approaching Sustainability: Integrated Environmental Management and New Zealand's Resource Management Act, paper prepared for the Ian Axford (New Zealand) Fellowship in Public Policy, December 1997, at 17 ("The RMA serves as a framework, not a blueprint."); P. Ali Memon, Keeping New Zealand Green: Recent Environmental Reforms, at 94-95 (Univ. of Otago Press, 1993) ("Despite its name, it is essentially a policy planning instrument, not an operational code. It highlights the significance of policy formulation as a means for making decisions within the public sector."); Ministry for the Environment, Introducing the Resource Management Bill, at 2 (1989) (RMA is a framework, not a blueprint); Janet McLean, "New Zealand's Resource Management Act of 1991: Process with a Purpose?", 7 Otago L. Rev. 538, 539 (1992) ("The Resource Management Act can be seen as part of a legislative trend to state broad principles rather than to prescribe rules of conduct.").

[6] Auckland Regional Council v. North Shore City Council, (1995) NZRMA 424 at 427 (Ct. App.).

II. AN OVERVIEW OF THE RESOURCE MANAGEMENT ACT

A. The Old World View - Environmental Management in NZ Before 1991

New Zealand was the first country in the world to adopt a scheme of environmental management based on sustainability. It did not arrive there overnight. Rather, the RMA was the culmination of a long process of reform that is best viewed in the context of New Zealand's earlier systems of environmental management and the radical government and economic reforms that swept the country during the 1980s. Before the onset of the reforms that led to the passage of the RMA, New Zealand's system of environmental management and policy, such as it was, reflected the dominant themes of its political and economic history--active promotion of economic growth by central government and emphasis on private property rights.[7]

Driven as much by pragmatism as ideology, New Zealand's central government historically engaged both directly and indirectly in developing a wide array of economic sectors. Direct central government intervention and entrepreneurship extended to (1) the development of infrastructure such as roads, railways and electricity generation facilities, (2) the delivery of services such as healthcare, education and income support, and, most important, (3) the creation and support of industries for the utilisation of natural resources, such as mining, forestry, hydroelectricity, and fisheries.[8] By the early 1970s, there had evolved a massive bureaucracy of government departments focussed heavily on resource development, including departments of Agriculture and Fisheries, Energy, Tourism, Mining, Housing, Forestry, Lands and Survey, and Works and Development. Generally, these departments were expansion oriented and operated in a compartmentalised manner, often dictating development programs from Wellington.[9]

Where the government was not directly involved in entrepreneurship to promote the development and utilisation of New Zealand's natural resources, it adopted policies designed to encourage private sector development. Much like the laws that govern the use of natural resources on federal lands in the United States, New Zealand's laws regarding private use of resources before the reforms that led to the RMA promoted the exploitation of those resources. Policies of indirectly supporting resource utilisation ranged from minimum price supports for livestock[10] to the provision of relief from local government review of projects deemed to be of national importance.[11]

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[7] P. Ali Memon, Keeping New Zealand Green, at 26-27.

[8] Id.

[9] Id. at 31.

[10] After the Government ended its price support for sheep, the number of sheep grazing New Zealand farmland dropped from close to 70 million to approximately 50 million. The implication is that the policy had led to the environmentally damaging maintenance of far more sheep than the land (or the market) could sustainably support. Ian Smith, ed., The State of New Zealand's Environment, 8.33, Ministry for the Environment, 1997.

[11] The National Development Act of 1979, for example, provided a streamlined process for obtaining the necessary permits for development projects deemed to be of national interest. The process allowed applicants to bypass local government review and to go directly to the Planning Tribunal for the determination of necessary

Perhaps the most vivid example of central government involvement in natural resource development was the aggressive "Think Big" agenda of the National government during the late 1970s and early 1980s. Prompted by a perceived need for a national response to the oil crisis of the mid-1970s, the Government launched an extensive program of government-owned or guaranteed development projects intended to boost both the production and the market for domestic energy sources, primarily natural gas. In order to ease the way for the development of the Think Big projects, the Government enacted the National Development Act of 1979, which deprived local government bodies of approval authority and created a fast-track process for review and approval by a separate tribunal.

By the early 1980s, notwithstanding the central government's historical support for economic development and resource utilisation, New Zealand had enacted a smorgasbord of statutes to address environmental issues. Typically these statutes had been enacted on an ad hoc basis in response to disparate concerns and crises.[12] As described by Sir Geoffrey Palmer, former Minister for the Environment, Prime Minister and a chief architect behind the RMA, the "uncoordinated, unintegrated hotch-potch" of laws:

> bore the marks of the country's history -- gold mining, soil erosion owing to clearing of too much land for pastoral farming, harbour development, zoning laws for urban development, and a whole host of one-off regimes for regulating particular problems such as noise, air pollution, petroleum exploration and geothermal energy. * * * They contained no unifying principle or approach. Permission to do things was usually required but there was no golden thread running through the statutes of the standards to be applied or the outcomes to be achieved. The mechanisms for settling disputes contained no uniformity. The institutional structures for dealing with the issues were almost infinitely various.[13]

Among this hotch-potch, two laws in particular laid the institutional and ideological backdrop for the RMA. First among these is the Soil Conservation and Rivers Control Act of 1941, which established elected catchment control boards as the appropriate bodies for limited resource management and planning.[14] Each board was given responsibility for planning for soil conservation and flood control within its entire catchment area, providing regional oversight spanning several towns, boroughs and counties. Although environmental

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resource consents. See Geoffrey Palmer, Environment: The International Challenge 151 (Victoria Univ. Press 1995).

[12] Between 1925 and 1965, at least sixty separate pieces of legislation were enacted to regulate pollution. During the same time, pollution problems continued to spread. Memon, Keeping New Zealand Green, at 38.

[13] Palmer, Environment: The International Challenge, at 150 (citation omitted).

[14] The words "catchment" and "watershed" are synonymous. Each refers to the land area that is drained by a particular river system, including its tributaries.

advocates in other countries, including the United States,[15] have promoted the establishment of political boundaries along catchment lines, New Zealand was the first do so.[16] This use of natural boundaries to define environmental management responsibilities was continued in the RMA.

Second, the Town and Country Planning Act ("TCPA") of 1977 and its predecessors, established processes for making land management decisions which have been adopted in modified form--as well as extended to most natural resources--in the RMA. For large scale district and regional land use decisions, the TCPA relied on regional plans and district schemes, which specified the uses which were either permitted as of right, conditionally permitted, or permitted subject to limited discretion of the local authorities to require certain changes. Any land uses not permitted as of right could only be undertaken if special planning consent were obtained from the local council. The RMA retained the basic planning and consent structure of the Town and Country Planning Act, but jettisoned its activities-based focus in favour of a focus on the environmental effects of particular natural resource uses.

B. Emerging global concepts of sustainability

New Zealand's decision to forge a new, integrated system of environmental management reflected an emerging global consensus regarding shortcomings in the world's management of the global environment. Beginning in the 1980s, the global nature of environmental problems garnered increasing international attention. First the World Conservation Strategy[17] in 1980 and later the World Commission on Environment and Development[18] in 1987 (known as the Brundtland Commission) advocated the concept of sustainability as a linchpin of environmental policy. New Zealand's reliance on sustainability in the RMA was substantially informed by the work of these groups.

The Brundtland Commission's report, *Our Common Future*, was particularly influential in a number of respects. Importantly, it established a benchmark definition of sustainable development. It defined sustainable development as "development which meets the needs of current generations without compromising the ability of future generations to meet their own needs."[19] Under this formulation, sustainable development fundamentally concerns issues of equity--both between current and future generations and between societies

[15] Recognising that the scarcity of water in the American West would inevitably lead to difficult resource conflicts, the visionary explorer John Wesley Powell, who was the first European American to explore the Colorado River through the Grand Canyon, advocated in the late 1800s that political boundaries be established by watersheds or catchments.

[16] See Ian Smith, ed., The State of New Zealand's Environment 4.3, Ministry for the Environment, 1997.

[17] International Union for the Conservation of Nature and Natural Resources, "World Conservation Strategy," Gland, Switzerland, 1980. The strategy was endorsed by the New Zealand government. Memon, Keeping New Zealand Green at 97.

[18] Our Common Future, The World Commission on Environment and Development, Oxford University Press, 1987.

[19] Our Common Future at 43.

(or sectors of societies) that are developmentally privileged and those that are not. The formulation also recognises that development that affords intergenerational and distributive equity is subject to social, technological, and environmental limitations. Sustainable development, then, fundamentally involves an integration of social, economic, and environmental decisionmaking. It is a "process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations."[20]

While issuing a global call to action, the Brundtland Commission recognised that sustainable development would require substantial political will on the part of both national governments and international organisations. To guide national governments to develop and implement national sustainable development strategies, *Our Common Future* described institutional predicates, including:

- a political system that secures effective citizen participation in decision making;
- an economic system that is able to generate surpluses and technical knowledge on a self-reliant and sustained basis;
- a social system that provides for solutions for the tensions arising from disharmonious development;
- a production system that respects the obligation to preserve the ecological base for development;
- a technological system that can search continuously for new solutions;
- an international system that fosters sustainable patterns of trade and finance; and
- an administrative system that is flexible and has the capacity for self-correction.[21]

It also set forth seven strategic objectives or "imperatives" for sustainable development: (1) reviving growth; (2) changing the quality of growth to make it less material and energy intensive; (3) meeting essential human needs for natural resources and for social resources such as health care, education, and employment; (4) ensuring a sustainable level of employment; (5) conserving and enhancing the base of natural resources; (6) re-orienting technology and managing risk, informed by environmental concerns; and (7) merging environmental and economics concerns in decisionmaking.[22]

C. The Making of the RMA and The RMLR Process

[20] Id. at 46.

[21] Id. at 65.

[22] Id. at 49.

In many ways, the RMA represents New Zealand's attempt to implement a national strategy for sustainability as called for by the Brundtland report. The legislation that became the RMA was the result of the largest and most intensive and most expensive law reform project in New Zealand history. The Resource Management Law Reform ("RLMR") effort was launched by the Ministry for the Environment in early 1988. The two year project involved three phases. It began with careful analysis of then-existing environmental and natural resource laws by a core group, which developed and commissioned more than thirty working papers to study fundamental issues in resource management, and culminated in a publication setting forth for public submission four possible models for reform.[23] The second phase incorporated extensive public input and continued core group refinement of proposals for reform. It resulted in the publication of another discussion paper outlining the government's proposals for the law reform.[24] During the third phase, parliamentary drafters transformed the government's proposals into the Resource Management Bill.

The Fourth Labour government introduced the Resource Management Bill in the New Zealand Parliament in December 1989. Once again, the proposal was subject to wide public input, with a Parliamentary Select Committee receiving more than 1,400 submissions. Due to the lengthy review process, the Fourth Labour government was unable to enact the bill before elections in October 1990.

Following its victory in the 1990 elections, the National government launched a review of the Resource Management Bill. After a number of amendments to the bill and some additional public input, the Resource Management Act was enacted in July 1991 and became effective in October 1991.[25]

D. The RMA Framework: Some Themes of Sustainability

1. Sustainable Management

The fundamental, overarching principle in the RMA is "sustainable management." Although the concept of "sustainable management" has its roots in the global "sustainable development" movement discussed above, sustainable management is not sustainable development per se. In essence, the framers of the RMA developed and refined the concept during RMLR process to incorporate notions of sustainability while eschewing the issues of distributive equity (particularly cross-national distributive equity) heralded by the Brundtland report.

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[23] Palmer, Environment: The International Challenge, at 153-54; Ministry for the Environment, *Directions for Change, A Discussion Paper*, August 1988.

[24] Ministry for the Environment, People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform, December 1988.

[25] Amendments to the RMA were enacted in 1993, 1994, 1996 and 1997.

Section 5 of the RMA defines sustainable management and makes "promoting the sustainable management of natural and physical resources" the singular goal of the Act. As provided in section 5(2):

> "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social economic, and cultural well being and for their health and safety while --
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.[26]

Much has been written and said about the exact meaning and import of these words; the views of the primary commentators and the treatment of sustainable management by the Environment Court are discussed below.

2. Effects Based Management

One of the hallmarks of the RMA is its reliance on the concept of effects-based management. Traditionally, New Zealand's earlier laws, notably the Town and Country Planning Act, aimed to achieve their objectives by regulating or directing particular activities or resource uses. For example, a district scheme under the TCPA usually created specific zones in which particular activities were permitted; those activities would be listed by name. A person who wished to carry on a particular activity could consult the appropriate schedules and easily determine whether a particular activity was permitted in a particular place.

The RMA, in marked contrast, seeks not to control activities per se but the effects that activities have on the environment. The Act seeks to be generally permissive, allowing virtually any particular activity in any particular place if, after rigorous analysis, the effects can be adequately avoided, remedied, or mitigated, and are otherwise consistent with sustainable management.

The RMA's emphasis on effects based management is exhibited in several sections. Section 5(2)(c) makes the avoidance, remediation, and mitigation of adverse effects part of the definition of sustainable management and therefore a fundamental purpose of the Act. Section 17 separately imposes a duty on all persons to avoid, remedy, and mitigate adverse

[26] RMA s. 5(2).

effects of activities on the environment. In planning processes, Section 32 requires all decisionmakers to consider the environmental effects and alternatives to the specific provisions in its plans. In the resource consent process for individual projects or proposals, applicants are required to provide an assessment of environmental effects[27] and the actual and potential effects of the proposed activity are essential considerations for consent authorities determining whether to publicly notify and ultimately to consent to the proposal.[28]

The broad scope of effects based management under the RMA is exemplified by the Act's expansive construction of the term "environment." Without defining it, the RMA gives guidance respecting the meaning of "environment." Section 2 provides, in relevant part:

> unless the context otherwise requires, "Environment" includes -- (a) ecosystems and their constituent parts, including people and communities; and (b) All natural and physical resources; and (c) Amenity values; and (d) The social, economic, aesthetic, and cultural conditions which affect . . . or which are affected by those matters.[29]

Because natural and physical resources include "land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or not), and all structures," little is beyond the reach of the RMA.[30]

Similarly, Section 3 provides an expansive definition of "effect." Thus, effects based management must take into consideration effects on the environment whether positive or adverse; temporary or permanent; past, present or future; singular or cumulative; highly probably to occur or improbable to occur but potentially of high impact.[31]

3. Promotion of Public Participation

The promotion of broad public participation in environmental decisionmaking is a third cornerstone of the RMA. From the beginning of the RMLR, encouraging public participation was believed to be an essential principle of sustainability for several reasons.[32] First, determining what is sustainable for a community will depend on accurately ascertaining the community's preferences, which is best done by incorporating them into the decision

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[27] RMA s. 88(4).

[28] RMA s. 94 (public notification), s. 104 and 105 (considerations for granting consents).

[29] That the term "environment" is meant to be broad and inclusive is underscored by the use of the word "includes" rather than "means," which is employed in nearly every other definition in section 2.

[30] RMA s. 2.

[31] RMA s. 3.

[32] See, e.g., Ministry for the Environment, People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform, December 1988, at 55-57; David Sheppard, "Doing Justice in Environmental Decision-Making," presented to University of Auckland conference on Environmental Justice and Market Mechanisms, 5-7 March 1998, at 1-2; Explanatory Note to the Resource Management Bill at p. iii.

making process. Second, it is generally accepted that better environmental decisions will result from a greater flow of information, including information that is held or developed by the members of local communities. Finally, open public participation is encouraged on fairness grounds; if decisions are to be made that will broadly affect the community, then it is fair to provide members of the community the opportunity to participate.

The primary mechanism for promoting public participation in the RMA is open standing. The concept of open standing is applied at all levels of decisionmaking under the RMA. "Any person" may make a submission to the Ministry for the Environment regarding a proposed national policy statement.[33] With respect to the preparation of regional policy statements, and regional or territorial plans, any person may make a submission to council. Similarly, any person may make submissions to council in regard to notified resource consent applications[34] and heritage orders.[35]

Standing is similarly open in the Environment Court. Generally, any person who makes a submission to a council regarding a planning instrument or a resource consent has a right to take an appeal to the Environment Court.[36] Even where he or she has failed or was unable[37] to make a submission, "any person" may participate in any Environment Court action initiated by another person if he or she has "an interest in the proceedings greater than the public generally" or "represent[s] some relevant aspect of the public interest."[38] Further, "any person" may apply for a declaration and participate in the Court's proceedings on the application.[39] Similarly, "any person" may apply to the Court for an enforcement order, except that only a local authority may apply when seeking the enforcement of certain rules or resource consent conditions relating to discharges.[40] Finally, any person may request the Court to initiate proceedings regarding a criminal offence committed under the RMA.[41]

Besides standing, several other mechanisms relate to public participation. First, there is a presumption in favour of public notification of applications for resource consents.[42] Public notification is the gateway to broader participation in the processing of resource

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[33] RMA s. 49.

[34] RMA s. 96.

[35] RMA ss. 69, 190.

[36] RMA s. 120 (resource consents); First Schedule, s. 14(1) (policy statements and plans).

[37] In non-notified consent application determinations, the RMA provides no opportunity for public submissions.

[38] RMA s. 274.

[39] RMA s. 311 (declarations).

[40] RMA s. 315 (enforcement orders).

[41] RMA s. 338(4).

[42] RMA s. 92. To some extent, local government practice indicates this presumption is illusory. According to the Ministry for the Environment's survey of local authorities, 95 percent of all resource consent applications in 1996 and 1997 were processed on a non-notified process.

consents, since it allows interested parties to make submissions and thereby to secure a right of appeal to the Environment Court. Second, the awarding of costs in the Environment Court has the potential to discourage public participation by increasing the risk of participation.

E. The RMA Framework: Institutions and Instruments

The RMA applies a tiered planning and review approach to environmental management. Environmental planning occurs on the national, regional and local levels for the purpose of setting forth policies and rules for achieving sustainable management and the integrated management of natural resources, particularly land, air and water. These planning processes are undertaken by the central Government (Ministry for the Environment or Department of Conservation), regional councils, and district or city councils. In general, each planning document must be consistent with the objectives, policies, methods and objectives of a higher-level or same-level planning document. For example, regional authorities' planning documents must be consistent with statements of national policy and district plans must be consistent with both regional plans or policy statements and with national policy statements. In addition to establishing a system of resource planning, the RMA establishes a permitting (or resource consent) system.

1. National Institutions and Instruments

At the national level, the RMA provides for the development of national policy statements. National policy statements may be prepared by the Minister for the Environment for the purpose of setting national policy on "matters of national significance that are relevant in achieving the purpose of [the RMA]."[43] Although they may be used to address a variety of issues, the RMA intends them to address matters that are of broad national, rather than mere local or regional, importance.

One particular kind of national policy statement is the New Zealand coastal policy statement. The RMA mandated the preparation of the New Zealand coastal policy statement by the Minister of Conservation.[44] The purpose of the coastal policy statement is to set national priorities for the management of the coastal marine area in accordance with the purpose of the RMA. The first New Zealand coastal policy statement was issued in May 1994.

Although national policy statements do not set specific rules and are not specifically enforceable, they have potentially wide impact. When a national policy statement becomes effective, each district and regional council is required to ensure that its own policies and plans are consistent with the national policy statement and to take steps, with public input, to rectify any inconsistencies.[45]

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[43] RMA s. 45.

[44] RMA ss. 46-52.

[45] D.A.R. Williams, Environmental and Resource Management Law at 106 (citing Report of the Review Group on Resource Management Bill, 11 February 1991, at 35-36).

It has been suggested that national policy statements could be prepared for issues such as carbon dioxide emissions or the irradiation of food.[46] To date, however, the national government has not issued any discretionary national policy statements.

2. Regional and Territorial Authorities and Instruments

As stated above the most important institutions in the RMA framework are regional and territorial authorities. Regional authorities are primarily responsible for ensuring the integrated management of the natural and physical resources within each region. They also bear primary responsibility for managing the region's water and air resources, as well as land uses which particularly impact on water quality or air quality. The principal instruments through which regional authorities act are regional policy statements and regional plans.

The RMA requires each regional authority to prepare a regional policy statement . The regional policy statement serves as the fundamental policy document for each region and is intended "to achieve the purpose of the Act by providing an overview of the resource management issues of the region and the policies and methods to achieve the integrated management of the natural and physical resources within the whole region."[47] The Environment Court has called regional policy statements the "heart of resource management" for each region.[48]

In addition to regional policy statements, which are required by the RMA, regional councils have the discretion to address particular environmental issues through regional plans.[49] The purpose of regional plans is "to assist the regional council to carry out any of its functions in order to achieve the purpose of the Act."[50] Although regional plans may be prepared to address any function of a regional council,[51] the RMA lists a number of circumstances or considerations which would appropriately be addressed by means of regional plans, including *inter alia*: "[a]ny significant conflict between the use, development, or protections of natural or physical resources"; "[a]ny significant need or demand for the protection of natural and physical resources or of any site, feature, place or area of regional significance"; threats from natural hazards; and "any use of land or water that has actual or potential adverse effects on soil conservation or air quality or water quality."[52]

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[46] Id. at 105.
[47] RMA s. 60.

[48] North Shore City Council v. Auckland Regional Council, [1994] NZRMA 521, 526 (Pl. Trib.)

[49] RMA ss. 63-70.

[50] RMA s. 63(1).

[51] RMA s. 65(2)(a).

[52] RMA s. 65(3)(a) to (h).

Unlike the regional policy statement, which merely sets forth issues and objectives for integrated environmental management, a regional plan may promulgate specific rules regarding resource use. Rules in regional plans may prohibit, regulate or allow specific activities.[53] In general, a regional plan may not be inconsistent with a higher level planning document, including national policy or coastal statements, water conservation orders, or the regional policy statement.[54] It must also be consistent with other regional plans in effect for the same region.

Territorial authorities under the RMA have a narrower jurisdiction. Their primary function is to control the effects of land use, subdivision of land and noise.[55] The fundamental instrument to carry out this function is the district plan, the preparation of which is mandated by the RMA.[56] A district plan may promulgate rules regarding the use and subdivision of land and esplanade reserves. It may provide for permitted, regulated, and prohibited uses of land.[57] Before adopting any particular rule, a territorial authority must have regard to the actual or potential effects of the subject activity on the environment, and any rules in a district plan must be consistent with regional plans, regional policy statements, and national policy statements.

3. Resource Consents

In addition to national, regional and territorial planning and policy instruments, the RMA provides for certain resource uses to be subject to specific permission, or resource consent, from the appropriate authority. The resource consent process enables environmental managers to look closely at environmental issues associated with particular proposals for resource use. In order to obtain a resource consent, an applicant must prepare a project-specific analysis of the environmental effects of the proposal.[58] After considering a number of different factors,[59] the consent authority -- usually a regional or district council -- must decide whether to grant consent to the activity or impose conditions to address environmental effects.

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[53] RMA s. 68(1).

[54] RMA s. 67(2).

[55] RMA s. 31

[56] RMA s. 72-73.

[57] RMA s. 76(3).

[58] RMA s. 88.

[59] Section 104 of the RMA sets forth factors councils must "have regard to" when considering resource consent applications. These factors include: actual or potential effects on the environment of allowing the activity; national policy statements, regional and district plans; water conservation and heritage orders; and any other factor the consent authority considers relevant and reasonably necessary to consider. Importantly, consideration of all such factors (and presumably the resource consent itself) is explicitly made "[s]ubject to Part II."

Section 105 sets forth the standards for determining the merits of a resource consent application. These standards differ depending on whether the activity for which consent is sought is controlled, discretionary, or non-complying (as specified in the applicable plan).

The particular considerations depend on how a particular activity is characterised by the rules in a plan. A plan may designate an activity in one of five ways. A "permitted activity" is one that is allowed without any requirement for a resource consent. A "controlled activity" is one for which the applicant is entitled to resource consent, subject to council consideration of particular factors specified in the plan and possible imposition of conditions related to those factors. A "discretionary activity" is one for which a consent authority retains discretion to grant or deny, or to impose conditions on resource consent. The degree of discretion retained by the consent authority may be complete or limited and must be specified in the plan. A "non-complying activity" is one which contravenes a rule in a plan but is not listed as a "prohibited activity"; resource consent may be granted or denied. A "prohibited activity" is one which is expressly disallowed by a plan; as such, it may not be pursued even with resource consent.

There are five types of resource consents: land use consents; subdivision consents; coastal permits; water permits; and discharge permits.[60] A land use consent is required only if a land use would contravene a rule in a district plan.[61] In other words, there is a general presumption that land uses do not require resource consents unless a rule in a plan requires one. Resource consent is required for subdivision unless the subdivision is expressly permitted by a rule in a district plan.[62] Similarly, no person may take, use, dam or divert water or heat or energy from geothermal water,[63] and no person may discharge contaminants to air, land or water[64] without obtaining resource consent unless expressly permitted by a rule or regulation.

Resource consent applications may be processed on a notified or a non-notified basis, although a statutory presumption favours notified processing. Notified resource consent applications are open for public input and submissions from "any person" before a decision is made on the merits of the application. Non-notified applications are not subject to public submissions and are decided by the consent authority without formal public participation. Generally applications must be notified unless the proposal will have effects which are not more than minor and written approval has been obtained from all persons likely to be adversely affected by the proposed activity. Despite the statutory preference for notification of resource consent applications, the Ministry for the Environment recently estimated that approximately 95 percent of applications nationwide are processed on a non-notified basis.[65]

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[60] RMA s. 87.

[61] RMA s. 9.

[62] RMA s. 11.

[63] RMA s. 14.

[64] RMA s. 15.

[65] Report of the Minister for the Environment's Reference Group, September 1998, at 58.

A resource consent for land use or subdivision is for an unlimited duration unless otherwise specified. Other resource consents may be issued for a period of up to thirty five years, but run for a term of five years if no period is specified.[66] Resource consents regarding land uses and subdivision attach to the land and may be transferred with the land. Water permits may be transferred in some cases.[67]

4. Appeals and References

In addition to the quasi-legislative instruments of national policy statements, regional policy statements, regional and district plans, and the quasi-judicial system for issuing resource consents, formal adjudication in the Environment Court represents an essential arm of the RMA framework. The Environment Court's role in overseeing the planning and the resource consent processes is potentially large.

With the exception of national policy statements, the RMA gives the Environment Court the power to render judgment on any aspect or instrument in the planning process and resource consent system. Any person who makes a submission regarding a provision of a plan may refer the regional or district council's decision to include or omit that provision to the Environment Court for reconsideration.[68] Similarly, any person who makes a submission on a resource consent, as well as the applicant, may appeal the consent authority's decision to the Environment Court for a de novo rehearing.[69] Thus, the Environment Court's decisions on references and appeals round out the principal instruments under the RMA.

[66] RMA s. 123.

[67] All water permits may be transferred to the new owner or occupier of the site to which they apply. Permits to divert/abstract or use water may be transferred to another site in some circumstances.

[68] RMA, First Schedule s. 14.

[69] RMA s. 120.

III. THE STRUCTURE OF ENVIRONMENT COURT LITIGATION UNDER THE RMA

Before reviewing the contribution the Environment Court has made to developing the thematic and substantive aspects of New Zealand's law of sustainability, it is well to consider more closely some of the structural aspects of this unique tribunal. Indeed because its rulings focus primarily on the legal and technical machinery of the RMA and the facts of the individual cases before it--which by nature are specific to New Zealand--the structural aspects of the Environment Court are what make it most interesting to oversees observers. Accordingly, this chapter will briefly trace the history of the Environment Court, outline its powers and functions under the RMA, and describe its unique role as an arbiter of questions of sustainability.

A. A Brief History of the Environment Court

The Environment Court was not established by the simple stroke of a pen. It has existed in some form since the earliest days of land use planning in New Zealand. Its earliest forebear, the Planning Appeal Board, was established by the Town and Country Planning Act of 1953 for the purpose of adjudicating disputes arising from town planning schemes. The Board's parliamentary creators intended to create a specialist tribunal, "more or less judicial" in nature, that would ensure "justice as between the people and the [planning] authority."[70] From the start, the Board was intended to be a full-time, multi-disciplinary body (with a barrister as chair) that would resolve disputes on the basis of evidence received at hearings held around the country.[71]

By the middle 1960s the Planning Appeal Board had developed a substantial body of case law comprising planning principles applicable to rural, residential, commercial and industrial zones, as well as to reserves. Its increasing case load, however, threatened to overwhelm it. Help came in the form of a so-called temporary Special Town and Country Appeal Board established in 1963. With the ever increasing case load, the temporary board was made permanent and a third appeal board was created in 1969.

During these early years, the importance of these specialist Town and Country Planning Appeal Boards was recognised. R.J. Bollard (now an Environment Court Judge) emphasised that the Boards' decisions were often more important than ordinary court decisions because they involved issues of widespread public interest and precedential value as well as large sums of money.[72] Judge Bollard also noted that the nature of appeal board hearings differed from ordinary judicial proceedings in this important respect: the boards

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[70] (1953) 299 Parliamentary Debates at 809-10 (cited in Principal Environment Court Judge David Sheppard, "Forty Years of Planning Appeals," Resource Management News, May/June 1995 at 20).

[71] David Sheppard, "Forty Years of Planning Appeals" at 20 (citing (1953) 299 Parliamentary Debates at 689).

[72] R.J. Bollard, "The Important Role of Town and Country Planning Boards," New Zealand L. J. 233 (5 June 1973).

exercised the power of de novo review on issues that inevitably involved the prickly intersection between public interests and private rights. As Bollard summarised:

> The outcome of an Appeal Board hearing reflects the planning and administrative experience of Board members, enabling them properly to assess the evidence adduced (the extent and quality of which varies from case to case), and to foresee the overall effect of a planning decision beyond the bounds that the individual may conceive as owner of the land under consideration. What may seem illogical to the individual appellant, may be quite logical in terms of wider planning concepts and experience.[73]

Thus, as Bollard noted, the Appeal Boards were endowed with the difficult responsibility of protecting the public interest by applying expert knowledge and "enlightened opinion" to an essentially judicial function of determining individual rights.[74]

The 1970s brought further changes to the Appeal Boards. The Town and Country Planning Act of 1977 consolidated the three Appeals Boards into a single Planning Tribunal and declared the tribunal a court of record. It also vested the Planning Tribunal with the power to make declarations regarding whether particular uses were permitted under the provisions of the Town and Country Planning Act.

The expanding role of the Planning Tribunal was checked by the National Development Act of 1979 and the advent of the Government's "Think Big" program.[75] In order to streamline consideration of major projects deemed vital to the nation's strategic interests, the National Development Act relegated the Planning Tribunal to an advisory role on the Think Big projects. After an inquiry into the merits of granting consents for a Think Big project, the Planning Tribunal could merely recommend to the Minister of National Development whether to proceed and, if so, under what conditions. Ultimate authority, however, rested with the Government, which had no obligation to follow the Planning Tribunal's recommendations. The Parliamentary debates regarding the proper role of the Planning Tribunal (as opposed to the democratically-accountable elected officials) in deciding the fate of the Think Big projects[76] reflected a growing wariness of the Planning Tribunal's expanding authority.

The National Development Act was repealed in 1986. No major changes were made to the Planning Tribunal until the RMA was enacted in 1991.

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[73] Id. at 234.

[74] Id. at 234 (citing Turner and Others v. Allison and Others, [1971] N.Z.L.R. 833, 843).

[75] Sheppard, "Forty Years of Planning Appeals," at 22-23.

[76] Id. at 22.

B. The Powers and Functions of the Environment Court Under the RMA

The RMA substantially elevated the role of the Planning Tribunal. It both expanded its powers and vested in it a wider range of functions at the planning, resource consent, and enforcement stages of environmental management. In short, virtually every important mechanism for environmental management is now subject to review in the Environment Court, including regional policy statements, regional and district plans, and resource consents, as well as water conservation orders.

The Environment Court exercises authority under the RMA in three realms. First, it has the power to make declarations, or in other words, to say what the law is. Second, it has the power to review the decisions of local government authorities when they are brought to the Court by reference or appeal. Finally, it has the power to enforce the duties of the RMA through civil or criminal proceedings. In exercising its jurisdiction, the Environment Court has the status and powers of a District Court.[77] It is not, however, bound by the usual procedural and evidentiary formalities of courts of law.[78] Rather it is responsible for establishing its own rules of conduct and evidence.

1. The Power to Make Declarations

The RMA significantly expanded the Environment Court's power to make declarations. Section 310 of the RMA addresses the scope of the Court's power to make declarations. One important item within its power to declare is "the existence or extent of any function, power, right, or duty" under the RMA.[79] This power has been invoked by litigants to gain guidance on the division of authority between regional and territorial authorities.[80] It has also been used to seek Environment Court determination of whether certain acts violate the RMA's general duty to avoid, remedy or mitigate adverse environmental effects.[81] In addition, the Environment Court may also declare whether or not there are inconsistencies between provisions in the various policy statements and plans and whether or not any act or omission contravenes or is likely to contravene any rule in a plan or proposed plan.[82] Declarations on these issues may be sought by any person.[83]

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[77] RMA s. 278 (powers of a District Court), 247 (powers inherent in a court of law).

[78] RMA s. 246.

[79] RMA s. 310(a).

[80] E.g., Application by Auckland City Council (1992) 2 NZRMA 9 (Pl. Trib.); Application by Christchurch City Council, (1995) NZRMA 129 (Pl. Trib.).

[81] Sayers v. Western Bay of Plenty District Council (1992) 2 NZRMA 143; Kaimanawa Preservation Society, Inc. v. Attorney-General, [1997] NZRMA 356, 360 (Env. Ct.).

[82] RMA s. 310(b) and (c).

Whether or not to make a declaration is a matter of discretion for the Environment Court. Although the Court is generally reluctant to make declarations about abstract issues or issues not adequately framed by specific facts and argument, it has sometimes been willing to rule on uncontested issues where the public interest warranted judicial interpretation at an early point.[84]

The Environment Court's broad power to make declarations offers several substantial opportunities for environmental litigants. First, it enables the Environment Court to make pronouncements on issues that otherwise might be beyond its reach in appeals and references. One example is notification of resource consent applications. Council decisions not to notify applications do not give rise to a right of appeal and are usually challenged in judicial review proceedings in the High Court. However, on several occasions, the Environment Court has entertained applications for declarations that consent authorities had the duty to notify particular resource consent applications.[85] Second, litigants may seek declarations regarding the Crown's duties under the RMA, the only enforcement mechanism (although indirect) that can be used to enforce the Crown's compliance with the RMA.[86] Third, the declaration procedure allows litigants to resolve disputes at an early stage. This can prevent the undue expenditure of resources that might later be deemed unnecessary.

2. The Power to Decide References and Appeals

As mentioned already, the Environment Court is also empowered to decide appeals challenging decisions by regional and territorial authorities. This power extends to the basic planning instruments -- regional policy statements and regional and district plans -- as well as to resource consents. National policy statements are not reviewable in the Environment Court.

Any person who makes a submission to a council regarding a plan or policy statement has the right to a review of that submission in the Environment Court. Such a reference to the Court, however, may not be broad based. It must refer to a specific provision of a plan or

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[83] See RMA s. 311(1) and (2).

[84] See Applications by Canterbury Frozen Meat Company (1993) 2 NZRMA 282 (Pl. Trib.) (deciding, after consideration, to make a declaration even though the application was unopposed); Application by Christchurch City Council [1995] NZRMA 129 (Pl. Trib.) (appointing an amicus curiae to present opposing arguments); North Shore City Council v. Auckland Regional Council, [1994] NZRMA 521, 526 (Pl. Trib.) ("If there are differences . . . among responsible public authorities [as to the scope of the Regional Council's authority], it is desirable that the differences should be resolved promptly."); Application by Projet Adventures Ltd and Stevens, (1994) NZRMA 27 (Pl. Trib.) (where there are interested or affected parties who have been served, the fact that no parties appeared at the hearing in opposition to the requested declaration does not deprive the court of power to make "an effective and binding declaration").

[85] E.g., Foodstuffs (South Otago) v. Christchurch City Council (1992) 2 NZRMA 154 (Pl. Trib.

[86] D.A.R. Williams, Environmental and Resource Management Law at 625 (2d ed. 1997).

policy statement which was the subject of the litigant's submission to the council.[87] After a public hearing on a reference, the Environment Court may either confirm or "direct the local authority to modify, delete, or insert" any provision referred to it.[88] Local authorities are obliged to make any amendments necessary to give effect to the Environment Court's decisions.[89] Accordingly, the Environment Court is the final arbiter of whether particular provisions are included in plans and regional policy statements.

Similarly, any person who makes a submission to a local authority regarding a resource consent application, as well as the consent applicant, may appeal the local authority's decision to the Environment Court.[90] In discharging its functions as an appeal body, the Environment Court considers the merits of the application de novo, exercising the same powers and responsibilities as the local authority whose decision it is reviewing. Although it may rely on evidence that was submitted to the local authority, it may -- and almost always does -- permit new evidence to be introduced before it. Thus, the Environment Court maintains ultimate responsibility for deciding any resource consent application referred to it.[91]

3. The Power to Issue Enforcement Orders

The Environment Court also has wide powers to issue enforcement orders under the RMA. "Any person" may apply to the Court for an enforcement order for numerous reasons, including the following: (1) to enjoin a person from taking any actions that contravene any provisions of the RMA, any regulations, any rules in regional or district plans, or any resource consents; (2) to enjoin a person from any action that "is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment"; (3) to require a person affirmatively to act to ensure compliance with the RMA's various provisions and instruments or to avoid, remedy, or mitigate any adverse effects on the environment caused by or on behalf of that person; and (4) to compensate others for reasonable costs associated with avoiding, remedying or mitigating effects caused by a person's failure to comply with one of several instruments, including rules in plans or resource consents.[92] In addition, a local authority may also apply for enforcement orders in some additional circumstances.[93]

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[87]RMA, First Schedule, s. 14.

[88] RMA, First Schedule, s. 15(2).

[89] RMA, First Schedule, s. 16. The Minister of Conservation must approve any changes to regional coastal plans that are directed by the Environment Court.

[90]RMA s. 120.

[91] The same is true for resource consent applications that have been "called in" by the Minister for the Environment. The Minister's decision is subject to public comment and ultimately to review by the Environment Court on the same basis as any other resource consent application. RMA s. 149(3).

[92]RMA ss. 314, 316.

[93]RMA s. 316.

The far-reaching power to issue enforcement orders is a potentially powerful mechanism to enforce statutory duties arising under the RMA, particularly the general duty under Section 17 to avoid, remedy or mitigate any adverse environmental effects. Whether or not to issue an enforcement order is a matter of discretion for the Environment Court. The burden rests upon an applicant to make the case for an enforcement order and the Court will give the benefit of doubt to the person against whom the order is sought.

C. The Nature of Environment Court Adjudication

The broad powers of the Environment Court to address nearly all aspects of environmental management under the RMA's framework for sustainable management are only one aspect of what makes the Court interesting to international observers. The Environment Court's status as a specialist, expert tribunal with the powers of de novo review distinguish it from most other countries' adjudicators of environmental disputes -- including courts in the United States.

1. The Structure of the Environment Court

As constituted under the RMA, the Environment Court is a court of record comprising both Environment Judges and Environment Commissioners. Environment Judges are judges of law who are also appointed as District Court Judges. They are judges in the traditional sense--legally trained lifetime appointees. However, in order to ensure that the Environment Court "possesses a mix of knowledge and expertise" in matters coming before it, the RMA also provides for non-judicial Environment Commissioners.[94] Qualifications to become an Environment Commissioner include knowledge and expertise in several areas relevant to environmental disputes, including business, economics and local government affairs, planning and resource management, environmental science, architecture and engineering, Maori and Treaty of Waitangi issues, and alternative dispute resolution techniques.[95] Environment Commissioners are appointed for a term of five years by the Minister of Justice, in consultation with the Ministers for the Environment and for Maori Affairs.

In most instances, one Environment Judge and one Environment Commissioner constitute a quorum of the Environment Court.[96] It is the Court's practice, however, to empanel two Environment Commissioners and an Environment Judge to preside over plan references and appeals of resource consent applications. In such instances, the Environment Judge presides over the panel and the proceedings, but a decision of the majority represents the decision of the Court.[97] Applications for declarations or enforcement orders are presided

[94] RMA s. 253.

[95] RMA s. 254.

[96] RMA s. 265.

[97] RMA s. 265. The author is aware of no cases in which an Environment Judge was the dissenting member.

over and decided by an Environment Judge sitting alone.[98] Environment Commissioners increasingly preside over mediations of Environment Court cases. An Environment Commissioner who mediates a dispute usually will not sit on the panel that decides the case if the mediation fails to resolve all issues.[99]

2. De Novo Standard of Review

When deciding references and appeals of decisions by local authorities regarding policy statements, plans or resource consents, the Environment Court applies a de novo standard of review. In exercising its review, it is not limited to the consideration of the factual or legal issues by the local authority whose decision it is reviewing. The Environment Court may receive in evidence anything that it considers appropriate and may subpoena any witnesses whose testimony it considers will be helpful.[100] The focus of Environment Court review is the merits and substance of the particular decision at issue, not the deliberative process of the executive authority that made the initial decision.

Importantly, in exercising its appeal function, the Environment Court "has the same power, duty, and discretion . . . as the person against whose decision an appeal or inquiry is brought."[101] In addition to any specific duties applicable to any particular planning decision, the Environment Court's duties include the Section 17 duty to avoid, remedy, or mitigate adverse effects on the environment and the general duty to promote sustainable management. In discharging its duties, the Environment Court may confirm, amend, or cancel any decision to which an appeal relates.

More than any other single power, the power of de novo review shapes the contours of the Court's influence in resource management. It places the Court in the position to exercise the fundamental tasks of environmental management. In short, as the Court has written, "the Court hears the evidence itself and decides what the facts are, based on that evidence, before coming to its own conclusion as to the proper way in which the statutory discretions should be exercised."[102] The Court is free to exercise this discretion in the way it sees fit, even where there are potentially inconsistent council decisions on similar facts.[103]

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[98] RMA s. 265.

[99] See RMA s. 268.

[100] RMA ss. 276 and 278.

[101] RMA s. 214.

[102] Waitakere Forestry Park Ltd v. Waitakere City Council, [1997] NZRMA 231, 234-35 (Env. Ct.) (citing Countdown Properties et ors v Dunedin City Council [1994] NZRMA 145 (High Ct.); A J Burr Ltd v Blenheim Borough Council [1980] NZLR 1 (Ct. App.); Love v Porirua City Council [1984] 2 NZLR 308 (Ct. App.)).

[103] McLuskie v. Waikato District Council, [1995] NZRMA 31 (Pl. Trib.) (addressing the function of appeals with regard to inconsistent council decisions on applications with similar facts: "[B]y bringing this appeal, [plaintiffs] have obtained a second consideration of their proposal by independent and experienced decision-makers, and a reasoned decision addressing the main evidence and issues presented on their behalf by counsel experienced in resource management cases.").

The Court of Appeal has described the Environment Court's duties in exercising de novo review as follows:

> [Its] duty necessarily includes the duty to decide the application. Unlike more general jurisdiction appellate Courts, the Environment Court has no power to remit a [matter] to a council for the latter's reconsideration and decision. For the Environment Court to do so would be contrary to its "duty". So where under s 290(2) it cancels a decision, the application to the council to which that decision related ceases to have effect. It does not remain extant for fresh or further consideration by the council. And consistently with that role and responsibility any rehearing in the light of new evidence or a change in circumstances subsequent to its decision is by the Environment Court itself (s 294).[104]

In essence, then, when the Environment Court exercises its function of de novo review, it becomes the primary decisionmaker and bears full responsibility for achieving the purpose of the RMA.

3. The Public Law Nature of Environment Court Proceedings

As with all environmental and natural resource disputes, Environment Court cases fundamentally concern more than private rights. They concern the ways in which public rights to environmental quality constrain the exercise of private rights. In recognition of the public law nature of its proceedings, the Court has established procedures to ensure that it serves the public interest in its exercise of discretion. For example, in Te Aroha Air Quality Protection Appeal Group v. Waikato Regional Council (No. 1),[105] the Court allowed the late submission of evidence, despite unfairness to the opposing party, on the basis that the public law importance of RMA appeals is was an overriding factor:

> These are public law proceedings in which a general public interest may transcend the private interests of the parties. That public interest may even transcend the important aspect of fairness to the parties. * * *
>
> The Tribunal's need [to consider additional evidence] is [that] a decision to grant a resource consent may affect interests of the public and of other private parties than the appellants and for a long time. It

[104] Fleetwing Farms Ltd. v. Marlborough DC, [1997] NZRMA 385, 391 (Ct. App. 1997).

[105] (1993) 2 NZRMA 572 (Pl. Trib.).

> also relates to the confidence that the public is entitled to have in the quality of the Tribunal's decision-making.[106]

The public law nature of Environment Court proceedings is also evident in other ways. There is no formal burden of proof in plan references and appeals on resource consent decisions. There is no presumption that the local authority's decision is correct, and therefore no onus on the party taking the appeal to dislodge the presumption.[107] Each party simply provides the Court evidence and argument as to why its position should prevail and has the opportunity to test other parties' evidence through cross examination. As a result, the adversarial element, though present, is not as important as in ordinary litigation regarding private rights.[108] The primary purpose of the adversarial process in Environment Court proceedings is to develop high quality information in order to assist the Court to discharge its public law responsibilities.

4. Appeal from Environment Court Decisions

Unsuccessful litigants may appeal Environment Court decisions to the High Court. The appeal is limited to points of law.[109] In RMA litigation, the High Court has been reluctant to assert itself in the kinds of policy judgments and decisions which are the daily diet of the Environment Court.[110] Rather, the High Court appears to carefully constrain its review to matters of law. Its function is "to see that the statute, the district plan and the regional plan have been correctly interpreted . . . , to ensure that all relevant, and no irrelevant, matters have been considered, that the decision of the [Environment Court] is properly based upon the evidence before it and that the decision reached is 'reasonable' in the sense that it was one that could be arrived at by a rational process in accordance with a proper interpretation of the law and upon the evidence."[111] By contrast, the High Court construed the Environment Court's function as quite different:

> [T]he role of this Court is not to delve into questions of planning and resource management. That is for the expert [Environment Court] to

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[106] Id. at 574.

[107] Leith v. Auckland City Council, [1995] NZRMA 400, 408-09 (Pl. Trib.) (citing K. A. Palmer, Local Government Law in New Zealand (2d ed. 1993) at 646).

[108] New Zealand Rail Ltd. v. Nelson Marlborough Regional Council, (1992) 2 NZMRA 70, 76 (Pl. Trib.) (holding that the court is empowered to make orders for particular discovery, noting that, while the adversarial element is not as important in public law proceedings where there is no formal onus of proof, "it is highly desirable that the [Court] has before it all the information necessary to enable it to make a fully informed decision.").

[109] RMA s. 299.

[110] See R. Somerville, "The Resource Management Act 1991: An Introductory Review," in 1 Brookers Resource Management RM-7, RM-9 (23/7/98).

[111] Stark v. Auckland Regional Council, [1994] NZRMA 337, 340 (High Ct.).

> determine based on its knowledge gained from its day-to-day experience and its consideration of district and regional plans and submissions made to it.[112]

By its own assessment, then, the High Court lacks the expertise and background to deal with matters of policy that drive environmental decisionmaking.

D. Summary and Conclusion

In summary, the Environment Court is a paramount institution in environmental decisionmaking under the RMA. It has the power to determine almost every kind of issue that might arise, including the substantive provisions of policy statements, plans and resource consents. The capacity of the Environment Court to review nearly every important aspect of RMA implementation underscores its crucial role.[113] In the end, the Environment Court bears the ultimate responsibility to ensure that each instrument it considers contributes to the goal of promoting sustainable management.

The potential influence of the Environment Court is sobering. In essence, it is the adjudicator of sustainability. As one of the framers of the RMA, Sir Geoffrey Palmer, states: "It might be argued that questions of this sort cannot be made justiciable; that the [Environment] judges and their [commissioners] are being handed a task with such sweeping social and political consequences that it is impossible."[114] Despite the great burden they were placing upon the Environment Court, however, Palmer and others believed that the Court would succeed because of its experience and expertise, political guidance in the exercise of its discretion through national policy statements, and flexibility in the RMA that would permit the Court to achieve optimal outcomes in fact specific situations.[115]

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[112] Id. at 340.

[113] As one commentator has noted, "legislative" rules under the RMA can be unmade in various ways. Janet McLean, "New Zealand's Resource Management Act: Process with a Purpose?," 7 Otago L. Rev. 538, 542 (1994). The unmaking, or remaking, of these rules is often accomplished on a case by case basis when resource consents or plan changes are being considered by a council in its quasi-judicial capacity or by the Environment Court in its full judicial capacity, resulting in "policy making by adjudication"). The importance of the Environment Court is thus elevated by the likely predominance under the RMA of judicial rulemaking. Id.

[114] Sir Geoffrey Palmer, Sustainability - New Zealand's Resource Management Legislation (Victoria University 1992).

[115] Id. at 20.

IV. THE SUBSTANCE OF SUSTAINABILITY: ENVIRONMENT COURT TREATMENT OF FUNDAMENTAL RMA THEMES

A. Interpreting Sustainability: Defining Sustainable Management

Part II of the RMA sets forth the purpose and the principles that govern environmental management under the RMA regime. Section 5 establishes the overall purpose of the Act, namely promoting the sustainable management of physical and natural resources. Sections 6 through 8 set forth other principles and matters of importance under the RMA scheme. These require decisionmakers, in promoting sustainable management, to "recognise and provide for" matters of national importance, such as the preservation of the natural character of the coastal environment, wetlands and lakes and rivers, the protection of significant indigenous vegetation and habitat for indigenous fauna.[116] Section 7 requires decisionmakers to "have particular regard to" other issues of importance, including intrinsic values of ecosystems and the efficient use and development of natural and physical resources.[117] Section 8 requires

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[116] RMA s. 6. Section 6 provides in full:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development;

(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development;

(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;

(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers;

(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

[117] RMA s. 7. Section 7 provides in full:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to--

(a) Kaitiakitanga;

(aa) The ethic of stewardship;

(b) The efficient use and development of natural and physical resources;

(c) The maintenance and enhancement of amenity values;

(d) Intrinsic values of ecosystems;

decisionmakers to take into account the principles of the Treaty of Waitangi.[118]

Although Part II of the Act must be read as a whole, the definition of sustainable management in Section 5 is the cornerstone of the RMA. For that reason, the Environment Court's interpretation and application of that section is of particular importance to overseas observers. The Court's treatment is summarised below.

1. The Priority of Part II

One of the fundamental issues the Environment Court has been called upon to address during the implementation of the RMA is the role that the broad principles in Part II, and particularly section 5, play in the complex environmental management scheme created by the Act. Does section 5 and the rest of Part II pronounce values that are intended to constrain or direct decisionmaking under the various planning and resource consent functions under the Act? Or does section 5 simply set out in elaborate narrative, but essentially precatory, terms what the specific provisions and mechanisms in the RMA are designed to achieve? Because the Environment Court itself acts as a primary decisionmaker under the Act, the answer to this question is fundamental not only to how councils perform their functions but also to how the Court itself discharges its duties. Not surprisingly, these questions have provided fodder for an ongoing colloquy between the Environment Court, the High Court, and Parliament.

It is well established now that the broad principles of Part II, particularly section 5, guide if not constrain the exercise of particular decisionmaking functions under the RMA. As a matter of statutory certainty and case law authority, all plans and policy statements are required to conform with Part II,[119] as are resource consents.[120] The Environment Court now accepts that all discretion under the Act is to be exercised for the purposes of the Act.[121] The Environment Court, however, did not come to this determination easily.

(e) Recognition and protection of the heritage values of sites, buildings, places, or areas;

(f) Maintenance and enhancement of the quality of the environment;

(g) Any finite characteristics of natural and physical resources;

(h) The protection of the habitat of trout and salmon.

[118] RMA s. 8. Section 8 provides in full:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[119] RMA ss. 51, 61, 66, and 74.

[120] RMA s. 104(1), as amended 1993 (requiring all considerations in processing resource consents to be "[s]ubject to Part II").

[121] Royal Forest and Bird Protection Society v. Manawatu-Wanganui Regional Council [1996] NZRMA 241 (Pl. Trib.) (partial reporting).

In an important early case, Batchelor v. Tauranga District Council,[122] the Environment Court held that Part II considerations were not an overriding consideration of resource consent applications under section 104 of the Act. Weighing the relative importance of Part II principles in the consideration of resource consent applications, the Court took a limited view of the importance of section 5 to the mechanisms under the Act. In its view, section 5

> may be valuable to inform an exercise of discretion (particularly in the absence on express statutory guidance for the particular discretion); and to inform the interpretation of a provision, the meaning of which may be ambiguous or otherwise unclear. However, Parliament has provided detailed resources in the rest of the Act to serve that general purpose. Where the intent of those measures is clear from their terms, there may be no need to refer to that broad purpose of the whole Act. Further, there may not be any advantage in doing so, given the breadth of the meaning to be given to the term "sustainable management."[123]

This statement is remarkable for two reasons. First, it reflects a traditionally conservative philosophy of strict statutory interpretation, giving greatest weight to the most specific terms of the Act. Second, and more important, it betrays a scepticism of the RMA's expression of "sustainable management," openly criticising Parliament for casting the definition so loosely that it provides little direction to a reviewing court. The passage suggests that the Court was reticent to wade into such broad waters to provide helpful commentary and was ambivalent about letting its policymaking role under the Act displace the traditional judicial function of narrowly determining facts and applying statutory law.

The Environment Court's decision in Batchelor, based as it was on sound (if strict) interpretation of section 104, was upheld by the High Court.[124] However, it was quickly overturned by Parliament. The Resource Management Amendment Act of 1993 clearly stated Parliament's intent that decisionmakers, including the Environment Court, accord primacy to Part II considerations when determining resource consent applications.

At least one commentator has regarded the Environment Court's treatment of the primacy of Part II in Batchelor as a prime example of "quality litigation," or litigation that effectively promotes the development of helpful case law.[125] By making a determination that Part II considerations did not warrant primacy in resource consent decisions, the Environment Court pressed Parliament into action to clarify its intent.

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[122] (1992) NZRMA 266 (Pl. Trib.).

[123] Id. at 268-69.

[124] (1992) NZRMA 137 (High Ct.); accord New Zealand Rail Ltd. v. Marlborough District Council, [1994] NZRMA 70 (High Ct.) (holding that the provisions of Part II do not warrant primacy in the consideration of resource consents under section 104).

[125] Martin Phillipson, "Judicial Decisionmaking under the Resource Management Act," 24 Victoria U. of Wellington L. Rev. 163, 168 (1994).

There remains no doubt today that Part II considerations merit primacy in nearly all aspects of decisionmaking under the RMA. However, the Environment Court still must grapple with the question of what sustainable management and according it primacy actually means. The High Court recently has stated:

> . . . Part II of the RMA is critical to the new statute. It requires courts and practitioners to approach the new machinery provisions, and the resolution of cases, with the hortatory statutory objectives firmly in view. The fact that there are some difficult issues of interpretation of Part II itself, and its relationship with the rest of the RMA, does not absolve the consent authorities and courts from wrestling with these problems; or justify the side-tracking of Part II.[126]

The importance of the goal of the RMA has been increasingly evident in decisions by the Environment Court. On a procedural level, the Environment Court specifically addresses Section 5 and Part II issues in each of its decisions, usually in a discrete portion of the judgment. On occasion, in contrast to its reticent posture in the Batchelor case, it has allowed Part II considerations to predetermine resource consent applications, overriding and rendering unnecessary the specific consideration of the matters set forth in Section 104.[127] On a substantive level, the Court has recognised that the concept of sustainable management takes priority over common law rights in private property.[128] Despite its early reluctance to view Section 5 and the other Part II principles as paramount, the Court now comfortably does so.

2. The Meaning of Sustainable Management

As the Environment Court's views on the priority of "sustainable management" in environmental decisionmaking have evolved, so have its interpretation of the substantive meaning of sustainable management. Although Section 5 embodies many different concepts which are not altogether clear on their face, the focus of most debate among legal

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[126] TV3 Network Services Ltd. v. Waikato District Council, Case No. AP55/97 (September 12, 1997) (J. Hammond) (reported in Gordon, et al., Brookers Resource Management at A5.05 (1997)).

[127] In Minister of Conservation v. Kapiti Coast District Council, (1994) NZRMA 385, 393 (Pl. Trib.), the Environment Court held that it was unnecessary to consider the particular prongs of section 105(b)(2) because it had determined that the consent at issue should not be granted because of Part II considerations. Cf Titterton v. Dunedin City Council, (1994) NZRMA 395, 404 (Remarking on the difficulties of interpreting the amendment, the Court stated, "[i]t might be suggested for example, that s 104 is not the appropriate section to place the words '[s]ubject to Part II' and that perhaps they would be more appropriate in s 105, which provides the means by which a consent authority is to make decisions on applications for resource consents.").

[128] New Zealand Suncern Construction v. Tasman District Council, [1996] NZRMA 411, 425 (The RMA "sets in place a scheme in which the concept of sustainable management takes priority over private property rights. . . . It is inherent in the nature of district plans that they impose some restraint, without compensation, on the freedom to use and develop land as the owners and occupiers might prefer."), aff'd (1997) 3 ELRNZ 230. See also Falkner v. Gisborne District Council, (1995) NZRMA 462, 478; Hall v. McDrury, (1996) NZRMA 1, 9 (RMA purpose of sustainable management and its goal of avoiding, mitigating, or remedying adverse environmental effects override common law rights to drove livestock on a public road.).

commentators is the relationship between the first clauses of Section 5(2)--referring to enabling people and communities to provide for their wellbeing--and the latter clauses in subparagraphs (2)(a)-(c)--referring to ecological and environmental factors.

a. The "Environmental Bottom Lines" Approach

Some commentators view Section 5 as establishing a basic environmental threshold--or bottom line--which cannot be violated. According to this view, Parliament set forth those bottom lines narratively in subparagraphs 2(a)-(c) of Section 5.

The Minister for the Environment, Honourable Simon Upton, has long championed the bottom lines approach. In his often cited speech to Parliament on the third reading of the Resource Management Bill in 1990, he outlined the two pronged policy underlying the RMA. On the one hand, he argued, the RMA was designed to enable people and communities--not the Government--to provide for their economic wellbeing by making choices about their uses of resources free from government control. On the other hand, their choices would be constrained by the environmental bottom lines of Section 5, as interpreted and safeguarded by public authorities exercising powers under the Act. As the Minister said:

> [Section 5] enables people and communities to provide for their social, economic, and cultural wellbeing. Significantly, it is not for those exercising powers under the Bill to promote, to control, or to direct. With respect to human activities it is a much more passive formulation. People are assumed to know best about what it is that they are after in pursuing their wellbeing. Rather those who exercise powers under the legislation are referred to a purpose clause that is about sustaining, safeguarding, avoiding, remedying, and mitigating the effects of activities on the environment. It is not a question of trading off those responsibilities against the pursuit of wellbeing. * * * The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. As such, the Bill provides a much more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards, and society will set those standards. [Section 5] sets out the biophysical bottom line.[129]

As formulated by the Minister, then, the establishment of environmental bottom lines allows private resource developers to be freer from direction and control by governmental regulators.

Shortly after the RMA's enactment, and before any major statement by the Environment Court about the meaning of Section 5, the environmental bottom lines approach gained further momentum from a Board of Inquiry empaneled under the RMA to review the

[129] As reproduced in 1 Brookers Resource Management at A2-6 (10/3/98).

required New Zealand Coastal Policy Statement. Focussing its attention on the text of Section 5 rather than the broad policy objectives of Upton's remarks, the Board reasoned:

> in its context, the word "while" in subsection (2) means "and at the same time", and "contemporaneously", "so long as management is". In other words subsection (2) does not call for a balance to be struck between two objectives, it requires that management of natural and physical resources be carried out in a way which achieves the objectives (applies the constraints) specified in (a), (b) and (c).[130]

The Board's scrutiny of the word "while" has been shared by several commentators who have addressed the meaning of Section 5. As put by Professor Fisher, the precise issue of statutory interpretation is whether the word "while" denotes a coordinating or a subordinating relationship between the section's social and economic objectives on the one hand and environmental objectives on the other.[131]

Against the backdrop of the Minister's Third Reading Speech and the Board of Inquiry's construction of sustainable management, the Environment Court developed a line of cases promoting a bottom lines approach. In Plastic and Leathergoods Company, Ltd., v. Horowhenua District Council,[132] for example, the Environment Court held that clauses (a), (b), and (c) of Section 5(2) established "cumulative safeguards" and stated that "[i]f we find that any one of these safeguards is unlikely to be achieved, then the purpose of the Act is not fulfilled."[133] In that case, the Court cancelled a resource consent for a recycling center and waste transfer station adjacent to a commercial and light industrial area on the basis that the adverse effects of noise, odour, and traffic were not likely to be adequately avoided, remedied or mitigated. In the Court's view, Section 5 prohibited the granting of a resource consent irrespective of the value of the project for the community's wellbeing because the cumulative bottom lines were not satisfied. This approach was repeated in a number of decisions by several Environment Court panels led by Judge Kenderdine.[134]

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[130] As cited in 1 Brookers Resource Management A2-8 (10/3/98), s A5.09.

[131] D.E. Fisher, "The Resource Management Legislation of 1991: A Juridical Analysis of its Objectives," in 1 Brookers Resource Management Intro-1 (15/11/91); see also Milligan, "Pondering the 'While'", Terra Nova, May 1992.

[132] Dec. No. W 26/94 (April 19, 1994) (slip op.).

[133] Id. at 8.

[134] E.g., Foxley Engineering Ltd v. Wellington City Council, Dec. No. W 12/94 (March 16, 1994) (Pl. Trib.) (slip op. at 40-41) (Sections 5(2)(a), (b), and (c) are "cumulative safeguards" which "must be met before the purpose is fulfilled."); Shell Oil New Zealand Ltd v. Auckland City Council, Dec. No. W 8/94 (February 2, 1994) (Pl. Trib.) (slip op. at 10) ("Section 5(2)(a), (b), (c) provisions may be considered cumulative safeguards which enure (or exist at the same time) whilst the resource . . . is managed in such a way or rate which enables the people of the community to provide for various aspects of their wellbeing and for their health and safety."); Campbell v. Southland District Council, Dec. No. W 114/94 (December 14, 1994) (Pl. Trib.) (slip op. at 66) ("Section 5 is not about achieving a balance between benefits occurring from an activity and its adverse effects. . . . [T]he definition in s.5(2) requires adverse effects to be avoided, remedied or mitigated, irrespective of the benefits which may accrue. . . .").

Perhaps the most important aspect of the cumulative "bottom lines" approach developed by this line of cases is that it established the absolute primacy of the environmental considerations under the RMA's scheme of sustainability. The interpretation subordinates the enabling aspects of the definition to the ecological ones and precludes any balancing of the social or economic benefits of a particular project against environmental harms.[135]

b. The Overall Judgment Approach

Almost as soon as it took shape, the environmental bottom lines approach developed by Judge Kenderdine's panels began to show its limitations. First, the "bottom lines" interpretation sat somewhat uncomfortably with the text of Section 5. As the Environment Court pointed out in Trio Holdings v. Marlborough District Council,[136] the inclusion of mitigation within Section 5(2)(c) is not necessarily consistent with a rigid "bottom lines" approach:

> The idea of "mitigation" is to lessen the rigour or the severity of effects. We have concluded that the inclusion of the word in s 5(2)(c) of the Act, contemplates that some adverse effects from developments . . . may be acceptable, no matter what attributes the site might have. To what extent the adverse effects are acceptable, is, however, a question of fact and degree.

Second, many cases do not permit a clear determination of whether bottom lines are met. In fact, most cases present a montage of facts and issues, some of which accord with the themes in Section 5(2)(a) to (c), and some of which do not. In short, they do not lend themselves to a mechanistic, even if well considered, ticking of the boxes of those clauses. In Royal Forest and Bird Protection Society v. Manawatu-Wanganui Regional Council, the Court expressed reservations about the rigidity of the phrase "environmental bottom line" and suggested that the more proper consideration is "whether allowing the activity represents managing the use, development and protection of natural and physical resources for a purpose within the first part of s 5(2) while having the effects described in paras (a), (b) and (c)."[137]

Further, in the High Court's first treatment of Section 5 and the meaning of sustainable management, Justice Greig emphasised the broad generality of the concept. In New Zealand Rail Limited v. Marlborough District Council,[138] he stated that Section 5 and Part II generally:

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[135] Campbell, slip op. at 66.

[136] [1997] NZRMA 97, 116.

[137] [1996] NZRMA 241.

[138] New Zealand Rail Limited v. Marlborough District Council, [1994] NZRMA 70; see Marlborough District Council v. Southern Ocean Seafoods Ltd., [1995] NZRMA 220, 336.

> should [not] be subjected to strict rules and principles of statutory construction which aim to extract a precise meaning from the words used. There is a deliberate openness about the language, its meanings, and its connotations which I think is intended to allow the application of policy in a general and broad way.

Drawing on both the Trio Holdings and the New Zealand Rail cases, Principal Environment Judge Sheppard articulated a modified approach to Section 5 in North Shore City Council v. Auckland Regional Council.[139] Judge Sheppard recognised the difficulty of harmonising the "wellbeing" aspects of sustainable management embodied in the first part of Section 5(2) with the "ecological" aspects in clauses (2)(a) to (c). He reasoned that "[t]o conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject section 5(2) to the strict rules . . . of statutory construction" that the High Court had rejected.[140] Rather, Judge Sheppard concluded, decisionmakers under the RMA must exercise overall, broad judgment in considering the various factors included in the definition of sustainable management. More succinctly, Judge Sheppard's overall judgment approach:

> calls for consideration of the aspects in which a proposal would represent management of natural and physical resources in a way or at a rate which enables people and communities to provide for their social, economic and cultural wellbeing, health and safety. It also requires consideration of the respects in which it would or would not meet the goals described in paragraphs (a), (b) and (c). * * * Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.[141]

B. Effects Based Management

Although the RMA's embrace of sustainability and integrated environmental management has attracted great interest from international observers, the theme that has attracted the most persistent commentary in New Zealand is the reliance under the RMA on so-called "effects based management," rather than the prescriptive management of particular activities or resource uses. Many commentators consider that reliance on effects based management represents the RMA's sharpest departure from New Zealand's planning past. Curiously, however, the RMA nowhere comprehensively addresses what effects based environmental management really means, or how it is to be achieved. Rather, the RMA addresses different aspects of effects based management in different sections of the statute relating to particular functions.

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[139] [1997] NZRMA 59, 93-95.

[140] Id. at 93.

[141] Id. at 94.

The Environment Court has had the opportunity to address the three most important aspects of effects based management: (1) effects based management in district and regional plans; (2) effects based scrutiny of resource consent applications; and (3) the broad duty to avoid, remedy, or mitigate adverse environmental effects. In addition, it has addressed related issues of the use and weight of scientific evidence as proof of environmental effects and the precautionary principle.

1. Plans as Effects Based Instruments

The Environment Court's most comprehensive and fundamental treatment of effects based planning is its decision in Application by Christchurch City Council.[142] Before beginning what it considered to be a lengthy and expensive process of developing its city plan, Christchurch City Council sought a declaration from the Environment Court that the approach to effects based planning it intended to follow was permissible under the RMA.[143] Rather than follow a traditional activity based zoning approach to planning -- in which particular areas or zones are designated for particular permissible activities, such as residence, commerce, or industry -- Christchurch proposed to write a plan in which any activity or land use would be permissible provided that it complied with certain standards of environmental performance. Different areas would be subject to different environmental performance standards based on the desired environmental result to be achieved within that zone -- for example, suitability for residential use. Advocates likened this approach to a sieve in which performance standards would block undesirable activities (without naming the particular activity) while permitting desirable activities to occur. Specifically, Christchurch City Council sought a declaration that "it is lawful for a district plan to contain a rule in respect of permitted activities having the following form: Any activity which complies with the standards specified for the zone where the standards specified go to the effects which activities have on the environment rather than their purpose."[144]

A court-appointed advocate[145] presented arguments against Christchurch City's approach to effects based planning. In essence, he argued that the very concept of resource

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[142] [1995] NZRMA 129 (Pl. Trib.).

[143] Id. at 132.

[144] Id. at 132.

[145] The case is a procedural oddity which demonstrates the far-reaching authority of the Environment Court relative to United States courts reviewing environmental decisions. Christchurch City's application for a declaration was supported by several territorial and regional councils and the Ministry for the Environment. The Environment Court was not able to find any organisation that opposed the application. In order to ensure that the arguments before it were well developed and focussed, the Court took the "unusual step" of appointing an amicus curiae to oppose the application. Id. at 134. In two important respects this differs from the availability of declaratory relief in the United States. First, no actual case or controversy is required under the RMA in order to invoke the jurisdiction of the court, as it is under Article III of the United States Constitution. Second, the generality of the declaration sought, coming as it did at the beginning rather than the end of the governmental process, would likely preclude any analogous review in the United States, where actions for declaratory judgment generally must be raised in a well developed factual context after the decisionmaking process is completed (or at least far along).

management requires the designation of activities for its operation.[146] A "resource," according to the advocate, only has meaning in relation to a purpose or use to which it is put. Since purposes are designated by activities, the argument goes, the sustainable management of resources--or achieving the purpose of the RMA--requires the designation of activities. The Environment Court rejected the advocate's argument, stating that it was satisfied that "the sieve process can be demonstrated to work" and "can be used to provide for the different classes of activity" specifically identified in the RMA.[147] The Court further held that, as the RMA provides for instances in which a council may restrict its discretion to certain issues in consent applications, the performance criteria sieve provided an adequate basis for such restrictions.

If Application by Christchurch City Council established that it is permissible for councils to implement effects based planning by applying specific environmental performance criteria for broad or even unspecified classes of activities, it decidedly did not address two other pressing questions: (1) Whether the RMA requires plans to be constructed in the manner adopted by Christchurch City, rather than by traditional specification of activities; and (2) whether it is permissible under the RMA to continue the traditional practice of zoning by geographically defined areas.[148]

The Environment Court has not yet answered either of these questions in full. But it has entertained several challenges to rules on the basis that the rules were not appropriately based on environmental effects. Several statutory provisions underlie the Court's analysis. In enacting each rule, a territorial or regional authority is required to "have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect."[149] Further, the Court has held that Section 32 of the RMA requires that each rule in a territorial plan:

> has to be necessary in achieving the purpose of the Act, being the sustainable management of natural and physical resources (as those terms are defined); it has to assist the territorial authority to carry out its function of control of actual or potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most appropriate means of exercising that function; and it has to have the purpose of achieving the objectives and policies of the plan.[150]

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[146] Id. at 136-37 ("It would follow, if this argument is accepted, that a district plan would only . . . achieve the statutory purpose[] to the extent that it identified the natural and physical resources of a district in terms of the purposes to which they may properly be put.").

[147] Id. at 142.

[148] Id. at 140 ("[T]his case does not raise issues about the validity of zoning as a technique. . . . Rather the question is whether it is an essential part of the regime governing the formulation of a district plan that activities are identified by description.").

[149] RMA ss. 68(3) (regional councils) and 76(3) (territorial councils).

[150] Nugent Consultants Ltd. v. Auckland City Council, [1996] NZRMA 481, 484 (Pl. Trib.).

The specific rule at issue in the Nugent case provided, among other things, that no more than one-third of the gross floor area of buildings in a certain zone could be used for the purposes of a home business.[151] In defence of the floor area limitation, the council had argued that it had "anticipated a point at which . . . the effects or cumulative effects of that floor area limitation being exceeded could be expected to have an adverse effect on the environmental amenity."[152] It further argued that the formulation was useful as a "rule of thumb" to ease administration by council staff and to provide certainty to members of the community considering working from the home.

Rejecting the arguments, the Court reasoned that the "effects on the environment of a home occupation are not necessarily related to the proportion of the gross floor area of all buildings on a site that are occupied by the activity."[153] This was particularly true, the Court added, where other parts of the same rule specifically addressed the kinds of adverse effects that would be related to floor space. Accordingly, the Court rejected the floor space limitation as not sufficiently effects based.

More recently, the Environment Court reviewed a decision to create a special zone in the Marlborough region of the South Island for future industrial development, including a potential but not yet planned wood products processing plant.[154] Marlborough District Council wished to promote forestry operations in its district and determined that, in order to do so,[155] it would create a zone favouring industrial uses requiring large sites before potentially inconsistent uses arose that might preclude such "dirty" uses in the future. After a study of several locations, it decided to rezone an area from rural to industrial status. Within the zone, certain activities, such as processing and storage of forestry, agricultural and horticultural produce, as well as the manufacture and storage of wood products would be permitted as of right (subject to conditions) as long as certain performance standards were met and could be permitted as a matter of discretion even if some performance standards were not met.[156] The forest industry supported the zone change.

Residents of the area subject to rezoning appealed to the Environment Court on the grounds that the council had not properly considered all environmental effects of the zone

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[151] The rule also provided, for example, that "[n]o objectionable noise, smoke, smell, effluent, vibration, dust or other noxiousness or danger, or significant increase in traffic, shall result from the operation of the home occupation activity." Id. at 483. Only the floor space limitation was challenged.

[152] Id. at 484 (emphasis added).

[153] Id.

[154] In Re: Boon and Marlborough District Council, W 32/98 (Env. Ct. May 12, 1998) (slip op.).

[155] Id. at 8 ("It was the council's view that such facilities must be sited in appropriate locations. Currently these are considered to be limited and will become scarcer if no provision is made to ensure suitable sites are not compromised by incompatible development.").

[156] Id. at 3.

change and that the change was not necessary to provide for the needs of industry.[157] In their view, in light of the potential effects of industry, including bulky and high buildings, high traffic volume, noise, air and water emissions and glare, the area was not suitable for industrial activities. Considering those effects, in addition to the effects of the rezoning on the values of the residents' property, the Court rejected the plan change. The Court stated:

> given the potential for mishaps which could occur from timber plants, the Court is concerned about the lack of comprehensive performance standards in the proposed plan change. * * * And like the appellants we consider the potential for adverse effects from these intended plants to be major unless both the plan change and resource consents process require clear and strict requirements.[158]

Further, the Court doubted the ability of the new zone to achieve its purpose of promoting industrial uses because it permitted continued, interim development of incompatible uses that would set up the potential for conflict when industrial operations eventually tried to locate there.[159] The Court rejected the zone change as unnecessary and inefficient.

The Boon decision has been heralded by some as rejecting the use of geographical zoning techniques in the effects based regime of the RMA. In actuality, the case stands for a narrower proposition -- that the Court will carefully scrutinise each zone to ensure that the council adopting it has properly considered and weighed the environmental effects of the activities to be permitted. Where evidence and analysis suggests that the zone is not strictly necessary to control the effects of particular resource uses, the zone will likely be rejected. This view is in accord with High Court's decision in Countdown Properties (Northlands) Ltd v. Dunedin City Council[160] stating that zoning is a blunt instrument in the context of the RMA, although it is acceptable under some circumstances during the transition to effects based management under the RMA. The High Court said "the aims and objects of the RMA represent a major change in policy in that the RMA moved away from the concept of protection and control of development towards a more permissive system of management of resource focused on control [of] the adverse effects of activities on the environment."[161]

2. Resource Consents and Environmental Impact Assessment

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[157] Id. at 9. The residents also feared that they would be precluded from participating in resource consent proceedings respecting future industrial sites.

[158] Id. at 15.

[159] Id. at 17 ("We find the potential for adverse effects from the timber industries impacting on sensitive industries is high, in particular food processing and the food storage industries. . . .").

[160] (1994) NZRMA 145, 171 (High Ct.) (citing J. Thorp, in K B Furniture Ltd v. Tauranga District Council, (1993) NZRMA 291).

[161] Id. at 171.

In addition to requiring councils to base their rules and planning methods on analysis of environmental effects, the RMA emphasises the analysis of environmental effects in resource consent determinations. Each applicant for a resource consent is required to submit with its application an assessment of environmental effects ("AEE") which describes the "actual or potential effects that the activity may have on the environment, and the ways in which any adverse effects may be mitigated."[162] The Act does not require AEEs to be in a certain format, and recognises that the AEEs will differ in scope depending on the scale of the proposal.[163] All AEEs are required to be prepared in accordance with the Fourth Schedule, which lists certain matters that should be included and matters that should be considered in preparing AEEs. Where information provided is determined to be insufficient to enable the consent authority to understand the nature of the activity, the effect it will have on the environment, or ways in which adverse effects may be mitigated, councils may require additional information from applicants.[164]

Consent authorities use the information provided in AEEs for two purposes. Once the application is complete, it makes a determination on the basis of the AEE whether to process the application on a notified basis allowing for broad public participation. In general, a decision whether to notify a particular application turns on whether the expected effects on the environment are more than minor and whether all persons likely to be adversely affected by the proposal have given their approval.[165] Later the merits of the consent application are determined on the basis of the AEE and any other information obtained from submissions, if notified, or at hearings before the council.

The Environment Court's opportunity to scrutinise effects based management in the resource consent process arises when it hears appeals on resource consent applications. As stated above, an applicant may appeal any adverse decision by a council and any submitter may appeal a decision on a resource consent processed on a notified basis. One consequence of the Court's having the power of de novo review, however, is that the AEE and the council's treatment of it are not often the focus of the proceedings before the Environment Court. Rather than focus on procedural aspects of prior proceedings before the consent authority, the Court tends to concentrate on the ultimate, substantive question before it, namely whether to grant or refuse resource consent. Because the Court may take additional evidence on the merits of the proposal, it need not concern itself with the AEE and the council's evaluation of it.[166]

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[162] RMA s. 88(4)(b).

[163] RMA s. 88(6)(a) (AEEs "[s]hall be in such detail as corresponds with the scale and significance of the actual or potential effects that the activity may have on the environment.").

[164] RMA s. 92(4).

[165] RMA s. 94.

[166] In this regard, the Court operates differently from United States courts reviewing impact assessment cases. Because federal courts are generally limited to deferential judicial review of government decisions, which may be set aside only if arbitrary or capricious or not in accordance with law, the focus of cases tends to be on the government's decisionmaking process, rather than the substance of the ultimate decision.

The Environment Court seems to accept that the RMA places primary responsibility for assessing environmental effects of proposed activities on resource consent applicants rather than consent authorities. In McFarland v. Napier City Council,[167] it stated that "an applicant is under no obligation to become a devil's advocate in order to destroy its own application before it has even started." The Court rejected the argument that the applicant's failure to indicate the ways in which adverse effects can be mitigated, pursuant to Section 88(4), rendered the council without jurisdiction to act upon an application. The role of framing appropriate conditions to control adverse effects, the Court held, falls upon councils, not the applicant: "It would be patently absurd to require an applicant to predict the sorts of things objectors may raise."

Read narrowly, McFarland stands only for the proposition that applicants must only reasonably comply with the requirement of providing an adequate AEE and that a council has the power to reject an application or seek more information if what is provided is inadequate. However, the case raises an important issue as to who bears the ultimate responsibility for ensuring that the AEE is properly prepared and for ensuring that adverse environmental effects are avoided, remedied, or mitigated. Because the focus of Environment Court cases is so often on the merits of particular proposals rather than the deliberative process of the consent authority, it would seem their greatest value is in exemplifying the kinds of analysis that consent authorities should conduct when processing resource consents.

3. The Duty to Avoid, Remedy, or Mitigate Adverse Effects

The Environment Court has also recognised section 17 of the RMA as an important mechanism for managing effects. Section 17 places a specific duty on "[e]very person . . . to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of a person. . . ."[168] The duty applies whether or not the adverse effect is in accordance with plan provisions, resource consents, or other provisions of the RMA that allow certain existing uses and activities. Although the duty does not impose liability for damages, it may be enforced by application to the Environment Court for an enforcement order enjoining the offending activity or to take affirmative actions to avoid, remedy, or mitigate "any actual or likely adverse effect on the environment."

The Environment Court has demonstrated that the section 17 duty is an important back stop where other mechanisms of the RMA fail adequately to protect against adverse effects on the environment:

> Although, as we have said, the Act embraces a permissive land use approach, applicable unless the particular activity is prevented or controlled in some way, s 17 is critical for ensuring that, at the end of the day, particularly in cases where no District Plan rule is apt for

[167] (1993) 2 NZRMA 440, 442.

[168] RMA s. 17.

> calling in aid to avoid, remedy, or mitigate an adverse effect on the environment . . . a person is not able to claim that no public law duty is owed to take such rectifying steps as the case may warrant.[169]

Thus in that case, the Court required a landowner to remove fill placed on his property which the Court found was having adverse effects on the environment, both physically (by creating silt laden runoff) and by detracting from "amenity values of the neighbourhood, as well as the economic and aesthetic conditions which affect or are affected by those values."[170]

Despite having recognised Section 17 as an important tool under the RMA to promote effects based management, however, the Environment Court has been judicious in putting it to use. In Kaimanawa Preservation Society, Inc. v. Attorney-General[171] the Court refused to issue an enforcement order prohibiting the Government from culling and mustering wild horses in the Kaimanawa ranges in the central North Island. The Society argued that the culling would irreparably damage the horse herd's ability to continue the process of natural selection that produced the herd's unique genetic type and contravene the Section 17 duty. Although the Environment Court accepted that wild horses were part of the "environment" as broadly defined by the RMA and the horses themselves would be adversely affected, it held that they did not fall within the Section 17 duty because other mechanisms within the RMA focussed exclusively on managing land, air and water. Principal Environment Judge Sheppard concluded: "I do not consider that I should impute to Parliament an intention that the general duty imposed by s 17(1) extends to restrain activities that are not subject to control elsewhere in the Act and which are authorised under other legislation, even though they give rise to an adverse effect on the environment."[172]

Even where the Section 17 duty to avoid, remedy or mitigate adverse activities does apply, its reach is limited--particularly as a remedial tool. The Environment Court's decision in the "fast ferries" is a good example. In Marlborough District Council v. New Zealand Rail Ltd.,[173] the Court considered applications for declarations and enforcement orders to require avoidance, mitigation or remediation of environmental effects caused by the wash of a new "fast ferry" service between the North and South Islands. The Court refused to impose the requested enforcement orders. Reviewing the discretion of the Environment Court to impose enforcement orders in general, Judge Treadwell concluded that orders to halt or cease

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[169] Sayers v. Western Bay of Plenty District Council, (1992) NZRMA 143, 152 (Pl. Trib.).

[170] (1992) 2 NZRMA at 152.

[171] [1997] NZRMA 356, 371 (Env. Ct.) ("I understand the society to be claiming that as their case alleges that the proposed acts would have adverse effects on the environment, it is a case for the Environment Court. That claim is too broad. Parliament has not conferred on the Environment Court general authority over all acts which would or might have adverse effects on the environment. The law does not provide for appeals to the Environment Court about the contents or implementation of management plans under the Wildlife Act. The jurisdiction given to the Court has been carefully defined.").

[172] Id. at 369.

[173] [1995] NZRMA 356 (Pl. Trib.).

activities altogether -- as opposed to orders to mitigate adverse effects -- require evidence of serious, or "top level" effects. Although the Court acknowledged some change to the shorelines affected by the fast ferries' wash, it found that the shorelines were adjusting to the wash and reaching a new "dynamic equilibrium" and that any ecological disturbance was therefore temporary. Further, since the adjustment was nearly complete and a new equilibrium established, an enforcement order could not provide the mitigation, remediation or avoidance that the applicants sought.

4. The Precautionary Principle and Proof of Environmental Effects

As noted above, among the duties incumbent upon councils and the Environment Court in deciding consent applications is the duty to have regard to the actual and potential effects of proposed activities on the environment.[174] In so doing, the Environment Court -- as do all environmental adjudicators -- must confront issues of scientific uncertainty. One issue is the problem of proof: What kind and what weight of evidence are required to prove an effect on the environment? Another issue involves the Court's use of and reliance on scientific evidence: when provided with scientific evidence of adverse effects, when should the Court and other decisionmakers employ caution?

The Environment Court most fully addressed issues of scientific proof of environmental effects in McIntyre v. Christchurch City Council.[175] In considering the appeal of resource consents for a cell phone transmission facility in a residential area, the Environment Court confronted "clear differences in opinion" between experts regarding the potential health effects of radiation.[176] The applicant argued that there were no proven harmful effects from the transmission facility as planned and located. Opponents argued that, although there were no proven health risks, there was a "serious hypothesis that exposure to the amounts of radiation that would be emitted" was harmful to human health.[177] They urged the Court to refuse consent on the grounds that, given the present state of scientific knowledge, the balance of probabilities and the "risk avoidance policy" of the RMA counseled against the proposal.[178]

The Environment Court first addressed its own role under the RMA when presented with conflicting scientific evidence and opinion. Citing several of its earlier holdings, the Court distinguished its role from basic fact finding: "The purpose of the appeal hearing is to determine . . . whether the [consent] should be granted, not to resolve technical differences. The [Court] does not conduct a scientific inquiry to discover absolute truth, nor is it judging between the expert witnesses."[179] Rather, the Court reasoned, "[i]t is our duty to make

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[174] Sec. 104(1)(a).

[175] [1996] NZRMA 289 (Pl. Trib.).

[176] Id. at 295.

[177] Id. at 292.

[178] Id. at 292.

[179] Id. at 296 (quoting Darroch v. Whangarei District Council, unpublished decision A 18/93).

factual findings about actual or potential effects of the proposed activity on the environment. To make a finding on a question on which there is a conflict of evidence, we have to be satisfied on the balance of the probabilities, having regard to the gravity of the matter in question."[180] The Court indicated that, where the potential effect is large, it may require a greater showing from witnesses opining that the probability of the effect is low.

The Court next addressed the issues of proof of environmental effects. The Court reviewed the treatment of novel scientific evidence in other jurisdictions, including the United States, and stated:

> We do not accept that the existence of a serious scientific hypothesis, or even one that is regarded as deserving priority for testing, is necessarily sufficient by itself to establish a potential effect, even a potential effect of low probability which has a high potential impact. Nor do we accept that the Tribunal should impose a threshold based on current scientific knowledge before taking notice of a scientific hypothesis. We hold that like any other evidence tending to establish a contested fact, the grounds for the hypothesis have to be exposed to testing . . . and scrutinised to determine whether they meet a basic threshold of reliability . . . to assist the Tribunal to weigh the evidence and make a finding one way or the other.[181]

Accordingly, the Court will allow evidence based on novel scientific analysis as long as the analysis is subjected to testing and deemed reliable, even if the evidence does not meet a standard of current acceptance in the relevant scientific community.

Finally, the McIntyre court addressed the role of the precautionary principle in decisionmaking under the RMA. Project opponents argued that the RMA embraces a "risk avoidance policy" that requires decisionmakers to exercise caution when faced with some likelihood of severe adverse effects. The Environment Court acknowledged that the precautionary principle is a consideration under the RMA, but one which is subject to the decisionmaker's discretion:

> The influence of the general precautionary principle on the evaluation and ultimate judgment is a matter of discretion. . . . Like all elements that contribute to the ultimate judgment, the weight to be given to the precautionary principle would depend on the circumstances. The circumstances would include the extent of present scientific knowledge, and the impact on otherwise permitted activities. However, we think that in an appropriate case they would also

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[180] Id. at 296 (quoting Trans Rail New Zealand v. Rodney District Council, unpublished decision A 85/94).

[181] McIntyre v. Christchurch City Council, [1996] NZRMA 289, 307 (Pl. Trib.) (citing Daubert v. Merrill Dow Pharmaceuticals Inc, 113 S. Ct. 2786 (1993) and Canadian Supreme Court case R v. Mohan, [1994] SCR 9, 89 CCC (3d) 402).

include the gravity of the effects if, despite present uncertainty, they do occur.[182]

In sum, the Environment Court seems to have established the following rules on scientific uncertainty and the use of the precautionary principle. First, novel scientific evidence will be accepted by the Court if it is demonstrated, after testing, to be more than mere conjecture or hypothesis. Second, the application of a general precautionary principle is within the Court's discretion when exercising its judgment whether or not to grant consent. Factors influencing the application of caution are the reliability of the scientific evidence and the gravity of the effect the scientific evidence tends to establish.

C. Promoting Public Participation

The Environment Court has also made its mark on the elements of the RMA designed to promote broad public participation in environmental decisionmaking. These elements include standing, notification, and the awarding of costs against unsuccessful litigants.

1. Standing

As discussed above, one of the fundamental ways the framers of the RMA hoped to promote public participation in environmental decisionmaking was to eliminate restrictive rules of standing. At the administrative level, this was accomplished primarily by permitting "any person" to make submissions regarding policy statements, plans, and resource consents. At the Environment Court level, the RMA makes a distinction between the right to initiate Environment Court proceedings by bringing an appeal and the right to participate in proceedings once they are initiated. Any person who makes a submission to a local authority regarding a planning instrument or resource consent may appeal adverse decisions to the Environment Court. Once Environment Court proceedings are initiated, however, standing requirements are meant to be minimal. Section 274 provides that "any person having any interest greater than the public generally" and "any person representing some relevant aspect of the public interest" has a right to appear and to present evidence to the Court.[183]

Although the right of public interest groups to participate in Environment Court proceedings is now clear, it was not always. In its 1996 amendment to the RMA, the Parliament reaffirmed the broad approach to standing under section 274 after a restrictive interpretation by the Environment Court. When initially enacted, section 274 provided a right of participation to "any person having an interest greater than the public generally." The right of standing did not expressly include persons representing the public interest. In Purification Technologies Ltd. v. Taupo District Council,[184] the Environment Court considered whether community groups had standing to participate in proceedings regarding a commercial gamma radiation facility. The Environment Court refused standing to the groups

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[182] Id. at 305.

[183] The rule for initiating proceedings is different for declarations and enforcement orders. Generally, any person may seek a declaration or enforcement order.

[184] [1995] NZRMA 197 (Pl. Trib.).

on the grounds that the RMA omitted words from the earlier Town and Country Planning Act specifically conferring standing to persons representing aspects of the public interest. Reviewing other Commonwealth legal authority on standing and legally cognisable "interests," the Court held that standing under section 274 required some showing of "advantage or disadvantage, such as that arising from a right in property directly affected, and which is not remote."[185] Closing the door to almost all participation in the absence of economic injury, it further considered that

> an interest in proceedings in seeking to enforce the public law as a matter of principle, a belief that activity of a particular kind ought to be prevented, or as part of an endeavour to achieve the objects of an association, or uphold the values which it was formed to promote, would not be an interest greater than the public generally. Nor would be an interest in the preservation of a particular environment, or an intellectual or emotional concern, the satisfaction or righting a wrong, an interest in upholding a principle, a sense of grievance or the risk of being ordered to pay costs.[186]

The Environment Court's decision in Purification Technologies was criticized by commentators at the time.[187] It reflects the Court's reluctance during its early years under the RMA to embrace its broad role in environmental management. Interestingly, one commentator has even suggested that the Court's narrow rendering of section 274 was "a self-defence mechanism against inundation of the adjudication process."[188]

The case's precedential value is limited. First, the decision was effectively overturned when Parliament passed the 1996 amendments permitting participation for any person representing a relevant aspect of the public interest. Second, most Environment Court cases are brought by parties who made submissions to councils; as a result, section 274 has limited utility as a standing provision.

2. Notification

In many respects, notification is a more important consideration than standing. The non-notification of resource consent applications is a significant potential barrier to public participation in Environment Court proceedings. As noted above, the right to appeal consent authorities' decisions on resource consents is limited to applicants, consent holders, and persons who make submissions to the consent authority.[189] The opportunity to make formal

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[185] Id. at 204.

[186] Id.

[187] E.g., K.A. Palmer, "Standing before the Planning Tribunal," (1995) 1 Brooker's Resource Management Bulletin 143.

[188] D.A.R. Williams and Nicholas Williams, "Environmental Litigation and Dispute Resolution," in Williams, Environmental & Resource Management Law (2d. ed. 1997) at 581.

[189] RMA s. 120(1).

submissions arises only when the consent authority decides to notify an application to the public. As a result, objectors to a proposal have no recourse to the Environment Court when an application is not notified.

Decisions on whether to notify resource consents largely depend on two factors: the significance of the environmental effects and whether parties deemed to be adversely affected have given their written approval to the proposal. Although the primary vehicle for challenging non-notification decisions is judicial review in the High Court, the Environment Court has occasionally ruled on notification issues as a result of its declaratory powers.

In Aro Valley Community Trust v. Wellington City Council,[190] the Environment Court underscored the importance of the decision on notification to the right to take an appeal to the Environment Court. It held that only formal submissions under the Act--such as those made in notified proceedings--give rise to a right of appeal. The Court denied a right of appeal to a community group that had made an informal submission to council regarding a non-notified consent application. In a curious comment, the Court, in dicta, suggested that the council had made a mistake to permit the informal participation in a non-notified process and suggested it unwise to continue to do so where the council was not prepared to process the consent on a notified basis. Although the Court's statement could be read as a condemnation of public participation, it is better understood as an admonishment to local authorities that when the situation warrants public input, the opportunities for public participation should be meaningful--including the right to appeal.

The Court also addressed the issue of notification in Australasian Conference Association v. Auckland City Council.[191] In that case, the Court considered whether statutory time frames for making notification decisions could properly be extended to permit Auckland City Council to reverse an earlier decision not to notify an application. Considering the importance of the notification decision in relation to statutory time limits, the court stated that, although the time limits were important and expressed Parliament's will to avoid delay in processing consent applications, "[e]xpedition should not prevail over quality of decision making." The court reasoned that the time limits for reaching decisions were not as important as administrative time limits under the RMA, and that public participation through notification was an important purpose of the Act:

> One reason for that may be to enable the private interests of those affected to be brought to the attention of the consent authority by submission. Another reason is that, as a result of submissions from those who have an interest in the outcome, the quality of the decision stands to be improved. Submissions are calculated to assist the consent authority to view an application in its true perspective and give a decision which promotes the purpose of the Act. The issue on

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[190] (1992) 1 NZRMA 221 (Pl. Trib.).

[191] (1992) 2 NZRMA 104 (Pl. Trib.).

> a contested application for resource consent is not only a question between conflicting private interests; there can often also be a public interest in achieving the purpose of the Act which transcends the private interests.[192]

The Court permitted the extension of the time limit for the application to be notified.

In Foodstuffs (South Island) Ltd v. Christchurch City Council,[193] the Environment Court again indicated a preference for broad notification. It held that exceptional circumstances are not required for a council to require notification of a consent application even where all persons directly affected have granted their approval. The Court stated:

> It has to be remembered that in its decision-making role council is required to act impartially or as is sometimes said quasi-judicially. There may well be occasions when it will want to have the benefit of submissions from a wider section of its community than those contemplated by s 94(2) of the Act, to assist it in coming to the decision that it is required to make . . .[194]

In promoting such broad public participation, the Court acknowledged that the public plays an important role in helping councils "to act as the guardian of the policies and objectives" of its plan.[195]

In sum, the Environment Court's pronouncements on notification, though few, reflect a genuine concern that public participation be meaningful. They also reflect a philosophy that robust public participation is helpful, if not essential, to the local authorities' and the Environment Court's discharge of their broad policymaking and judicial responsibilities to manage the environment.

3. Awarding of Costs against Unsuccessful Litigants

The awarding of costs against unsuccessful litigants is a potential barrier to participation under the RMA. Section 258 of the RMA gives the Environment Court broad discretion to order an unsuccessful litigant to pay the "reasonable" litigation costs of another party. The costs awarded can include attorneys' fees, expert witness fees, and travel expenses for witnesses and attorneys, and can grow to hefty sums. In one well publicised case, a mining company sought costs of more than $85,000 against a community

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[192] Id. at 111.

[193] (1992) 2 NZRMA 154, 160 (Pl. Trib.).

[194] (1992) 2 NZRMA at 160.

[195] Id. at 160.

environmental group that had unsuccessfully challenged its plans to conduct exploratory mining activities.[196]

The Environment Court has developed a substantial body of case law setting forth the principles on which it awards costs against unsuccessful litigants. The usual rule in New Zealand courts is that the unsuccessful party in litigation pays some portion of the litigation costs of the successful party as compensation for costs unnecessarily incurred. In view of the public law nature of Environment Court proceedings under the RMA, the Environment Court has expressly disavowed the general rule. The Court has said that

> [c]osts are not awarded as a penalty, nor to encourage or discourage resort to the [Environment Court] in different classes of case; but as compensation where that is just. Decisions on claims for costs are made in exercise of judicial discretion, having regard to the circumstances of the individual case.[197]

While reserving its consideration as to whether to award costs to the circumstances of each case, the Environment Court has indicated that costs are not normally to be awarded to any party in references involving the provisions of plans or policy statements.[198] This policy indicates the Court's belief that public participation is especially important in the formulation of the fundamental planning instruments under the RMA.

The Environment Court's decisions on costs also reflect a philosophy that costs should not be awarded where the public interest is served by a judicial determination of issues. For example, in Foodstuffs (South Island) Ltd v. Christchurch City Council,[199] the Court declined to make an order of costs where the case mainly raised a novel issue that was a question of law and counsel for both parties argued the case fully. The Court has further recognised that public interest groups play an important role in RMA decisionmaking by "testing the acceptability of claims by industry and developers about the extent to which their projects serve the promotion of sustainable management of natural and physical resources."[200] In several cases where the Environment Court has declined to award costs, it has noted the public interest nature of the case.[201]

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[196] Peninsula Watchdog Group, Inc. v. Waikato Regional Council [1996] NZRMA 218 (Env. Ct.), aff'd Peninsula Watchdog Group, Inc. v. Coeur Gold New Zealand Ltd, Auckland High Court, HC 120/96 (9 July 1997). The amount the applicant sought in its petition for an award of costs was only a fraction of the more than $400,000 in costs it actually incurred. The Court ultimately awarded only about $20,000.

[197] Foodstuffs (Otago Southland) Properties Ltd v. Dunedin City Council, [1996] NZRMA 385, 393 (Pl. Trib.).

[198] Environment Court Practice Note 34.

[199] (1992) 2 NZRMA 154, 160 (Pl. Trib.).

[200] Peninsula Watchdog Group, Inc. v. Waikato Regional Council [1996] NZRMA 218 (Env. Ct.).

[201] David Grinlinton, "Access to Justice under the Resource Management Act - System Failures" (presented to University of Auckland Conference on Environmental Justice and Market Mechanisms, March 1998) at 14 n.50 (citing unreported cases).

Notwithstanding its recognition of the importance of public participation, including pursuing Environment Court appeals that raise issues of public interest, the Court has sometimes awarded costs against public interest groups. In the Peninsula Watchdog case, it declined to adopt a general rule against awarding costs to environmental groups pursuing public interest appeals. It reasoned that "[t]he possibility of an award of costs is an important discipline to encourage participants in proceedings -- even those with public interest motives -- to limit responsibly the exercise of their appeal rights."[202] Accordingly, the Court will award costs against public interest groups in certain instances, such as when their claims "lack substance";[203] when litigation is not conducted in an efficient and fair manner;[204] or when the case raises general issues of policy rather than specific issues in dispute.[205]

Some commentators have voiced concern about the awarding of costs by the Environment Court. Justin von Tunzelman has argued that the Court, while expressing that it awards costs to compensate parties unreasonably subjected to litigation, actually uses costs to regulate proceedings and to punish unreasonable litigation behaviour.[206] High Court Justice Peter Salmon, while upholding the Environment Court's award of costs in the Peninsula Watchdog case, suggested that the Court might refine the criteria on which it awards costs to reflect the relative importance of issues for promoting sustainable management under the

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[202] Id. at 221.

[203] Id. at 221; see also Darroch v. Northland Regional Council, (1993) 2 NZRMA 637, 639 (Pl. Trib.) ("The objectors, having failed in their opposition to the proposal at the fist hearing, exercised their right to obtain the judgment of the Tribunal after a full rehearing de novo. They are not criticised for having done so, but we recognise that by exercising that right they put the applicant to the expense of presenting its case a second time. . . The outcome in this case does not indicate that the objectors' appeal was necessary to avoid harm to the environment.").

[204] Auckland Heritage Trust v. Auckland City Council, (1992) 1 NZRMA 174 (awarding costs upon cancellation of interim enforcement order which had been sought ex parte without warning to council; rejecting argument that costs should not be awarded because action was a "test case" under the new law); Medical Officer of Health v. Canterbury Regional Council, (1995) NZRMA 49, 66 (discussing principles governing awarding of costs). In the latter case, discussing the duty of litigants before the Court, the panel said:

> [I]t is important that litigants before this Tribunal exercise a degree of discipline over their case. That is the purpose of the pretrial procedures such as were undertaken in this case. They were intended to narrow the issues, and ensure that all parties knew in advance the case they had to prepare, or meet. It is simply not good enough for a party to lead all others to the litigation to believe that an objection will be fought in one way, and then materially alter that stance at the opening of the case without any prior notice to the other parties. We have expressed on a number of occasions how expensive litigation under the RMA is becoming. This case illustrates the point. It behoves all parties to ensure that only the matters truly in issue are litigated. A party who does not exercise that minimal degree of discipline can hardly complain if they are called upon to contribute to costs thereby thrown away by other parties, particularly when offered the opportunity to participate fully in a number of pretrial conferences to avoid that outcome.

[205] Wilbrow Corporation v. North Shore City Council and Auckland Regional Council, 4 NZPTD 624 (Pl. Trib.).

[206] See generally Justin von Tunzelman, "Costs Awards in the Planning Tribunal," 1 New Zealand J. Env. Law 237 (1997).

RMA.[207] Under such an approach, costs would likely be awarded infrequently in cases involving policy statements and plans, but might be awarded more frequently in unmeritorious cases involving resource consent applications for discretionary activities.

The Environment Court also has the power to require appellants to provide security for costs.[208] In its first decision regarding the issue, however, the Court has shown itself reluctant to require such security. In Wakatipu Environmental Society v. Queenstown-Lakes District Council,[209] the Environment Court refused to order security for costs against an environmental group for several reasons: (1) the appeal and opposition at council level were conducted in a reasonable and responsible manner; (2) the appeal raised legitimate concerns which were prima facie valid; (3) the environmental group's bona fides were demonstrated by its earlier refusal to withdraw the appeal for a payment of $50,000; (4) the Court should not encourage pressure tactics against community groups which refuse to settle on a principled basis; and (5) public interest considerations favour permitting legal challenges to resource consents for activities which do not comply with the district plan.

[207] [1997] NZRMA 501, at 508-09 (Pl. Trib.).

[208] RMA s. 278(1).

[209] (1997) NZRMA 132, 143-44 (Pl. Trib.).

V. Some Thoughts on Environmental Adjudication in New Zealand

Having completed a "study tour" of the Environment Court and its role in promoting sustainable management under the RMA, I now turn to share some of my observations about the nature of environmental adjudication and management under the RMA. These observations are informed both by my research reflected in the earlier portions of this report, and by the nine month gestation of ideas while observing New Zealand's ongoing debate about the effectiveness of the RMA from the office of my host institution, the Parliamentary Commissioner for the Environment. These observations are arrayed in three sections. First I offer some general thoughts on the broader themes of sustainability as they have unfolded during my journey through the Environment Court's jurisprudence. I next offer some observations on the Environment Court itself and the role it plays under the Resource Management Act. Last I turn to the Minister for the Environment's recent proposals to substantially change the Environment Court.

A. Observations on the Substantive Themes of Sustainability

1. The Meaning of Sustainable Management

- **The essence of determining and promoting sustainability is the exercise of judgment and discretion.** Under the RMA process, the responsibility to make that judgment in the public interest lies with councils in the first instance and the Environment Court in the second instance. The role of decisionmakers under the RMA, therefore, is to exercise overall, broad judgment about the use, development, conservation and allocation of resources and the acceptability of potential effects on the environment (including, but not limited to, biophysical effects). **The role is fundamentally one of governance.** It involves more than the identification of environmental effects and rote application of measures to address them. To a large extent it involves assessing environmental risk--often in the face of uncertainty--and making informed decisions about how to manage that risk in the public interest (including the interest of future generations). Under the RMA decisionmakers do more than provide a service; they act as the protector of the public interest in applying their judgment about what activities or proposals are consistent with sustainable management.

- **Individual Environment Court determinations of the sustainability of particular proposals are unlikely to yield broad precedent.** Determining whether a particular proposal is consistent with the goal of promoting sustainable management requires individual scrutiny and separate analysis. Unlike under the Town and Country Planning Act, Environment Court precedent will not generally be far-reaching because sustainability depends on particular facts and a judgment applied to those facts. This means that other decisionmakers under the RMA (ie, local government) must rely more on the Environment Court's method of analysis than on its substantive treatment of particular situations for lessons about how

properly to address issues of sustainability. As a result the Environment Court provides only indirect assistance to local government bodies whose decisions it reconsiders. The trade-off, of course, is that the Environment Court directly confronts and decides substantive issues of sustainability.

- **Under the prevailing view of sustainable management, social and economic considerations cannot be separated from ecological issues.** Although many commentators think of sustainable management under the RMA as setting environmental bottom lines, the prevailing interpretation indicates that sustainable management requires the integrated consideration of social, economic and ecological issues. This is consistent with the Brundtland Commission's statement about the nature of sustainable development:

> [I]n the end, sustainable development is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all made consistent with future as well as present needs. We do not pretend that the process is easy or straightforward. Painful choices have to be made. Thus, in the final analysis, sustainable development must depend on political will.[210]

2. The Meaning of Effects Based Management

- **Effects based management at the planning level involves a careful balance of foresight and risk management.** The difficulty, of course, is setting a proper threshold of information about effects to justify restrictive measures intended to achieve certain environmental results. The Environment Court has shown that, in accordance with Section 32 of the RMA, it will closely scrutinise the justifications for environmental regulation. The danger is that, if too high a degree of factual proof of adverse effects is required, local government will shy away from or be prevented from planning strategically toward the environmental outcomes (ie, effects) that their communities desire.

- **On a project level, effects based management is complex and potentially expensive.** Effects based management at the project level requires the deconstruction of activities into their constituent effects. This is a more complex analytical process than previously required under the Town and Country Planning Act. However, it is also the necessary ingredient of a more flexible and permissive system of resource consents under the RMA. Care must be taken, however, to ensure that concern about the analytical difficulty and cost of effects based project assessment does not result in scant analysis of the environmental effects of individual projects.

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[210] Brundtland Commission, Our Common Future, at 9.

- **The proper analysis of cumulative effects presents a challenge under the RMA scheme.** The RMA framework relies heavily on individual analysis of particular rules in plans and individual resource consents. Although cumulative effects are given lip service in the RMA's definition of effects, there are no mechanisms in place to ensure that cumulative effects are taken seriously. One way to enhance the ability to analyse cumulative effects would be to require specific analysis of cumulative effects in proposed plan changes (perhaps as part of Section 32) and resource consent applications (perhaps in assessments of environmental effects).

- **Strategic effects based planning must incorporate prospective as well as retrospective analysis.** Effects based management should be broad enough to incorporate planning to attain desired environmental effects. Otherwise it may be likened to "steering by the wake." The current mechanisms of Environment Court review promote the latter because they encourage piecemeal review of policies and specific activities that have the potential to affect the environment. One way to promote strategic, forward-looking effects based planning might be to hold an Environment Court hearing on the whole of a plan or policy statement before it becomes effective. In such a hearing, parties could present evidence, and the Environment Court could make a determination about how well the particular instrument promotes sustainable management as a whole.

3. Promoting Public Participation

- **Increased public participation in environmental decisionmaking has been an elusive goal.** In the current debate over the RMA, focus on public participation as a means toward better decisionmaking seems to have been lost. Rather, in the ongoing debate, that goal has been surpassed in the political consciousness by concern for reducing compliance costs.

- **Notification has replaced standing as the gateway to public participation.** Despite a "presumption" that applications for resource consents will be processed on a notified basis, about 95 percent are non-notified. This has the effect of restricting public participation at both the council level and, more importantly, at the Environment Court. Although it might be argued that the public is not barred from participating in planning processes which influence what kinds of applications will require notification, it is reasonable to expect that people will be more likely to participate in scrutinising concrete proposals that affect them directly. In order to achieve full and meaningful public participation, therefore, it is important to maintain open gateways to public participation for resource consents as well as plans.

- **The risk of costs awards against environmental community groups represents a significant barrier to public participation.** Even though the Environment Court has awarded costs only in certain circumstances where litigation costs have

been unreasonably incurred by opposing parties, the spectre of costs awards appears to impose a barrier to meaningful public participation. Anecdotal evidence suggests that threats of costs are often used by developers to discourage would-be objectors from exercising their rights of appeal.

- **Open standing in the Environment Court seems largely irrelevant as a tool for promoting meaningful public participation under the RMA.** Although it was hoped that open standing would lead to broad participation in environmental decisionmaking under the RMA, barriers still remain. Nonetheless, open standing has led to many cases being litigated by "trade competitors" motivated by commercial rather than environmental reasons. Under the rules of standing to challenge federal environmental decisions in the United States, a litigant must suffer an actual injury that falls within the "zone of interests" that a particular statute aims to protect. In essence, litigants must generally demonstrate environmental harm. In my view, public participation in New Zealand is limited more by lack of resources and restrictions on participating at the local government level than it would be by rules restricting standing to those who suffer environmental injuries.

- **A "carrot and stick" system of awarding litigation costs might yield more meaningful participation.** In the United States, three rules work in concert to create a carrot and stick system for imposing litigation costs. These rules, or variations of them, may provide a useful model for New Zealand.
    - First, as a general rule, each party in litigation bears its own costs. As a result, there is no disincentive for bringing well-founded cases which might still fail on their merits.
    - Second, under the Equal Access to Justice Act,[211] qualified organisations, including public interest groups, can recover litigation costs from the federal government if (1) they prevail in the litigation; and (2) the government is not "substantially justified" in its position. To recover costs under this rule, an environmental group must do more than win (or achieve its objective through settlement); it must demonstrate that the government was wrong to pursue its own position. The government may not recover litigation costs against its adversaries.
    - Third, courts may impose monetary sanctions against attornies or parties for litigation activities which are frivolous or for an improper purpose (such as for causing delay, etc.). Sanctions under Rule 11 of the Federal Rules of Civil Procedure are a powerful tool for courts to ensure that litigation is conducted forthrightly. Importantly, however, the inquiry is focussed not on the outcome of the litigation but on the subjective intent of the litigants. Thus the fundamental question in deciding to impose sanctions is whether, at the time of filing a lawsuit, the attorney or party had a good faith basis for doing so after a reasonable inquiry into the facts and the law.

[211] 28 U.S.C. s. 2412(d)(1)(a).

B. Observations on the Role of the Environment Court

1. De Novo Review of Environmental Decisions

- **De novo review invites--indeed requires--the Environment Court to delve deeply into the issues and to replace the local authorities' judgments with its own.** In this sense, the de novo standard of review expands the judicial function beyond its usual boundaries of interpreting the law, finding facts, and applying the law to the facts it finds. When deciding appeals related to the planning instruments, the Court is placed into an overtly policymaking role. When deciding appeals on resource consents, the Court exercises its own judgment about policy implementation notwithstanding the determination of local government authorities.

- **De novo Environment Court review results in important environmental decisions being made by an unelected tribunal rather than democratically elected politicians.** Although it might be argued that vesting the Environment Court with the power of de novo review reflects a belief that environmental decisions are merely technical determinations based on clear legal rules applied to plainly identified facts, I draw a different conclusion. Vesting the Environment Court with power of de novo review reflects a belief that environmental decisions are too important to be ultimately determined solely by the political process. Regard for the public interest nature of environmental decisions is the basis for political decisions being made reviewable to the fullest extent. De novo review in the Environment Court is intended to ensure that public interest considerations are adequately treated.

- **Some upward pressure on litigation costs is a consequence of de novo review.** Because de novo review involves the full presentation of all necessary evidence to the Environment Court, it is more expensive than more limited forms of court review. Although much of the expense is necessary in order to fully educate the Environment Court about the facts and policies involved in each decision, some costs might be saved by increased use of written or other record evidence that has already been presented to the local authority.

- **De novo review results in little direct scrutiny of local government deliberations regarding environmental choices.** Rather than focus on the deliberative process of the local government entities, the Environment Court tends to focus on the substantive outcomes of cases. While this increases the influence of the Court on the substantive outcomes, it diminishes the Court's importance as a watchdog or policer of local government. A system that allows more direct scrutiny of local government's deliberative processes would place the Environment Court in a better position to encourage good practice under the RMA.

2. The Use of a Specialist, Expert Tribunal

- **Use of a specialist, expert tribunal increases public confidence in the Court's determinations.** During my discussions with various New Zealanders about the merits of the Environment Court, I have heard very few criticisms of the quality of the Court's decisions or the capability of the Court to render them. To a considerable degree this is attributable to the public's (and the resource management bar's) knowledge that the Environment Court understands both the technical aspects of its decisions and the importance those decisions bear on the public interest. While there is no way of actually quantifying the quality of the environmental judgments the Environment Court renders relative to courts of general jurisdiction, I conclude that the use of an expert, specialist court contributes to environmentally sound decisionmaking.

- **Use of a specialist, expert court improves efficiency of environmental litigation.** Most environmental cases in the United States are heard by courts of general jurisdiction. As a result, more time is required to educate judges about the technical aspects of cases and the particularities of environmental law. The Environment Court, by contrast, has a strong and interdisciplinary background in the range of issues likely to come before it in cases under the RMA. Relatively less time (and expense) is necessary to reliably inform the Court about the issues it is adjudicating.

C. The Minister's Proposals for the Environment Court

1. The Minister's Proposed Changes

In late September 1998, the Minister for the Environment announced his intention to seek substantial changes to the role of the Environment Court.[212] The proposed changes would significantly limit the Environment Court's role in determining appeals arising from decisions on resource consents. Although the Minister has not offered a detailed description of his intended reforms, his proposal will likely contain the following elements:

- **Retention of full de novo review of references and appeals on plans and policy statements.** The Environment Court would remain the final arbiter of policy based decisions in these key planning documents.

- **Removal of local government from decisions on resource consent applications.** Applications for resource consents would be decided in the first instance by professional "commissioners," not by elected councillors. A route would be provided to refer applications directly to the Environment Court for primary

[212] Simon Upton, "The Review of the Resource Management Act," Address to the Resource Management Law Association Conference, 25 September 1998.

consideration. Councils' sole role in the resource consent process would be to set clear policies, methods, and rules through policy statements and plans, which guide and constrain resource consent determinations.

- **Limitation of Environment Court review of commissioners' decisions to points of law.** Where an applicant or objector seeks review of a commissioner's decision, the Environment Court's review will be limited to questions of law. Apparently, there will be no opportunity to introduce factual evidence to the Environment Court on resource consent appeals or to engage the Court in a redetermination of the facts.

The Minister for the Environment has acknowledged that many details of his proposals for the Environment Court remain undetermined. He has sought additional public input on two issues in particular: the extent to which first instance hearings would require greater formality under the new system; and methods for deciding how to appoint commissioners and to monitor their performance.

Any changes to the Environment Court should be carefully considered in light of the Minister's questions. Other important issues come to mind:

- **How do the proposed changes to the Environment Court fit with the Minister's other proposed reforms?** In addition to the changes to the Environment Court's review of resource consent appeals, the Minister is proposing to introduce contestability into the resource consent processing system. Together these changes could entirely eliminate the role of elected councils in determining resource consent applications. The notion that professional commissioners can make technocratic determinations of resource consent applications does not appear to be consistent with the broad, discretionary aspects of sustainable management and effects based management as developed in Environment Court jurisprudence. Deciding whether to grant resource consent will always require the exercise of discretion, judgment and governance--even if district and regional plans develop along the specific and clear lines that the Minister hopes.

- **Given that questions of sustainable management arising under the RMA involve exercising informed discretion over issues of risk management, is it meaningful to limit review to questions of law?** As discussed above, promoting sustainable management--as that concept has been developed in case law--is about exercising informed judgment and discretion. Within this context, it is not easy--nor particularly meaningful--to separate "questions of fact" from "questions of law." Accordingly, rather than limit Environment Court review to "questions of law," it makes more sense to focus its review on the exercise of discretion in determining resource consent applications.

- **How might the proposed changes to the Environment Court alter the incentives for parties to reach mediated or negotiated settlements of resource disputes?** Promoting the resolution of disputes by negotiation rather than

prescriptive measures, including Court orders, is one of the hallmarks of the RMA. Limiting Environment Court review solely to questions of law, however, changes the contours of the incentives for parties to engage in meaningful negotiation. Great consideration should be given to the effect this might have on the Environment Court's successful mediation programme.

2. Judicial Review of Federal Action in the United States

A brief overview of the United States' system of judicial review of federal environmental decisions provides a useful backdrop against which to consider these issues and the function of de novo review. In the United States most environmental decisions made by agencies of the federal government--for example the Environmental Protection Agency, the National Park Service or the Forest Service--are subject to judicial review under the Administrative Procedure Act.[213] Among the key features of judicial review are the following:

- **The scope of review before the court is the administrative record that was before the primary decisionmaker.** In the absence of extraordinary circumstances, courts are not permitted to develop a new evidentiary record in judicial proceedings. Rather, judicial review is limited to the record before the primary decisionmaker. In most quasi-adjudicative decisions analogous to resource consents, the record is not created in formal proceedings. It typically consists of the documents and sources the agency consulted during its deliberations. In the example of a permit application to fill wetlands, the record would typically consist of the application and supporting documentation; an environmental assessment; submissions (whether formal or informal) by the public; evaluations of the application by agency staff experts; and comments by various federal and state agencies that have an interest in the application. Accordingly, the focus of the court's analysis is the deliberative process of the agency as reflected in the administrative record.

- **The standard of review requires courts to give deference to the primary decisionmaker.** A court may set aside the decision of a federal agency only if the decision is arbitrary and capricious, an abuse of discretion, contrary to the law, or not based on substantial evidence.[214] Reviewing courts are not entitled to substitute their own judgment for the judgment of the primary decisionmaker, which is regarded to hold special expertise. Decisions are generally upheld--even if not supported by the balance of the evidence--as long as there is enough evidence that the agency could reasonably have reached the conclusion it did. Again, the focus of courts' analysis is on the deliberative process of the agency.

[213] 5 U.S.C. ss. 701-706.

[214] 5 U.S.C. s 706.

- **The remedies available to a reviewing court are limited.** If a court finds that a federal agency's decision regarding an environmental matter does not meet the required standard, it may not directly "fix" the problem by rendering its own substantive decision. A court may merely set aside the decision as unlawful and return the substantive decision to the agency to render it anew.

- **Merely filing a judicial challenge does not necessarily warrant an injunction against work proceeding to implement a decision being challenged.** Once a decision is made by the agency with primary responsibility, the decision is final and operative unless and until it is set aside by a court. In order to prevent work in furtherance of a project which has received a permit, it is necessary to obtain a judicial injunction against the activities. Courts do not always issue injunctions on request, particularly if they have not yet determined the merits of a case. Preliminary injunctions are sometimes issued soon after the initiation of litigation after consideration of several factors, including the likelihood that the party seeking the injunction will succeed on the merits of the case, the balance of the hardships to the parties if the injunction issues or does not issue, and the public interest. Separate hearings are usually held on requests for preliminary injunction, sometimes with limited evidence provided to the court. Many cases settle or are withdrawn after this preliminary hearing and ruling by the court.

Relative to the system of de novo review, the more limited system of judicial review has certain advantages and disadvantages. One advantage is that it allows judicial resolution of disputes in a relatively inexpensive way. Costs are kept low by relying on the record before the primary decisionmaker. Another advantage is that many cases are quickly determined through the preliminary injunction hearing, particularly where the court refuses to issue an injunction against proceeding with work in furtherance of a government permit. A third advantage is that the focus of legal proceedings is on the deliberative process of government. As a result the judiciary directly scrutinises the government's exercise of its functions.

The disadvantages of judicial review relate primarily to the constrained role allowed reviewing courts. The deference that courts are required to give primary decisionmakers means that a decision will stand as long as it is not arbitrary and capricious or woefully unsupported by evidence--even if a better decision could obviously have been taken. Moreover, when a decision has been set aside a court must remand it to the primary decisionmaker rather than directly cure its defects. Finally, the focus on the administrative record often precludes judicial consideration of relevant and helpful material that was not presented to the primary decisionmaker. Unless the record is so poor that it does not reflect the deliberative process of the decisionmaker, there is little opportunity to supplement a poor record.

In light of these limitations of judicial review, a doctrine of "hard look" review has been promoted in the United States. This judicial gloss on the "arbitrary and capricious" standard calls for courts "to intervene not merely in case of procedural inadequacies . . . but more broadly if the court becomes aware, especially from a combination of danger signals,

that the agency has not really taken a hard look at the salient problems and has not genuinely engaged in reasoned decisionmaking."[215] In essence, the "hard look" doctrine requires reviewing courts to undertake a careful study of the record, including the technical aspects, in order to educate itself fully and to closely scrutinise the way in which the primary decisionmaker arrived at its decision.[216] Advocates of the doctrine argue that it permits courts to undertake a more searching review of agency decisions and avoid "rubberstamping" government decisions. Critics argue that generalist judges are not technically proficient enough to second-guess decisions made by scientific experts within government agencies.[217]

3. A Hybrid Approach for New Zealand's Environment Court?

A comparison of U.S.-style judicial review with the current RMA system of de novo review suggests a hybrid approach that could minimise some of the difficulties of the Minister's proposal. Such a hybrid approach would involve the Environment Court having the power of searching judicial review over all aspects of resource consents, including the decision whether or not to notify. It would potentially be less expensive than the current approach of full de novo review, but would still allow in-depth scrutiny of consent authorities' decisions on resource consents.

Such a hybrid approach might include these elements:

- **Continue de novo review of plan and policy statement provisions.** Maintaining this fundamental role will enable the Environment Court to continue to influence the content of plans and policy statements. Given the limited opportunities to consider programmatic or strategic questions of environmental policy and cumulative effects, consideration should be given to requiring an overall hearing on plans and policy statements, before they become effective, to review the environmental merits of entire planning documents.

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[215] Greater Boston Television Corp. v. Federal Communications Commission, 444 F.2d 841, 850 (D.C. Cir. 1970, cert. denied, 403 U.S. 932 (1971) (Leventhal, J.).

[216] The "hard look" doctrine is discussed in depth in the leading case, Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1 (D.C. Cir 1976), cert. denied, 426 U.S. 941 (1977), in which Judges Wright, Bazelon and Leventhal debated the merits of "hard look" review. Judge Leventhal and another prominent jurist, Judge Oakes, also advocate the use of "hard look" review in environmental cases in two useful extrajudicial articles: Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 University of Pennsylvania Law Review 509 (1974) and Oakes, The Judicial Role in Environmental Law, 52 New York University Law Review 498 (1977).

[217] See Ethyl Corp., 541 F.2d at 34-36 (Wright, J.) ("There is no inconsistency between the deferential standard of review and the requirement that the reviewing court involve itself in even the most complex evidentiary matters. . . . The close scrutiny of evidence is intended to educate the court. It must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made."); Ethyl Corp., 541 F.2d at 66-67 (Bazelon, J.) ("The process of making a de novo evaluation of the scientific evidence inevitably invites judges of opposing views to make plausible-sounding, but simplistic, judgments of the relative weight to be afforded various pieces of technical data. . . . [S]ubstantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable.").

- **Provide for "hard look" judicial review of resource consent decisions by the Environment Court.** Judicial review of consent authorities' decisions on resource consents is more consistent with the legal standards of sustainability and effects-based management than is limited review on questions of law. The scope of such review should be focussed on, but not necessarily limited to, the factual record before the consent authority (with additional evidence taken in court only if the Environment Court deems it necessary or important to its determination). The standard of review should allow searching analysis by the Environment Court to ensure that challenged decisions are consistent with sustainable management. Because the Environment Court is an expert and specialist tribunal, there are few reasons not to employ a "hard look" doctrine to ensure a searching and substantive review of consent authorities' decisions. The burden could be placed upon the appellant challenging the decision to convince the Enviroment Court that the decision is not substantially consistent with sustainable management. The Environment Court, if the burden were met, could then impose its own decision. One benefit of searching judicial review in the Environment Court would be lower litigation costs and faster determinations of appeals. Another benefit would be the Environment Court's direct scrutiny of council reasoning and processes, perhaps leading to case law that is more helpful to councils in developing good practice.

- **Make consent authorities' decisions final and operative unless enjoined by the Environment Court after a preliminary hearing.** If resource consent decisions were final and operative unless enjoined by the Environment Court, then summary preliminary hearings could be effectively used to identify the cases likely to succeed and which bear most heavily on the public interest. Cases brought by objectors who failed to convince the Environment Court to issue a preliminary injunction would likely be withdrawn or forestalled by the implementation of the resource consent.

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