

**BEFORE THE INDEPENDENT COMMISSIONERS**

**UNDER**

the Resource Management Act 1991

**AND**

**IN THE MATTER**

of the proposed Northland Regional Policy  
Statement

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**LEGAL SUBMISSIONS ON BEHALF OF THE ENVIRONMENTAL DEFENCE SOCIETY  
INCORPORATED**

**21 May 2013**

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## **INTRODUCTION**

1. I appear today on behalf of the Environmental Defence Society Incorporated (“EDS”).
2. EDS is a national not-for-profit environmental advocacy group. It was established in 1971 with the objective of bringing together the disciplines of law, science and planning to advocate for better environmental outcomes in resource management matters.
3. Today, EDS is part think-tank and part environmental watch-dog. The focus of EDS’s work is on achieving good environmental outcomes through improving the quality of New Zealand’s legal and policy frameworks and statutory decision-making processes. EDS has been active in assessing the effectiveness of the Resource Management Act 1991 (“RMA”) and statutory planning documents in addressing key environmental issues, including landscape protection, coastal management and freshwater.
4. EDS’s original submission and further submission on the proposed Northland Regional Policy Statement (“pNRPS”) sets out the decisions EDS seeks. Today I will focus on:
  - a. The role of regional policy statements (“RPSs”);
  - b. Part 2 of the RMA;
  - c. The recommendations of the Section 42A report in relation to:
    - i. Freshwater
    - ii. Landscape and Natural Character
    - iii. Biodiversity

## **REGIONAL POLICY STATEMENTS**

5. RPSs are important documents that are prepared under the RMA. They are the only planning instruments that provide an integrated overview of the policies relating to the management of air, land, freshwater, the coast and the marine area.
6. They are also important in the hierarchy of RMA documents. RPSs can have a significant impact on what happens on the ground as they influence all RMA plans within their region and should ensure consistent management of resources.
7. RPSs are therefore the heart of resource management within a region. Unfortunately, however, the role and effectiveness of RPSs to date has not lived up to their potential.

8. Improving RPSs is a primary research and policy focus of EDS. It has published a guide *Strengthening Second Generation Regional Policy Statements (2011)* which is designed to provide practical guidance to those involved in the development of second generation RPSs. The guide summarises lessons learnt from first generation RPSs and sets out what should be included in second generation RPSs. I wish to table a copy of this guide.
9. A key issue with first generation RPSs was the failure to add significant value to resource management efforts. This was due to a number of factors, including:
  - a. *Lack of coordination* – created uncertainty as to roles and responsibilities and resulting in duplication and gaps
  - b. *Failure to address land-use planning issues* – which drive many key regional environmental outcomes;
  - c. *Lack of focus* – so that effort was dispersed and not focused on achieving significant regional outcomes;
  - d. *Use of vague and uncertain language* – sometimes doing little more than restating provisions of the RMA;
  - e. *Lack of maps* – resulting in considerable uncertainty as to the spatial application of policy;
  - f. *Lack of technical rigour* – with the provisions unsupported by good information or sound RMA rationale;
  - g. *Poor links with budgeting* – so that non-regulatory methods were often not undertaken;
  - h. *Lack of implementation of the statutory heirarchy* – with poor linkages between national policy statements, the RPS, RMA plans and resource consenting; and
  - i. *Lack of monitoring* – so that the effectiveness of RPSs could not be assessed and adjustments made in a timely manner.
10. New Zealand, and Northland, are facing many significant environmental challenges - and the preparation of RPSs is resource-intensive for all parties. We therefore encourage the Hearings Panel to take the learnings from first generation RPSs to ensure second generation RPSs do add value and do drive improvements in environmental outcomes on the ground.

## PART 2 OF THE RMA

11. The purpose of the RMA is the sustainable management of natural and physical resources.<sup>1</sup> This means:<sup>2</sup>

*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*

*sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

12. A decision made under Part 2 of the RMA requires the exercise of an overall broad judgment.
13. Section 5(2) can be separated into two parts, sometimes referred to as 'anthropocentric' and 'ecocentric' parts. EDS submits that section 5 does not require decision-makers to 'balance' or 'trade-off' anthropocentric and ecocentric effects, or economy and environment. Sustainable management requires that both the anthropocentric and ecocentric parts of sustainable management are satisfied. The Planning Tribunal stated:<sup>3</sup>

*Section 5(2)(a), (b), (c) provisions may be considered cumulative safeguards which enure (or exist at the same time) whilst the resource, in this case the land 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. These safeguards or qualifications for the purpose of the Act must all be met before the purpose is fulfilled. The promotion of sustainable management has to be determined therefore, in the context of these qualifications which are to be accorded the same weight.*

14. EDS would like to focus your attention on the role of the Council, under the RMA, relating to economic, social and cultural wellbeing. An evaluation of section 30 of the RMA will

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<sup>1</sup> RMA, s 5(1).

<sup>2</sup> RMA, s 5(2).

<sup>3</sup> *Shell Oil NZ Ltd v Auckland City Council* (Planning Tribunal W8/94, 2 February 1994) at 10.

demonstrate that that achieving economic development is not a function of the Council under the RMA.

15. The Council's role is essentially a passive one. It is to *enable* people and communities to provide for their wellbeing, not to direct how that is to be achieved.<sup>4</sup> Therefore, while it is appropriate to ensure that regulation does not prevent people and communities providing for their wellbeing, it is not the role of the Council to direct how they should do that. It is the function of the market to determine what economic activities are undertaken to provide for wellbeing.
16. This 'enabling' role can be distinguished from a requirement to 'promote' or 'provide for' a matter.
17. 'Promoting' is an active role that requires positive action. It is defined in the Oxford Dictionary as "support or actively encourage (a cause, venture, etc.); further the progress of".<sup>5</sup> Similarly, 'providing for' an outcome also requires positive action and is defined in the Oxford Dictionary as "make adequate preparation for".<sup>6</sup>
18. In contrast, 'enabling' is a passive role that does not require positive action. It is defined in the Oxford Dictionary as "give (someone) the authority or means to do something; make it possible for".<sup>7</sup> In *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 the Environment Court stated:

*[T]he role of councils under the RMA in relation to social, economic and cultural activities is essentially a passive one. It is to enable people and communities to provide for their wellbeing, not to direct how that is to be achieved.*<sup>8</sup>
19. The Environment Court has made similar comments in a number of other cases.<sup>9</sup>
20. EDS requests that this passive, enabling, role is kept in mind when decisions are made on the pNRPS.

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<sup>4</sup> *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59

<sup>5</sup> <http://oxforddictionaries.com/definition/english/promote?q=promote>

<sup>6</sup> [http://oxforddictionaries.com/definition/english/provide?q=provide+for#provide\\_10](http://oxforddictionaries.com/definition/english/provide?q=provide+for#provide_10)

<sup>7</sup> <http://oxforddictionaries.com/definition/english/enable?q=enable>

<sup>8</sup> *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 at [181]

<sup>9</sup> In *Southern Alps Air Ltd v Queenstown Lakes District Council* [2007] NZRMA 119, in relation to the safety of a commercial jet boating operation, the Environment Court said: *[S]ection 5 of the RMA appears to concentrate on the bottom lines of section 5(2)(a), (b) and (c), leaving people and communities to arrange their social objectives for themselves. One of those objectives in the first part of section 5(2) is about enabling people to look after their safety, not regulating or even managing for it.*<sup>9</sup> And in *Marlborough Ridge Ltd v Marlborough District Council* [1998] NZRMA 73 the Environment Court stated: *Our role as we perceive it under section 5 is to enable people to provide for that wellbeing. In other words, the scheme of the Act is to provide the "environment" or conditions in which people can provide for their wellbeing.*<sup>9</sup>

21. I would now like to turn to sections 6 and 7 of the RMA. I would like to bring your attention to just one of these principles - the requirement to have particular regard to the “maintenance and enhancement of the quality of the environment”.<sup>10</sup> This requires particular regard to be had to the principle that the quality of the environment must, at the very least, be maintained. It suggests that environmental degradation is not acceptable and enhancement may be appropriate.

22. The Environment Court has made the following comment on this principle:<sup>11</sup>

*The RMA does not regard the present Environment – being the sum of all environments – the best of all possible New Zealand's. Section 7 (f)'s reference to enhancement of the quality of the environment requires that improvements may be made in appropriate circumstances. That is consistent with purpose of the Act which requires remedying of the adverse effect of activities, including past effects (of past activities)... It is clearly contemplated by section 7 (f) together with sections 5 (2)(a) to (c) of the RMA that improvements to air and water quality may be very desirable ends of resource management. The same applies to degraded land and related natural resources.*

23. EDS submits that the current environment in Northland is clearly nowhere near “the best” it could be, and that enhancement of the environment is not only appropriate, but desirable.

## **FRESH WATER**

24. The pNRPS must “give effect to” the National Policy Statement for Freshwater Management 2011 (“NPSFM”).<sup>12</sup> The “give effect to” relationship has been discussed by the Environment Court, in the context of giving effect to a RPS. They said:<sup>13</sup>

*[50] ... the change in the test from “not inconsistent with” to “must give effect to” is significant. The former test allowed a degree of neutrality. A plan change that did not offend the superior planning instrument could be acceptable. The current test requires a positive implementation of the superior instrument...*

*[51] The phrase “give effect to” is a strong direction. This is understandably so for two reasons: [a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and [b]*

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<sup>10</sup> RMA, s 7(f).

<sup>11</sup> *J F Investments Limited v Queenstown Lakes District Council* (NZEnvC C48/06, 27 April 2006) at [28]

<sup>12</sup> RMA, s 62(3)

<sup>13</sup> *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211

*The Regional Policy Statement, having passed through the Resource Management Act process, is deemed to give effect to Part 2 matters.*

25. This statement applies equally to National Policy Statements.
26. The NPSFM requires plans to, *inter alia*:
  - a. Establish freshwater objectives for all bodies of fresh water<sup>14</sup>
  - b. Set freshwater quality limits and establish methods (including rules) to avoid over-allocation<sup>15</sup>
  - c. When water bodies do not meet the freshwater objectives, specify targets and implement methods to assist the improvement of water quality in the water bodies, to meet those targets, and within a defined timeframe<sup>16</sup>
  - d. Set environmental flow and/or levels for all bodies of fresh water<sup>17</sup>
  - e. Provide for the efficient allocation of fresh water to activities, within the limits set<sup>18</sup>
  - f. Ensure no decision will likely result in future over-allocation<sup>19</sup>
  - g. Set defined timeframes and methods by which over-allocation must be phased out<sup>20</sup>
27. EDS submits that the Hearings Panel should also bear in mind the recommendations of the Land and Water Forum. While there is no statutory requirement to have regard to the recommendations, they are the result of over three years of collaboration between industry groups, electricity generators, environmental and recreational NGOs, iwi, scientists, and other organisations with a stake in freshwater and land management. The recommendations must therefore carry significant weight.

### ***Implementing the NPSFM***

28. EDS would like to address the reasoning for the deletion of objective 3.1 and 3.2. The section 42A report<sup>21</sup> states that there is little to no value in repeating national objectives

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<sup>14</sup> NPSFM, policies A1 and B1

<sup>15</sup> NPSFM, policy A1

<sup>16</sup> NPSFM, policy A2

<sup>17</sup> NPSFM, policy B1

<sup>18</sup> NPSFM, policy B2

<sup>19</sup> NPSFM, policy B5

<sup>20</sup> NPSFM, policy B6

and while *one option is to provide greater direction ... the more appropriate course of action is to delete the objective* and rely on other provisions to give effect to the NPSFM.

29. The Environment Court in *Wairoa River Canal Partnership v Auckland Regional Council* (2010) NZEnvC 309 stated:

[12] *To be of most benefit, an RPS (or plan) should not repeat or paraphrase the requirements of higher order documents but **should interpret them into the regional (or local) context**. They should provide definition and clarification of phrases such as inappropriate subdivision, use and development through an explicit spatial and/or descriptive planning framework within which such areas can be identified and informed judgement made as to which policies should be applied to which areas and activities...". [Emphasis added]*

30. EDS submits that, while there is little value in repeating national objectives, to give effect to national policy statements the RPS must interpret the objectives into the regional context.

### **Objectives**

31. The section 42A report recommends the addition of two new objectives:

*Integrated Catchment Management*<sup>22</sup>

*Integrate the management of fresh water and the use and development of land in catchments to enable community values and uses of fresh and associated coastal water to be met.*

*Ecological flows and water levels*

*Maintain flows and water levels necessary to safeguard the life-supporting capacity, ecosystem processes, indigenous species, and the associated ecosystems of fresh water.*

32. EDS supports the inclusion of an objective directing integrated management of fresh water and land use and development. This is consistent with the NPSFM which directs regional councils to manage fresh water and land use and development in an integrated manner.<sup>23</sup>

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<sup>21</sup> At pages 132 and 137

<sup>22</sup> Staff Strikethrough, Page 46

<sup>23</sup> NPSFM, Objective C1, Policies C1 and C2

33. However, EDS has some concerns about the phrase “*to enable community values and uses of fresh and associated coastal water to be met*”. It is unclear what this means. Perhaps it is a reference to the freshwater objectives? However, integrated management (on its own) will not achieve this. EDS suggests that the purpose of integrated management is to ensure management is cognisant of the interactions between fresh water, land, ecosystems and the coastal environment and addresses adverse effects in a holistic manner, including cumulative effects.

## **Section 4.2**

34. The Section 42A report recommends deleting Section 4.1 and amending Section 4.2 to provide for *Integrated Catchment Management*. EDS agrees that management of freshwater and coastal waters should be integrated.

### *Method 4.2.3*

35. As notified, the pNRPS required the adoption of a precautionary approach in setting environmental flows and/or levels.<sup>24</sup> The Section 42A report recommends deleting this requirement because it considered *the precautionary approach is inherent in the RMA* and therefore the method is *always redundant*.<sup>25</sup>
36. EDS agrees that the precautionary approach is inherent in the RMA. However, EDS disagrees that this is a good reason to delete the requirement. Without this, the precautionary approach is not *explicit* and EDS considers that its presence adds value.

## **Section 4.3**

### *Policy 4.3.1*

37. The Section 42A report recommends that Policy 4.3.1 direct an improvement in the overall quality of Northland’s water resources. EDS supports this recommendation. This gives effect to Objective A2 of the NPSFM (which requires the overall quality of freshwater within a region to be maintained or improved) and Section 7(f) of the RMA (which requires regard to be had to maintaining and enhancing the quality of the environment).

### *Method 4.3.2*

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<sup>24</sup> Method 4.2.3(2)(e)

<sup>25</sup> Page 241

38. The Section 42A report recommends a number of changes to Method 4.3.2. A number of these concern EDS, particularly the deletion of (c) *Enhanced controls on earthworks* and (d) *Controls on land use changes and intensification*. It appears that these were deleted because the method was considered *vague on details*.<sup>26</sup>
39. It is well recognised that these activities (earthworks and land use change/intensification) can have significant adverse effects on sediment, nutrient and faecal matter.<sup>27</sup> EDS submits that controls are required on activities which are known to contribute to water quality degradation in order to implement Policy 4.3.1 (Improve the overall quality of Northland's water resources...).
40. EDS is also concerned that the Section 42A report does not accept its submission point requesting the addition of a paragraph referring to *controlling diffuse discharges*. EDS submits that controls on diffuse discharges are required to implement Policy 4.3.1.

*Interim limits*

41. The Section 42A report recommends a new policy:

*Interim region-wide ecological flows and water levels*

*Establish interim region-wide ecological flows and water levels for water bodies outside of priority catchments to give effect to objective 3.X of this regional policy statement.*

42. EDS supports this policy. However it raises the question of why the council is not providing for interim region-wide *quality* limits. The Section 42A report states that these may have *unanticipated impacts* as they may be *too conservative or not conservative enough* and are therefore *difficult to enforce*.<sup>28</sup>
43. In *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 the Environment Court stated:<sup>29</sup>

*We should immediately say also that we have little sympathy for the line of argument that we should defer taking decisive action in the field of improving water quality (or, at the very least halting its further decline) because ... the science is not sufficiently understood ... or that ... further analysis could give a*

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<sup>26</sup> Page 257-261

<sup>27</sup> For example, the Ministry for the Environment website states: Changes in land use can effect [sic] the quality and availability of fresh water, in particular, the intensification of agriculture and the growth of cities and towns effect our water resources: <http://www.mfe.govt.nz/issues/water/prog-action/managing-effects-of-land-use.html>

<sup>28</sup> Page 240

<sup>29</sup> At [5-8]

*more comprehensive process ... or similarly phrased excuses for maintaining more or less the status quo. We will never know all there is to know. But what we undoubtedly do know is that in many parts of the region the quality of the natural water is degraded to the point of being not potable for humans or stock, unsafe for contact recreation, and its aquatic ecosystems range between sub-optimal and imperilled. We also know what is causing that decline, and we know how to stop it, and reverse it. To fail to take available and appropriate steps within the terms of the legislation just cited would be inexcusable.*

44. EDS submits that there will always be uncertainties, but this is no excuse for failing to take action.
45. The LAWF recommended that interim regimes be considered where:
  - a. the requirements of national instruments are at risk, and
  - b. the catchment has not already been prioritised for early collaborative limit-setting processes, and
  - c. the current suite of industry, community and council programmes is assessed as insufficient to manage the risk of significant impacts, and
  - d. existing regional plan provisions are not adequate, and
  - e. the resource is under pressure from existing or anticipated use.<sup>30</sup>
46. The Northland Regional Council 2007 State of the Environment Report stated:<sup>31</sup>
  - a. The number of consented discharges to water and to land, where it can reach water, has steadily increased in the last 10 years, with more than 2200 discharge consents in January 2007.
  - b. Only one of the 21 River Water Quality Monitoring Network sites comply with the guideline range for dissolved oxygen on more than 50% of sampling occasions
  - c. Macroinvertebrate monitoring indicated clean water at two of 24 sites monitored in 2007 ... while five sites had macroinvertebrate communities indicative of severe organic pollution.

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<sup>30</sup> Recommendation 23

<sup>31</sup> Chapter 12

47. Water quality monitoring at 12 of Northland's rivers, stream and lakes this summer shows that only four of the 12 sites were suitable for swimming more than 90% of the time.<sup>32</sup>
48. EDS considers that interim default water quality limits should be put in place for areas where the LAWF criteria are met. These limits should be aimed at preventing any further decline in freshwater quality in order to safeguard life-supporting capacity, ecosystem processes and indigenous species in fresh water within defined time frames.

#### **Section 4.4**

##### *Policy 4.4.1*

49. The Section 42A report recommends a number of changes to Policy 4.4.1. EDS accepts the attempts by the Officers to make the document more concise. However, EDS is concerned that the terminology *phase out* has been removed. This is inconsistent with the NPSFM which directs existing over-allocation to be phased out.<sup>33</sup>

##### *Method 4.4.5*

50. The Section 42A report recommends deleting Method 4.4.5(1)(c) which provided for priority to be established using activity statuses.<sup>34</sup> The report noted concern regarding how this would be implemented in practice and stated that for most of Northland's catchments "first in first served" is adequate because there is generally enough water to satisfy demand.<sup>35</sup>
51. EDS considers that the priority that was proposed reflects that in the RMA. Section 14 of the RMA allows a person to take water for their reasonable domestic needs and animal drinking water. Sections 124A-124C give priority to existing consent holders.
52. EDS submits that the statement "there is generally enough water to satisfy demand" does not inspire confidence. The Northland Regional Council 2007 State of the Environment Report noted:<sup>36</sup>
  - a) Northland's water resources are under increasing pressure to meet demands from a variety of consumptive users.

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<sup>32</sup> <http://www.nrc.govt.nz/Living-in-Northland/At-the-beach/Swimming-water-quality/Freshwater-quality/>

<sup>33</sup> NPSFM, Objective B2

<sup>34</sup> Staff Strikethrough, Page 91

<sup>35</sup> Page 276

<sup>36</sup> Page 192

- a) There is an increase in the number of permitted takes in Northland, as well as a large number of ‘unconsented takes that exceed the permitted activity rules.
- a) Northland's climate is such that it will experience a regional drought, on average, once every three years at east coast and inland locations, and once every four years at west coast and high altitude locations.

*Outstanding freshwater bodies and wetlands*

- 53. EDS considers that the Section 42A report<sup>37</sup> fails to give effect to Objective A2(a) of the NPSFM *protecting the quality of outstanding freshwater bodies* and Objective A2(b) of the NPSFM *protecting the significant values of wetlands*.
- 54. The explanation to Method 4.2.3(1) states that the council is to identify outstanding freshwater bodies for the purposes of protection. However this is not referred to in the policies or methods.
- 55. The NPSFM specifically recognises the importance of these two types of freshwater bodies and EDS considers that to “give effect” to the NPSFM, the pNRPS must provide for their protection.

**LANDSCAPE AND NATURAL CHARACTER**

- 56. The pNRPS must recognise and provide for the protection of natural character of the coastal environment, freshwater bodies and their margins, outstanding natural features and landscapes from inappropriate subdivision, use and development.<sup>38</sup>
- 57. The pNRPS must also “give effect to” the New Zealand Coastal Policy Statement 2010 (“NZCPS”).<sup>39</sup> As discussed earlier, this is a strong direction which requires positive implementation of the NZCPS.<sup>40</sup> Policies 13 and 14 set out directions for the management of natural character, and Policy 15 sets out directions for the management of landscapes and features, including:
  - a. Avoid adverse effects of activities, in outstanding natural landscapes and features and areas with outstanding natural character, in the coastal environment.

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<sup>37</sup> Particular the deletion of Objective 3.3

<sup>38</sup> RMA, s6(a) and (b)

<sup>39</sup> RMA, s 62(3)

<sup>40</sup> At paragraph [24]

- b. Avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities, on other natural features and landscapes and natural character in all other areas, in the coastal environment.

58. EDS submits that these are clear directions which should not be departed from. I will come back to this matter later.

### **Objective 3.15**

59. EDS supports the section 42A report recommended changes to Objective 3.15(a) which recognise that s6(a) of the RMA applies to all natural character (not just high or outstanding natural character).

### **Section 4.6**

#### *Policy 4.6.2*

60. EDS sought the deletion of Policy 4.6.2 in its original submission. We are pleased to note that the section 42A report recommends deleting this policy, and replacing it with an allowance for assessment at a site or property specific level. EDS considers that this provides for the concerns regarding accuracy, while ensuring an appropriate degree of certainty.

#### *Identifying natural character*

61. EDS is supportive of the identification of the coastal environment, natural character in the coastal environment, and outstanding natural features and landscapes. EDS is however concerned that natural character outside the coastal environment has not been identified and this does not appear to be required. EDS requests the addition of a method requiring the identification of natural character in relation to freshwater bodies and their margins.

### **Section 4.7**

#### *Policy 4.7.1*

62. EDS is concerned that the recommended amendments to Policy 4.7.1 do not give effect to Policies 13(1)(a) and 15(a) of the NZCPS. In particular, sub-policies (1)(a) and (3) provide for exceptions to the requirement to avoid adverse effects of activities on outstanding natural character, outstanding natural features and outstanding natural landscape in the coastal environment.

63. The section 42A report states that the NZCPS cannot be departed from *without good grounds*, but that good grounds may include *where the overall strategic intent of the NZCPS and Part II of the RMA as a whole supports the exception*. The report states that the recommendation provides for *circumstances where the RMA is better served by not applying a strict protectionist approach or the intent of s5 to enable well-being outweighs the benefit of protection*.<sup>41</sup>
64. The section 42A report relies on *Wairoa River Canal Partnership v Auckland Regional Council* (2010) NZ Env C 309 at [30] to support this argument.
65. *Wairoa River Canal Partnership* concerned a policy which required countryside living to be avoided in areas identified as having significant ecological, heritage, landscape, or high natural character value. The issue before the Environment Court was whether the policy was, in effect, a rule.<sup>42</sup> The Environment Court noted that *to avoid is a step short of prohibit*<sup>43</sup> however *the use of the term avoid sets a presumption ... that development in those areas will be inappropriate*.<sup>44</sup> The Environment Court concluded that the policy would not rule out considering location and even site-specific special cases for countryside living, however, a district plan would have to have good reasons for departing from the policy.<sup>45</sup>
66. However, the Environment Court in *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211 when discussing the meaning of “must give effect to” stated that *[t]he phrase ... is a strong direction. This is understandably so for two reasons [including] The Regional Policy Statement, having passed through the Resource Management Act process, is deemed to give effect to Part 2 matters*.
67. Similarly, EDS submits that the NZCPS, having been through a rigorous development process, is deemed to give effect to Part 2 matters.
68. Furthermore, EDS submits that there is no need to have regard to *the overall strategic intent* of the NZCPS. The NZCPS is internally consistent. Policies 13(1)(a) and 15(a) are set a clear presumption that adverse effects are to be avoided. In contrast, Policy 19 which relates to public walking access recognises that restrictions on access will be

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<sup>41</sup> Page 345

<sup>42</sup> Section 62(1)(e) of the RMA provides that an RPS must state “the methods (excluding rules)”. Similarly, section 58 of the RMA states that a NZCPS may state objectives and policies.

<sup>43</sup> At [15]

<sup>44</sup> At [16]

<sup>45</sup> At [30]

necessary in some circumstances.<sup>46</sup> Similarly, Policy 6 refers to the need to *encourage the consolidation of existing coastal settlements* and Policy 7 requires planning documents to identify areas of the coastal environment where particular activities are or may be *inappropriate*.<sup>47</sup>

69. EDS submits that the section 42A report fails to give effect to Polies 13 and 15 of the NZCPS. We note that EDS has current proceedings in the High Court (relating to the King Salmon case) that may clarify the law relating to these policies. This case is being heard in May.

*Maintaining and enhancing amenity values*

70. EDS, in its submission, requested additions to the pNRPS to provide for amenity landscapes.
71. Sections 7(c) and (f) of the RMA require you to have particular regard to the maintenance and enhancement of amenity values and the quality of the environment.
72. EDS considers that ONLs simply represent one end of the landscape spectrum and that the Council should be addressing landscapes in a holistic manner – not just cherry-picking key parts. Rural character and amenity values are intrinsic qualities that need to be addressed holistically if the Council is to manage the environment for future, as well as current, generations.
73. EDS’s submission suggested that a method is necessary. This would require a corresponding objective and policy. EDS proposes the wording utilised in the proposed Waikato Regional Policy Statement (Decisions Version):

*Objective: Amenity*

*The qualities and characteristics of areas and features, valued for their contribution to amenity, are maintained or enhanced.*

*Policy: Maintain and enhance areas of amenity value*

*Areas of amenity value are identified, and those values are maintained or enhanced. These may include:*

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<sup>46</sup> This relates to the proposed exception: “directly associated with significant improvement in public access to the coast, lake or river”:

<sup>47</sup> This relates to the proposed exception: “The ability to achieve consolidated development and efficient use of land and infrastructure would be constrained in areas specifically identified in operative plans for urban redevelopment and/or specific uses by way of zoning or designations”.

- (a) areas within the coastal environment and along inland water bodies
- (b) scenic, scientific, recreational or historic areas
- (c) areas of spiritual or cultural significance, and
- (d) other landscape, seascape, or natural features

74. EDS proposes the following wording for methods:

Method: Identify areas of amenity value

*Regional and district plans shall ensure areas of particular amenity value to regional or local communities are identified.*

Method: Maintain and enhance areas of amenity value

*Regional and district plans shall ensure the qualities and characteristics of areas of particular amenity value are maintained or enhanced by:*

- (a) Avoiding significant adverse effects,
- (b) Avoiding, remedying, or mitigating any other adverse effects which are more than minor, and
- (c) Promoting activities that will enhance the qualities and characteristics of areas of particular amenity value.

Method: Maintain and enhance amenity value

*The regional council and district councils will consider adverse effects on amenity value when considering discretionary and non-complying resource consent applications.*

## **BIODIVERSITY**

75. The pNRPS must recognise and provide for the protection of significant indigenous vegetation and significant habitats of indigenous fauna<sup>48</sup> and have particular regard to the intrinsic values of ecosystems.<sup>49</sup>

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<sup>48</sup> RMA, s6(c)

<sup>49</sup> RMA, s7(d)

76. The pNRPS must also “give effect” to Policy 11 of the NZCPS and must enable the Council to fulfil its function of establishing, implementing and reviewing objectives, policies and methods for maintaining indigenous biodiversity.<sup>50</sup>

### **Objective 3.5**

77. The section 42A report recommends significant changes to objective 3.5. EDS is concerned about paragraph (b) which directs maintenance of the *diversity of indigenous ecosystems and habitats in the region*. EDS is concerned that the focus on *diversity* is insufficient. The extent and quality of indigenous ecosystems and habitats must also be maintained, in order to fulfil the Council’s functions and to fulfil the primary objective of *Safeguarding Northland’s ecological integrity*.

78. The Section 42A report appears to intend this as it states that the changes were recommended to make clear that the intent of the objective *is to safeguard the ecological integrity of the region by inter alia maintaining the regions overall indigenous biodiversity*.<sup>51</sup>

### **Section 4.5**

#### **Policy 4.5.1**

79. I have one small point to make regarding the addition of (*including significant cumulative adverse effects*) to Policy 4.5.1(2). The definition of effect includes any cumulative effect.<sup>52</sup> This statement is therefore not required, unless the intent is to restrict consideration of cumulative effects to *significant* cumulative effects. EDS suggests that such an intention would be inappropriate and inconsistent with Policy 11 of the NZCPS.

### **CONCLUSION**

80. I would like to conclude by summarising EDS’s key submissions in relation to the Section 42A report recommendations:

- a. There is value in explicitly referring to the precautionary approach;
- b. There is a need to address key activities that affect water quality in Method 4.3.2;
- c. There is a need for interim water quality limits;

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<sup>50</sup> RMA, s30(1)(ga)

<sup>51</sup> Page 157

<sup>52</sup> RMA, s3

- d. The section 42A report version fails to provide for outstanding freshwater bodies and wetlands;
- e. There is a need to amend Policy 4.7.1 to give effect to the NZCPS;
- f. There is a need for provisions providing for areas of particular amenity value;
- g. Objective 3.5 should be extended to ensure maintenance of extent and quality of biodiversity.

81. Thank you for your time today. I am happy to answer any questions you may have.

**Dated this 21<sup>st</sup> day of May 2013**

**Nicola de Wit  
Legal Advisor  
Environmental Defence Society**