Australasian Conference of Planning and Environmental Courts and Tribunals (ACPECT 2016)

Responsiveness to Resource Management Issues - a New Zealand perspective

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Background

Condition setting on resource consents is an important and often challenging part of the Resource Management Act (RMA) resource consent process in New Zealand and has been a cause for concern, not least in terms of the ability and enforceability of conditions to achieve the desired environmental outcomes. A resource consent is a generic term for a land use or subdivision consent, or for water, discharge (to air, land and water) and coastal permits which have a more limited life.

NZ is divided into regions and under the RMA regional councils co-ordinate and set policy for resource management, water management, soil conservation and transport in an overarching regional policy statement which regional and district plans have to give effect to. Regional councils have as their functions water management, discharges to land, air and water and related land use issues, and activities in the coastal marine area (the territorial sea out to the 12-mile limit) and prepare and administer policy and rules in regional plans. Territorial authorities, city and district councils and the Auckland Council, deal with land use and subdivision and prepare and administer policy and rules in district plans. The territorial authorities largely have responsibilities for service delivery functions of water supply, waste disposal, stormwater, roading and community facilities such as parks and reserves, although some areas have Council Controlled Authorities (CCOs) which exercise infrastructure service delivery functions. Six of the territorial authorities (Gisborne, Marlborough, Nelson, Tasman and Chatham Islands) and Auckland Council, sometimes referred to as unitary authorities, - combine the functions of regional councils and territorial authorities.[1]

There is no requirement for consistency in the approaches to setting resource consent conditions among the 78 councils, or consent authorities as they are known, when exercising their consent processing function. No national planning templates for guidance exist,

[1] There are 11 Regional Councils, 12 City Councils (which are largely urban), 54 District Councils and 1 Auckland Council (which amalgamated 8 former councils in 2010).

although there is some material on the Quality Planning Website. The Quality Planning website *(QP)* was launched in 2001 to "promote good practice by sharing knowledge about all aspects of practice under the RMA" among resource management practitioners, council planners, private practitioners, consultants and environmental managers among others.

In 2014 the Court co-operated with the Resource Management Law Association of New Zealand Inc (RMLA), the multi-disciplinary organisation for the promotion of best practice in environmental policy and law, in an initiative to improve the practice. The RMLA ran a series of road-shows around the country (13 in total) in both larger and smaller centres. The Principal Environment Judge and other members of the Court, including the author, were major contributors at the workshops. There was a good turnout of people at all levels of the respective professions and positive feedback from attendees. The Court closely monitors the conditions provided to it by the parties as part of cases heard by the court and also in settlements of appeals that require the Court's sign-off on conditions of consent.

The author is grateful to the contributors to the RMLA road-shows, and the participants who took part in the discussions and shared their thoughts, as it provided a rich source of material to draw on.

The Law

The broadly expressed discretion in the RMA allows for "any condition that the consent authority considers appropriate", subject only to any express provision elsewhere in the Act and any Regulations.[2] The RMA also has additional condition setting provisions that relate to land subdivision, discharges to air, land and water, water takes and reclamations in the coastal marine area.

Drawing from the UK House of Lords decision in *Newbury District Council v Secretary of State for the Environment: Newbury District Council v International Synthetic Rubber Co Ltd*[3] a condition will generally only be regarded as valid if it is:

(a) For a [resource management] purpose, not an ulterior one;
(b) Fairly and reasonably relates to the development authorised by the consent to which it is attached; and

2 *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149 (SC).
3 *Newbury District Council v Secretary of State for the Environment: Newbury District Council v International Synthetic Rubber Co Ltd* [1981] AC 578; [1980] 1 All ER 731 (HL).

(c) Is not so unreasonable that a reasonable planning authority, duly appreciating its statutory duties, could not have approved it.

The New Zealand courts modified the *Newbury* requirements in recent years. In the *Estate Homes* case, the Supreme Court took a more liberal view of the "fairly and reasonably relate" test:[4]

> [t]he application of common law principles to New Zealand's statutory planning law does not require a greater connection between the proposed development and conditions of consent than they are logically connected to the development.

A causal link is not required.

Key requirements for conditions taken from the case law are:

- Conditions, whether taken singly or as a whole, should promote sustainable management.
- A resource consent, which includes its conditions, must stand on its own and be capable of being interpreted and applied in its own terms.
- Conditions should make sense and be coherent, consistent and complete. There should be clarity, certainty and enforceability of all the conditions.
- Conditions are to accurately reflect not only the proposal advanced in the application but also any modifications suggested or offered in evidence during the course of a hearing.
- Conditions which require expert certification or expert oversight of an activity are valid but require clear parameters.
- Performance standards must be set in the terms and conditions of consent and not left to some later stage, although certification of compliance with specified standards can be delegated.

The development and imposition of conditions is also to avoid the following:

- Delegation of council duties, including decision making and enforcement duties, or the delegation of judicial duties (such as determining a disputed issue that may arise in conducting the consented activity).
- Conditions that would derogate from (or nullify) the grant of the consent. Examples are conditions that require an application for further resource consents in order for the proposed activity to occur, and conditions restricting the capacity of a consented

[4] [[2007] 2 NZLR 149 at [66].

land use (such as a school or child care facility) or the hours of operation of the activity (such as an airport) to a level which make the proposal unviable.

This principle is now somewhat tested in the adaptive management approach, a matter returned to later.

- Conditions which would limit an individual's ability to exercise statutory legal rights available to them, such as the ability to appeal a resource consent decision.
- Conditions which require actions of third parties or activities, such as requiring acoustic noise insulation of houses not owned by the consent holder, unless those third parties have agreed to them. Pre-conditions, such as the consent cannot be exercised until a road is upgraded, without requiring the third party (e.g. council) to build the road can be acceptable.

Augier **conditions**

It is common for applicants to proffer ***Augier*** conditions[5] that could not be imposed as a condition of a resource consent by the consent authority to resolve or overcome issues that might otherwise result in a decline of part or all of an application. The High Court requires four elements to be established:[6]

- A clear and unequivocal undertaking to the Court and/or other parties;
- Receipt of the grant of resource consents in reliance on the undertaking;
- Imposition of a condition on those resource consents which broadly encompassed the undertaking; and
- Detriment to the Court or other parties if the undertaking was not complied with.

Augier conditions can present a challenge, particularly where there has been a long design process resulting in substantial or total agreement, with elements that the proponent may consider to be *Augier* a primary foundation for consent. It is often not clear what could and should be considered to be *Augier* and that can provide scope for legal challenge including difficulties with later consent applications seeking to undo key consent conditions. It is preferable that the *Augier* principle is not relied on for the fundamental planks of a consent.

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5 *Augier v Secretary of State for the Environment* (1978) 38 P& CR 219 (QBD) is authority for the proposition that an applicant for planning permission who gives an undertaking to a planning authority, which is relied upon in granting the permission is stopped from later asserting that there was no power to grant the permission subject to a condition based on the understanding.

6 *Frasers Papamoa Ltd v Tauranga City Council* [2010] 2 NZLR 202 (HC) at [34].

Conditions as part of the consent package

Good practice now involves presenting proposed conditions up front in applications and at hearings as a key part of the effects assessment and the methods to manage effects. Conditions are no longer treated as of secondary importance to the main event of the grant of consent, but are an integral part of the consent and the consent process.

In reality, the conditions are the continuing narrative of the development. They have greater importance over time as only the conditions of the consent endure and are the basis for future certainty of what has been approved and to be enforced. Organising consent conditions in a structured way is also helpful, such as gathering conditions together, not only by subject but also according to:

- matters that must be complied with before the activity may commence;
- matters related to site development and construction;
- operational conditions;
- special events and emergencies; and
- end of development (close down and rehabilitation) requirements.

A "conditions expert", often a planner solely specialising in preparing conditions, has become common on large projects. Often there will be separate expert conferencing on conditions, which may involve planners with the input of other experts where necessary. It is generally better for lawyers or planners who understand the legal and practical requirements of conditions to take the specific type of mitigation agreed on by experts, such as in the noise and landscape areas, and craft it into conditions.

Unfortunately, some members of the legal fraternity and resource management practitioners have been slow to pick up on the importance of condition setting and the need to engage with it early on, as well as during, the consent process. It continues to be a work in progress.

Condition 1

In NZ there has been an almost universal "condition 1" of any consent requiring that the development proceed "in general accordance with the application", including the Assessment of Environmental Effects. The use of the word "generally" in condition 1 is intended to permit minor variations but does not permit the consent holder to conduct the

activity in a materially different way from that described. However, there are dangers with this approach. Referring to all the application documentation has the potential to lead to confusion about what is required, particularly when the application details have evolved through the project development and consenting process. The application material would constrain the scope of any consent granted, whether referred to or not.

The ideal is a self contained consent document that is complete on its face so that there is no need to refer back to the application documents. Condition 1 on all the consents should clearly set out the key plans that the activities are to comply with, which are likely to be ones that must be fully complied with, and these should be attached. It is better to record any important limitations on the scale of the development, or obligations as to mitigation, expressly in consent conditions themselves. It is common to include in the condition that where there is conflict between the general condition and specific conditions, the latter prevails.

A recent example illustrating the dangers of a condition 1 is *Palmerston North City Council v New Zealand Windfarms Limited*[7]*.* Condition 1 referred to the construction and operation of a wind farm generally in accordance with the information, site plans and drawings provided as part of the application or as additional information. The consent contained other conditions, with noise limits at the notional boundary of any receiving dwelling and monitoring processes for measuring whether there was compliance. Part of the Assessment of Environmental Effects (AEE) involved a Noise Impact Assessment Report (NIAR). Modelling conducted on the part of the respondent indicated that only a few neighbourhood houses would be impacted by the noise, but the modelling was in error and the Council subsequently received a very large number of complaints once the wind farm was operational.

The majority decision by the Court of Appeal agreed with the High Court that the respondent's predictions of the noise effects of the turbines were not in themselves limits on the scope of the wind farm, enforceable by the Council through condition 1. The appellant sought to have condition 1 to do work which expressly, and quite specifically, the other conditions were intended to do.

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7 *Palmerston North City Council v New Zealand Windfarms Ltd [2014] NZCA 601, (2014) 18 ELRNZ 149.*

However in dissenting, Randerson J considered condition 1 of the resource consent to be an important condition that is enforceable in its own right and one that did not conflict with the other conditions controlling the noise effects of the wind farm. The information accompanying the application for the resource consent is relevant in determining the scope of the activity for which consent is given. The Environment Court was right to declare that the resource consent was being, and had been, breached in that it was operated in such a way that the noise effects at local residential locations were considerably greater than those predicted in the application.

Outcome-based v process conditions

A problem has been the widespread use and reliance on *process* conditions, such as with management plans (covered next), that have no environmental outcomes and standards against which to measure whether the processes to be followed will achieve the desired results. There needs to be conditions which contain environmental outcomes and standards within which *process* conditions operate. [8]

Conditions need to be specific, measurable, achievable, relevant and time-bound (SMART). If they are SMART, they will meet the requirements of caselaw and be certain, workable and enforceable.

Interestingly, Dr Marie Brown,[9] in a recently published book recommended that consenting agencies adopt wide use where appropriate of outcomes-based conditions that are clear, measurable and enforceable as one of the priority actions for achieving better outcomes for biodiversity and the natural environment in NZ.[10] That is to address the problem that resource consent conditions often do not mandate desirable ecological goals but instead focus on process-oriented issues that can be unrelated to the achievement of tangible outcomes. She highlighted the Australian Government Department of the Environment and Energy Outcomes-based Conditions Policy and Outcomes-based Conditions Guidance. Both of these Commonwealth documents refer to SMART criteria. The book states:[11]

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8 *Royal Forest and Bird Protection Society Inc v Gisborne District Council* [2013] NZRMA 336 (NZEnvC).

9 Dr Brown was a presenter at the RMLA road-shows and is working for the Environmental Defence Society (EDS). EDS is very active in NZ in undertaking research, publishing and promoting good practice.

10 Marie A Brown *Pathways to Prosperity: Safeguarding biodiversity in development* (Environmental Defence Society Incorporated, 2016) at 65.

11 Marie A Brown *Pathways to Prosperity: Safeguarding biodiversity in development* (Environmental Defence Society Incorporated, 2016) at 49.

> In 2015, an outcomes-based conditions policy was released. Three types of conditions are used by the Australian federal government: administrative conditions, prescriptive conditions and achievement or outcomes-based conditions. By its own admission, the follow-up and compliance was strongest for the first category of conditions. The purpose of the change was to recognise that there are multiple ways to reach a given endpoint and to reduce the administrative burden of highly prescriptive conditions. Effort in recent years has been focused on improving condition drafting and the use of outcomes-based conditions that ensure ecological goals are met.

Dr Brown's PhD research into consent compliance with biodiversity conditions had found a similar result in NZ with follow-up and compliance much weaker for conditions that required "getting your gumboots wet".

A question is how Dr Brown's message will be picked up and progressed in NZ, including follow-up on the Australian experience.

Management plans

Unfortunately management plans (and multiple management plans) have been widely and poorly used by consent authorities as a key consenting technique, commonly putting difficult questions off to another day. Management plans have often been put forward at Court and Board of Inquiry hearings as the panacea for dealing with effects at a later stage once the consent has been granted. Management plans to be produced after consent is obtained, and with no outcome-based requirements and performance standards to be achieved through the actions in the management plans, are regularly advanced on the basis of "trust us – we know what we're doing".

The Board of Inquiry's decision on the *Transmission Gully* highway project clearly set out the expectations of Management Plans whether for resource consents or infrastructure designations. It said:[12]

> The Board was initially concerned that the extensive use of Management Plans which were to be certified by Council officers rather than the Board, might mean that we were in effect delegating our decision-making obligations. Ultimately, we

[12] Draft Report and Decision of the Board of Inquiry into the Transmission Gully Proposal (May 2012) at [189].

determined that this was not the case, provided the conditions of consent imposed contained clear objectives to provide focus to management plan provisions and performance criteria which operate as bottom lines which the management plans must achieve.

There are many approaches to management plans taken in NZ. It may be that the final management plan is to be effectively approved by the consent authority and attached to the consent. Another approach is for there to have been a draft either going into the process or evolved through the process and a requirement in the condition might be that the final management plan is to be generally in accordance with the draft (this approach is commonly used for major transportation and roading projects). A further approach is for a management plan to be produced later and certified by an officer of the Council. However, most consents provide for the updating or review of a management plan through a process that involves certification by an officer of the Council (even if there has been a certification process required of the consent holder).

Proponents of management plans (and that includes consent authorities and Council service delivery arms) have been learning that it is not wise to leave the development of a management plan that is critical to demonstrating that the adverse effects can be dealt with until later on in the process. An example of where it proved unwise to do that is to look at what occurred in the *Hagley Oval* situation with the World Cricket Cup proposal in front of the Environment Court as a direct referral. The Court had a concern that it needed to be demonstrated that it was possible to deal with the adverse traffic effects likely to be generated from major events such as on the hospital close by, with the management plan a key input to that, as a prerequisite to being able to grant any consent.

Another example is *Mount Field Ltd v Queenstown Lakes District Council*[13], a proposal for major and multiple building development on the road going up to the Coronet Peak skifield in Queenstown. By the time of hearing the applicant had put forward a condition for a Biodiversity Management Plan (BMP) and its implementation as its centrepiece for biodiversity improvement to offset the significant adverse landscape effects. The condition proposed was uncertain and effectively delegated substantive decision-making to the Council through an approval process on matters that should have been decided at first instance. It failed to set out clear outcomes for biodiversity within which the BMP, as a process condition dealing with how the outcomes would be met, would operate and could be

[13] *Mount Field Ltd v Queenstown Lakes District Council* [2012] NZEnvC 262.

certified by a Council officer. The applicant amended the management plan after the hearing, but there was still uncertainty as to what it would involve and its effectiveness, and the consent was declined.

Another problem with management plans is that many are long and complex and are more likely to sit on the shelf rather than be implemented effectively. The users may include anyone from Council compliance and enforcement officers to contractors and digger drivers. People come and go, particularly over the life of a long project, so the conditions must be easy for new people to understand and follow. There is a reluctance to use flow charts, diagrams and pictures, and not just words, and to design management plans that are fit for purpose.

Modelling

The use of models can be inherently problematic when assessing effects and setting conditions. In a case concerning a large layer chicken farm in a rural area the Court[14] remarked on the difficulties of accurately predicting the adverse effects of odour and found that while odour dispersion relied on by the applicant could make a useful contribution to informing the consideration of relative odour effects, the results were not absolute and might not reflect what actually occurred. The Court found significant uncertainties about the appropriate odour generation rates and concentration predicted to be received at the boundary of the site. There was the potential for neighbouring residents and workers in an adjoining horticultural operation to experience objectionable odours. The consent in that case was declined.

A comparatively recent development in NZ is the use of the computer model OVERSEER that estimates nutrient use and movement within a farm system and nitrogen and phosphorus loss to water through leaching and runoff. The core of OVERSEER is a nutrient budget, which includes the nutrient inputs and outputs of a farm system. Issues associated with its use have arisen in consenting as well as in plan making, where the outputs from OVERSEER have been used as a regulatory tool. However, it is the only tool currently available and considerable investment (approximately $300,000) has recently gone into a project called “Using OVERSEER in Regulation: Technical resources and guidance for appropriate and consistent use of OVERSEER by regional councils”.

[14] *Craddock Farms Ltd v Auckland Council* [2016] NZEnvC 51.

The National Policy Statement for Freshwater Management 2014 requires regional plans to establish objectives and freshwater quality limits for all freshwater management units, including targets to improve water quality where the limits are not met. The technical guidance material for OVERSEER presents it as a suitable method to assist in achieving the outcomes sought.

Version change of the OVERSEER software has caused problems. Following the hearing and first instance decision granting resource consent for many consents issued for water takes for irrigation in the Waitaki Basin (the McKenzie country) of the South Island, later versions of the Overseer model have given widely different predictions of nutrient losses for the same activity.[15] Because of the variations, the Canterbury Regional Council cannot quantify nutrient losses in absolute terms as losses of nitrogen or phosphorus in kg/property/annum (which the consents originally granted by the consent authority did). In response to the above, the OVERSEER model is now used to verify that next year's farming activities will not increase nutrient losses when compared to a benchmark. The benchmark is the losses modelled for a specified Overseer input file (the original input parameter file based on the consented activity) which is identified in the conditions of consent.

Following conversion of the farm to spray irrigation, the same version of the OVERSEER model is run twice each year, once using the inputs in the benchmark model input file and the second time using the inputs from a parameter input file created for the following year's intended farming activities. The outputs from the two model runs are then compared, with the requirement for there to be no increase in modelled losses.

The Waitaki consents have water quality variables monitored and reported at stated locations. If trigger parameters for nitrogen and phosphorus (for either a specific early warning or environmental standard) are exceeded, then an expert review panel is to prepare reports into whether this is caused by the authorised irrigation and whether there is a trend towards exceedance of the trigger level. If the experts conclude that is the case there are reductions in nutrient discharge allowances and a requirement for remedial action plans and amended farm environment plans (management plans) to be prepared and given effect to with certification by the Regional Council.

There are questions about the robustness of OVERSEER in predicting actual nutrient losses that are occurring on farms and its validation in locations with different conditions such as

[15] *Bellfield Land Company Ltd v Canterbury Regional Council* [2015] NZEnvC 88.

topography, soil and climate. There are also questions about how the nutrient discharge allowances set in plans have been firstly assessed at a catchment level, and then assessed and allocated at a property or farm level, and under what margin of safety or precaution. A central and troubling issue is whether the nutrient loss limits that have been set, even if adhered to, will achieve the objective. In many locations in NZ the "load to come" has a very long timeframe. For example, it is estimated to be 80 years before the outcome of the North Island's Lake Taupo RMA OVERSEER based nitrogen discharge regulatory regime will be known.

Finally, there are challenges to the way at least one Council is allegedly granting consents for farm operations with higher nitrogen discharge limits than that said to be envisaged in its regional plan policy (and on which its plan development was based). To date it is understood that there has been no enforcement action taken by regional councils in relation to conditions restricting nitrogen or phosphorus discharges.

NZ Standards, Guidelines and Other External Documents

Conditions often incorporate external documents by reference e.g. NZ Standards, Council's Engineering Standards, and Council documents such as soil and erosion control guidelines. Often these are not sufficiently clear or certain enough to achieve the requirements of conditions. They may contain a range of options for outcomes, with many only containing good practices, and many leaving a lot of discretion up to the consent holder or the certifying officer to decide what needs to be done. Frequently those decisions should have been made at first instance. The essential elements of those documents that do need to be complied with should be included in conditions.

For example, the current NZ Standard for wind farm noise[16], has a discretion in terms of the level of night time noise that ought to be allowed, similarly the current NZ Standard for construction noise[17] which has some discretion relating to Sunday and night time operations. There is another problem with NZ Standards and that is with copyright and the cost of purchase which is well beyond the means of most people. NZ Standards forbid photocopying at public libraries. It is better to include the specific provisions in conditions so they are known and accessible to all.

[16] NZS 6808:2010: Acoustics – Wind farm noise.
[17] NZS 6803: 1999: Acoustics – Construction noise.

It is also important to make sure that those considering the conditions such as affected residents have access to and understand the conditions put forward by the applicant and consent authority (including at mediation).

If it is necessary to incorporate by reference specific provisions from a document in a consent condition it is desirable to state the document version, date it, and attach it to the consent conditions, or at least require it to be kept with the consent for future reference.

Review conditions

Resource consents may contain review conditions which allow a consent authority to review particular conditions following the same process as for an application for a resource consent. The RMA provides for specifying time(s) and purposes for such review.

Many such review conditions merely parrot the provisions of the Act that allow specifying time(s) and purposes for the consent authority to require such a review:[18]

> to deal with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage; or
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> to require a holder of a discharge permit or a coastal permit to do something that would otherwise contravene [provisions for discharging contaminants into water or air or into or onto land] to adopt the best practicable option[19] to remove or reduce any adverse effect on the environment.

That is despite the Act allowing other purposes to be specified in the consent.

Review conditions are frequently general and poorly worded without clear consequences, essential scope, triggers and possible outcomes for review. Review conditions are often the focus of mediation, with the applicant and often the consent authority advancing them as the

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[18] Resource Management Act 1991, s 128.

[19] Resource Management Act 1991, s 2:
best practicable option, in relation to a discharge of a contaminant or an emission of noise, means the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to -
(a) the nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and
(b) the financial implications, and the effects on the environment, of that option when compared with other options; and
(c) the current state of technical knowledge and the likelihood that the option can be successfully applied.

approach to dealing with the issues raised by other parties. In practice, consent authorities are wary of actually using such review conditions and they are infrequently triggered.

Adaptive Management

Not only devising conditions for adaptive management, but deciding whether adaptive management is a suitable approach, are major consenting issues. The RMA does not explicitly refer to adaptive management, but it has been a feature of case law dating back to the Tasman Bay aquaculture cases in the early 2000's. In *Crest Energy*[20] an *Augier* condition required the cessation of the turbine activity at any time during the staged establishment and operation of the tidal electricity generation turbines in the entrance to the Kaipara Harbour if monitoring proved the adverse effects to be at an unacceptable level, particularly in respect of the harbour's important snapper nursery role.

Recent Supreme Court consideration of adaptive management - *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd*[21], informed by consideration of international approaches has laid down some guidance. That case considered conditions requiring the gathering of baseline information for the assessment as to whether new salmon farms in the Marlborough Sounds could be built and stocked, and extensive monitoring and remedial actions if water quality was compromised.

The Supreme Court decision refers to "adaptive management" as a precautionary approach allowing for activity to proceed in incremental stages, with monitoring, reporting and assessment of any adverse effects taking place before next stage of activity progresses.

It depends on an assessment of the following four factors:

- The extent of the environmental risk (including the gravity of the consequences if the risk is realised).
- The importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment).
- The degree of uncertainty.
- The extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.

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20 *Crest Energy Kaipara Ltd v Northland Regional Council* [2011] NZEnvC 26.

21 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673.

Before endorsing an adaptive management approach the Supreme Court[22] said it would have to be satisfied that –

(a) there will be good baseline information about the receiving environment
(b) the conditions provide for effective monitoring of adverse effects using appropriate indicators
(c) thresholds are set to trigger remedial action before the effects become overly damaging
(d) effects that might arise can be remedied before they become irreversible.

It also said: [23]

> As to the threshold question of whether an adaptive management regime can even be considered, there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk. The threshold question is an important step and must always be considered. As Preston C J said in Newcastle, adaptive management is not a '"suck it and see" approach.

As a side note, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, which is not within the jurisdiction of the Environment Court, has specific provisions relating to adaptive management, unlike the RMA which does not specifically refer to it. That Act defines "adaptive management" inclusively as follows:[24]

> allowing an activity to commence on a small scale or for a short period so that its effects on the environment and existing interests can be monitored, and any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, or continued with or without amendment, on the basis of those effects.

The Act requires the decision-maker to "favour caution and environmental protection" if the information available is "uncertain or inadequate", but if that means an activity is likely to be

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22 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40 [2014] 1 NZLR 673 at [133].

23 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40 [2014] 1 NZLR 673 at [125].

24 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 64(2).

refused then the decision-maker must first consider whether taking an adaptive management approach would allow the activity to be undertaken. The Act specifically provides that: [25]

> In order to incorporate an adaptive management approach into a marine consent, the EPA may impose conditions … that authorise the activity to be undertaken in stages, with a requirement for regular monitoring and reporting before the next stage of the activity may be undertaken or the activity continued for the next period.

A stage may relate to the duration of the consent, the area over which the consent is granted, the scale or intensity of the activity, or the nature of the activity.

The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act is administered by the Environmental Protection Authority, which appoints decision-making panels to hear and decide applications, and its adaptive management provisions have not been tested on appeal as yet. Two major applications were declined for seabed mining.[26]

Infrastructure - Financial contributions v development contributions

The RMA allows conditions requiring "financial contributions" to be paid (having taking over from the regime that was in the Local Government Act prior to the RMA enactment in 1991) to deal with contributions for roading, water supply, wastewater treatment and disposal and stormwater on land use and subdivision applications.

However, there was dissatisfaction with the RMA regime, partly because of the appeal rights and the revisiting on the merits of the policy for and decisions made by the consent authority on individual cases by the Environment Court. A new regime came in under the Local Government Act 2002 with "development contributions" that could only be appealed on legal grounds. Many Councils (approximately 40%) moved to development contributions. The new development contributions regime under the local government legislation specifically does not allow double-dipping and also has different requirements from the RMA. The interface with the RMA poses some challenges.

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[25] Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 64(3) and (4).

[26] Refusal of South Taranaki Bight Iron Sand Extraction Project marine consent application made by Trans-Tasman Resources Limited March 2014. Refusal of subsequent application by Chatham Rock Phosphate Ltd for a marine consent to mine phosphorate nodules from the crest of the Chatham Rise. Further work has since resulted in a revised and new application for the TTR iron sand mining proposal.

Ironically, the new regime of development contributions was not without its problems. A recent development is the ability to object to the council's imposition of a development contribution charge on a particular proposal (although not the Council's development contributions policy) which will be heard and decided by Development Contribution Commissioners appointed for a three-year term.[27]

The local government legislation also provides for Development Agreements between the Council and Council Controlled Organisations as service providers and developers on infrastructure provision and timing. These Agreements are often relevant to consenting and consent conditions.

The Resource Legislation Amendment Bill 2015 proposes to go further and repeal the RMA provisions for financial contributions.

Side Agreements

The Quality Planning web site states:

> Side or civil agreements are private arrangements that individuals and applicants for consent sometimes enter into. They can, for example, involve payment in exchange for a specific limitation on a development, and/or payment in compensation for an adverse effect or some other agreement. If the side agreement means that an affected party agrees to sign an affected party approval form (s95E) then the council can disregard an effect on that party.

The Environment Court Practice Note refers to side agreements in the following terms:[28]

> The scope and terms of settlement which the parties may develop may not necessarily be within the jurisdiction of the Court, or within the scope of the proceeding. The parties may request that aspects of their agreement that are within jurisdiction be referred to a Judge for the making of consent orders, and may enter into separate agreements on matters outside jurisdiction, or outside scope.

Side agreements are regularly entered into by affected parties. The issue of side agreements and their visibility or invisibility has not often come before the Court. However,

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27 26 Commissioners have been appointed to date.

28 Environment Court Practice Note 2014, Appendix 2, cl 7(c).

side agreements have come to more prominence as development agreements for infrastructure with Councils and Council Controlled Authorities as provided for under the Local Government Act 2002.

In Conclusion

The considerable investment put into the RMLA road-show by the Environment Court helped highlight the importance of sound condition setting and advanced the thinking of the ways in which this could occur. The written papers, presentations and discussion that occurred as a part of the road-show are also a valuable resource for those involved in resource management.

Finally there is a changing legislative landscape. The Resource Legislation Amendment Bill 2015 contains some proposed amendments to what can be imposed by way of conditions, such as to the financial contributions regime and to place limitations on conditions imposed without the agreement of the applicant for environmental compensation and offsetting of adverse effects.