

BEFORE THE ENVIRONMENT COURT

IN THE MATTER Decision No [2011] NZEnvC 403
of appeals under clause 14 of
Schedule 1 to the Resource
Management Act 1991

BETWEEN FEDERATED FARMERS OF N Z
(ENV-2010-WLG-000148)

AND PROPERTY RIGHTS IN NEW
ZEALAND INC
(ENV-2010-WLG-000152)

AND MINISTER OF CONSERVATION
(ENV-2010-WLG-000150)

AND WELLINGTON FISH AND GAME
COUNCIL
(ENV-2010-WLG-000157)

Appellants

AND MANAWATU-WANGANUI
REGIONAL COUNCIL

Respondent

Court: Environment Judge C J Thompson and Environment Commissioner J R Mills
Hearing: at Wellington 20 December 2011

Counsel/Appearances:

R Gardner for Federated Farmers of New Zealand

D P Coles for Property Rights in New Zealand Inc

S Ongley for the Minister of Conservation and the Wellington Fish and Game Council

N Jessen for the Manawatu- Wanganui Regional Council

DECISION ON PRELIMINARY ISSUE – POWER OF THE RESPONDENT TO
MAKE RULES FOR THE CONTROL OF THE USE OF LAND FOR
BIODIVERSITY PURPOSES

Decision issued:

21 DEC 2011

Costs reserved



Introduction

[1] There is a preliminary issue of interpretation of provisions of the Resource Management Act to be resolved, and the Court convened a hearing at the earliest possible time so that the parties could continue preparation for the substantive hearing of these appeals with that point resolved.

Plan provisions

[2] In its notice of appeal against decisions made by the Manawatu-Wanganui Regional Council in respect of its Proposed One Plan (POP), which combines both a regional plan and a regional policy statement (RPS), Federated Farmers of New Zealand sought, as part of its relief, ... *that control over land use in respect of indigenous biological diversity is deemed to be the responsibility of territorial authorities*. Essentially, the point arises out of Policy 7-1. As set out in the decisions version of the POP it provides:

Responsibilities for maintaining indigenous biological diversity

In accordance with s62(1)(i) RMA, local authority responsibilities for controlling land use activities for the purpose of managing indigenous biological diversity in the Region are apportioned as follows:

(a) The Regional Council must be responsible for:

- i. developing objectives, policies and methods for the purpose of establishing a Region-wide approach for maintaining indigenous biological diversity, including enhancement where appropriate
- ii. developing rules controlling the use of land to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna and to maintain indigenous biological diversity, including enhancement where appropriate.

(b) Territorial Authorities must be responsible for:

- (ii) retaining schedules of notable trees and amenity trees in their district plans or such other measures as they see fit for the purpose of recognising amenity, intrinsic and cultural values associated with indigenous biological diversity, but not for the purpose of protecting significant indigenous vegetation and significant habitats of indigenous fauna as described in (a)(ii) above.

(c) Both the Regional Council and Territorial Authorities must be responsible for:

- (i) recognising and providing for matters described in s6(c) RMA and having particular regard to matters identified in s7(d) RMA when exercising functions



and powers under the RMA, outside the specific responsibilities allocated above, including when making decisions on resource consent applications.

[3] That policy is followed by Rule 12-6 which provides that the activities noted in the Rule are Discretionary Activities under the POP. The activities are described in the Rule as follows:

Except as regulated by Rules 13-2, 13-10, 13-22, 15-5B, 15-9, 16-3, 16-5, 16-6, 16-8 in relation to any existing small dam structure, 16-13 and 16-14, any of the following activities within a rare habitat, threatened habitat or at-risk habitat:

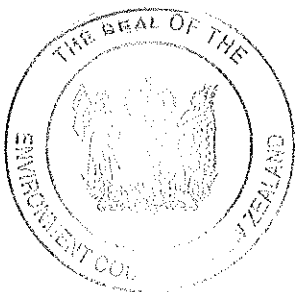
- (a) vegetation clearance, land disturbance or cultivation pursuant to s9(2) RMA
- (b) forestry pursuant to s9(2) RMA that does not meet condition, standard or term of Rule 12-2(b)(iii) or (c).
- (c) the drilling, construction or alteration of any bore pursuant to s9(2) RMA
- (d) activities restricted by s13(1) or s13(2) RMA in the beds of rivers or lakes.
- (e) the taking, using, damming, or diverting of water pursuant to s14(2) RMA
- (f) discharge of water or contaminants into water or onto or into land pursuant to s15(1) or s15(2A) RMA.

Principles of interpretation

[4] The primary principle of statutory interpretation is that words can be taken to mean what they say – captured in s5 of the Interpretation Act 1999:

5 Ascertaining meaning of legislation

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
- (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
- (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.



Discussion

[5] Considering the statutory provisions with that principle to the fore, we think that the position is clear and despite the comprehensive submissions made by Mr Gardner for Federated Farmers (which Mr Coles for Property Rights of NZ adopted), we cannot accept their position as being correct. It is Federated Farmer's position that all powers given to regional councils in respect of land use are to be found (only) within s30(1)(c), and that if the legislature had intended to give regional councils (as opposed to district and city councils) the ability to control the uses of land for biodiversity purposes, it would have been contained within that paragraph (and, by necessary inference) in no other paragraph. Section 30(1)(a), (b) and (c) provides:

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

(a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:

(b) The preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:

(c) The control of the use of land for the purpose of—

(i) Soil conservation:

(ii) The maintenance and enhancement of the quality of water in water bodies and coastal water:

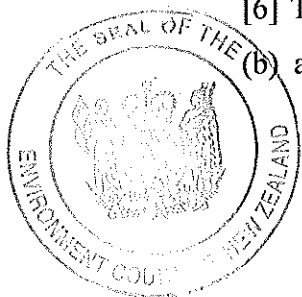
(iii) The maintenance of the quantity of water in water bodies and coastal water:

(iiia) the maintenance and enhancement of ecosystems in water bodies and coastal water:

(iv) The avoidance or mitigation of natural hazards:

(v) The prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:

[6] The first thing to note of course is that para (c) does not stand alone. Paras (a) and (b) also relate to the control of land use. Land is plainly a natural and physical



resource in terms of (a), and effects which are regionally significant arising from land use fall under (b). Para (c) then details a number of further purposes for which land use can be controlled. Land-related purposes also specifically appear in paras (ca), (d), (f), (gb) and possibly (h) also. There is nothing magic about (c) – it is not a code of purposes by which a regional council is confined in its objective, policy or rule making powers.

[7] We turn to look at s30(1)(ga) in particular. It provides:

30(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region: ...

(ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity

We note immediately that Mr Gardner conceded, rightly, that the term *methods* in that section does include *rules*. That is the way the term is used throughout the Act, and there can be no doubt about it. So, s30 imposes (ie, it is mandatory, not optional) on every regional council the function of making objectives, policies and methods for maintaining indigenous biological diversity. The requirement to fulfil that purpose of ... *maintaining indigenous biological diversity* ... and the power necessary to make plan provisions to do so is not spatially or otherwise restricted. If it is reasonably necessary to control the use of land in some way to fulfil the requirement, then there is nothing in s30 to prohibit that.

[8] We can then look to other statutory provisions to see if there are any which might circumscribe the s30 functions and matching powers. Section 62 provides:

62(1) A regional policy statement must state — ...

(i) the local authority responsible in the whole or any part of the region for specifying the objectives, policies, and methods for the control of the use of land—

(iii) to maintain indigenous biological diversity; ...

So there is a requirement (again, mandatory - not optional) for an RPS to specify which local authority (and a regional council is a local authority – see definitions in s2) is to have responsibility for specifying objectives policies and methods (ie including rules) to control the use of land for the purpose of maintaining indigenous



biological diversity. There is nothing that says that a regional council cannot, in its RPS, specify itself as such a local authority.

[9] The general rule making power for regional councils is in s68:

68 Regional rules

(1) A regional council may, for the purpose of—

(a) Carrying out its functions under this Act (other than those described in paragraphs (a) and (b) of section 30(1)); and

(b) Achieving the objectives and policies of the plan,—

include rules in a regional plan.

(2) Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.

The only exceptions specified are the purposes in (a) and (b) of s30(1), viz:

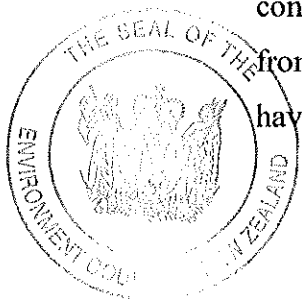
(a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:

(b) The preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:

And those exceptions make perfect sense – no one needs to make rules about establishing, implementing and reviewing, or preparing, objectives, policies and methods. Notably, para (ga) is not listed as an exception to that power, and one can safely assume that it would have been if, as Federated Farmers argue, rule making powers are confined to, and by, s30(1)(c).

Extrinsic contexts

[10] We consider the meaning of the provisions to be so clear as to not require consideration of what Mr Jessen described as, first, the planning and local authority context – in essence the complete absence of any opposition to the POP provisions from any of the seven territorial authorities making up the region, with two of them having already notified second-generation district plans giving effect to the

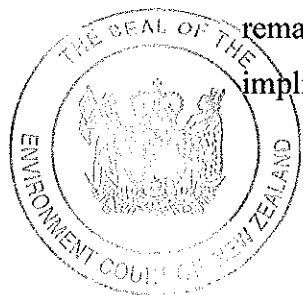


biodiversity provisions in POP. The acquiescence of the territorial authorities can be taken, in the submissions of both Mr Jessen and Ms Ongley, to indicate that they see no real issues with the *overlap* of responsibilities for biodiversity of territorial and regional councils. We agree. Secondly, the environmental context – the marked decline in biodiversity and the strengthening of measures to halt and reverse that decline contained in the POP provisions, with the regional council being best placed to provide a lead role in that task. While we do not need to rely on those extrinsic issues to satisfactorily interpret the statute, we comment that those contexts do support the plain meaning to be given to the words used. Nor do we need to rely upon the various select committees and advisory committees which were involved in introducing these provisions into the Act in its 2003 amendment.

Existing uses

[11] Mr Gardner, supported by the evidence of Dr Tessa Mills, put some emphasis on what he saw as problems likely to arise with existing uses and existing resource consents granted by territorial authorities if land use control passed to regional councils. In this, he pointed to the difference between existing uses under a district plan regime, and those under a regional plan. Those under a regional plan may continue when a regional plan rule becomes operative, subject to having been lawfully established and being of the same character, intensity and scale, and the person carrying on the activity applying for a resource consent within six months. Those under a district plan regime do not require the last step – the application for a resource consent.

[12] That may be so, but it has ever been so. Whenever rules in a new regional plan or a change to a plan become operative, existing uses may be affected in that way. That is the statutory scheme, and it is certainly not a reason to hold that words mean something other than their plain and obvious meaning. Nor are we moved by the issue about existing resource consents granted under a district plan. If they exist, they will continue according to their terms until they expire. If a new consent is required, it can be applied for. That would have happened even if the activity in question had remained under the jurisdiction of a district plan, and there would have been no implicit guarantee of renewal, even then.



[13] Further we agree with Ms Ongley's point that if there are existing uses likely to be affected by rules in a proposed plan, concerns about them can be raised through the Schedule 1 process, with rights of submission and of appeal. And some reliance can be placed on Policy 7-2A(e)(iv), requiring the regional council to ... *not unreasonably restrict the existing use of production land.*

Result

[14] The short point is that s30(1)(ga) means what it says. Regional Councils are required to establish, implement and review objectives, policies and methods (including rules) for maintaining indigenous biological diversity. The content of those objectives policies and rules may be the subject of debate, but the power of the Council to establish them, subject to process, is beyond doubt.

Costs

[15] Costs on this issue are reserved. Any application should be lodged within 15 working days from the issue of this decision, and any response lodged within a further 10 working days.

Dated at Wellington this 21st day of December 2011

For the Court



C J Thompson
Environment Judge