The Resource Management Act 1991: A "Greener" Law for Water? [1]

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This article explores the impact of the enactment of the Resource Management Act 1991 on the allocation of New Zealand's natural waters. The specific issue is whether the Act has the potential to make, and has in fact made, New Zealand's water law greener. The focus is on whether the introduction of sustainable management (as defined in s 5 of the 1991 Act) has brought about greener decision-making than occurred under the 1967 Act's beneficial use test. It is asserted that the practice of balancing interests has continued, although in a more confined sense, under the 1991 Act, and that this is environmentally flawed. Possible solutions are briefly addressed.

I: INTRODUCTION

This article poses a simple but important question: has the Resource Management Act 1991 brought a greener emphasis to decision-making concerning the allocation of natural water in New Zealand?[2] In general, the mechanisms for water allocation under the 1991 Act mirror those in

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1 By "green" I mean a leaning towards the conservation or protection of nature. I do not intend to make any distinction as to whether the aim is to conserve or protect instrumental, intrinsic or ecological values in nature.

2 The Act set out to "... restate and reform the law relating to the use of ... water", and

place under its predecessor, the Water and Soil Conservation Act 1967. Procedurally, the two Acts are very similar, despite the obvious increase in complexity. But is there any substantive difference – specifically, is there now more emphasis on nature?

In addressing this issue, this article focuses on the crux of decision-making under the two Acts, and compares the outcomes. Under the 1967 Act, water was allocated using a beneficial use test. Under the 1991 Act, sustainable management (as defined in s 5(2)) guides decision-making. This article discusses and analyses cases which have addressed s 5(2), and assesses the impact of the change. It concludes that the improvement is limited by the general terms of s 5(2). It proposes possible solutions involving increasing certainty, and changing the underlying ethics of decision-making.

It is emphasised at the outset that the focus of this paper is on allocation decisions outside of the planning process. There is no attempt to cover the 1991 Act's planning, enforcement, or water conservation provisions. These provisions may have the effect of making the 1991 Act a "greener law for water", but this analysis is confined to the impact of s 5 on allocation decisions.

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was heralded as introducing "... a new era in environmental management ..." (Ministry for the Environment *Introducing the Resource Management Bill* (1989) 1). The Ministry asserted that under the pre-existing laws, "... the outcomes for the environment [were] often inadequate .... The Resource Management [Act] proposes to change all this. In a world where concern for the environment grows stronger every day, New Zealand has recognised that the clean-up must begin at home", ibid.

II: ALLOCATION UNDER THE WATER AND SOIL CONSERVATION ACT 1967

Once regarded as "... the pinnacle of the water control pyramid ...",[3] the Water and Soil Conservation Act 1967 aimed to make "... better provision for the conservation, allocation, use, and quality of natural water ..."[4] by introducing a new scheme to control rights to use, divert, take, dam, or make discharges into natural water.[5] This new scheme was hinged on s 21 which declared, subject to certain exceptions,[6] that "... the sole right to dam any river or stream or to divert or take ... or to discharge ... water or waste into ... or to use natural water [was] vested in the Crown". Any new use of water had to be authorised by a regional authority under s 22,[7] or by way of

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3 Davis, B.H., "New Control over Natural Water" [1968] *NZLJ* 105.

4 Long Title, as originally enacted.

5 The Act also introduced a new administrative structure to oversee and coordinate existing water controls, which involved the newly constituted regional water boards, as well as the Pollution Control Council, the Soil Conservation and Rivers Control Council, the Water Allocation Council and, at the national level, the National Water and Soil Conservation Authority.

6 As to the precise effect of s 21 on: specific pre-existing common law rights, see Davis, supra, note 3, and Williams, D.A.R., *Environmental Law* (1980) 94; and statutory rights granted to or acquired by the Crown either before or after the enactment of the 1967 Act, see Davis, B.H., "Water and Soil Conservation Act 1967 - Some Further Observations" [1968] *NZLJ* 357.

7 Under s 22, regional water boards (later regional councils) were empowered to authorise, generally and by public notice, certain prescribed uses of water which could later be cancelled in the public interest.

a water right obtained under either s 21(3)[8] or s 23.[9] There were no express criteria directing the consideration of applications for water rights, Parliament apparently having "... pointedly refrained from tying the hands of the administering tribunal by hard and fast requirements".[10] Nevertheless, a "... general test ... that any proposed use of natural water should be a beneficial use, and that the loss which might flow from the taking of the water should be weighed against the benefit which will result from its use"[11] was developed by the Courts and the Tribunal.[12] In principle, this balancing test accorded no priority to any of the competing interests which may have been involved in allocation decisions, the Court of Appeal holding in *Auckland Acclimatisation Society Inc* v *Sutton Holdings* that "... [w]here there is a conflict, each [interest] has to be weighed on the particular facts, without any general presumption".[13] The decision-maker was required to

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8 Section 23(1) empowered regional water boards, on application and payment of the prescribed fee, to grant rights to dam any river or stream, to divert, take, or use natural water, to discharge natural water or waste into any natural water, or to discharge water containing waste onto land. According to s 24(1) applications could be made by any of the three Councils or the Authority named in n 5 above, or by regional water boards, public authorities, or any other persons.

9 Under s 23, applications for Crown rights in respect of Crown developments, or for other uses of water declared to be of "national importance", could be made.

10 *Keam* v *Minister of Works and Development* [1982] 1 NZLR 319, at 322-323 per Cooke J (CA).

11 This is the most authoritative statement of the test, and is drawn from *Keam*, ibid. The test is discussed in Williams, D.A.R., *Environmental and Resource Management Law* (2nd ed, 1997) 262.

12 "The Tribunal" refers to the Planning Tribunal, now known as the Environment Court.

13 [1985] 2 NZLR 94, 100. In this case, the Court of Appeal was particularly concerned with competing farming and conservation interests, and found itself "... unable to

make what was acknowledged to be a "value judgment" by determining whether or not, on the facts of the case at hand, " ... the benefits to be derived from granting the rights outweigh[ed] the detriments".[14]

1. Problems with the Beneficial Use Test

While the balancing, or so-called beneficial use, test had advantages (mainly in its simplicity and flexibility), it was open to challenge.[15] Because

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read into the Act any inbuilt preference for farming interests over conservation interests, or vice versa". In so deciding, the Court overruled the earlier decisions of the Planning Tribunal and High Court in the same case. The Planning Tribunal (*Auckland Acclimatisation Society* v *Waikato Valley Authority* (1983) 9 NZTPA 299, 311) had been heavily influenced by the wording of Long Title to the Act in its finding that "... in administering the Act the safeguarding of fisheries and wildlife habitats is not to be overlooked, but ... promoting soil conservation and ... the drainage of land are to be given greater importance". The High Court upheld this finding, noting that, in its view "... it is not surprising that this Act should give some limited paramountcy to soil conservation and land drainage at the expense of the preservation of wildlife [since t]here are other statutes which deal with wildlife specifically ..." (*Auckland Acclimatisation Society* v *Sutton Holdings* (1984) 10 NZTPA 225, 234 (HC)).

14 Both statements are from *Otago Acclimatisation Society* v *Otago Catchment Board* (1988) 13 NZTPA 172, 174.

15 It is emphasised that these flaws are directed specifically at the balancing test itself – more general difficulties which existed with water allocation under the 1967 Act (such as the lack of comprehensive planning) are beyond the scope of this paper, but have been addressed in the past by authors including D.A.R. Williams (see for example "The Law Relating to Water Protection and Management" *The Queen Elizabeth II National Trust Lecture 1* (1984)) and Milne, P.J., "Water Resource Allocation and Management in New Zealand: Recent Developments" (1985) 11 *NZULR* 245).

the test was basically one of comparison, it was impossible to identify any given example of environmental degradation as simply unacceptable. No matter how great the "... loss which might flow ..." from the exercise of the right, it could always be outweighed by the "... benefit which will result from its use".[16] The proponents and opponents of development alike lacked the certainty of knowing what kinds, if any, of degradation would never be authorised. There was no "bottom line" protection for water.[17]

The chances that environmental losses would be outweighed in the decision-making process was increased – then as now – since:[18]

> The balancing test usually favour[ed] developmental interests which can often be quantified in economic terms whereas it is difficult to put "numbers" on the values of natural ecosystems.

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16 These words are repeated from *Keam* v *Minister of Works and Development* [1982] 1 NZLR 319 (CA), see notes 10 and 11 above and accompanying text.

17 Unless the water had previously been classified under the Act, or was subject to a local water conservation notice or a national water conservation order. Classification was "... a declaration of the minimum standards of quality at which the natural water so classified [was to be] maintained ..." (s 26H); once waters were classified, all existing discharges had to be notified and were subject to cancellation (ss 26J and 26K), no new rights to discharge could be granted (unless by special consent – s 21(3)), and any new rights granted had to be made subject to conditions to ensure that the classification standards were maintained (s 21(3A)). Classification is also available under the Resource Management Act 1991 – see s 69 and the Third Schedule. Once water conservation notices or orders were in place applications for water rights could only be granted "... if the combined effect of the grant and of existing rights [was] such that the provisions of the ... order [or notice could] remain without change ..." (s 21(3F)). Water conservation orders may be made under the 1991 Act (see Part IX). As for their effect on the granting of resource consent, see ss 104(1)(g) and 217.

18 Williams, supra, note 15, at 3. Environmental costs are also often dispersed,

These criticisms are illustrated in cases decided under the 1967 Act, including *Royal Forest and Bird Protection Society of New Zealand Inc* v *Bay of Plenty Regional Water Board.*[19]

Royal Forest and Bird concerned applications to dam, divert water from, and discharge water into the Rangitaiki and Wheao Rivers for the purpose of establishing a hydroelectric generation station. The economic benefits of the proposal were significant, and since the station would be small, the capital outlay was minimal. Around 56,000 consumers would be serviced by the electricity produced. Significant ecological and recreational impacts were, however, also anticipated, and so the case disclosed "... another incident in the age-old conflict between [people] and [their] environment".[20] The proposal would completely destroy the "... relatively inaccessible ..." Rangitaiki River fishery[21] and cause the Wheao River's "... excellent dry-fly stream [to] be lost forever and replaced by a poor quality fishing stream".[22] The most significant effect, however, would be the certain loss of the nationally "unique" association of four New Zealand waterfowl, the grey and blue ducks and the black and brown teal.[23] Two of these were

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temporally distant, difficult to measure and understand, or even unknown – all of these factors also tend to devalue their standing in decision-making. Environmentalists respond to the last of these factors by promoting the use of the precautionary principle. The relevance of this principle to decision-making under the Resource Management Act was addressed in *McIntyre* v *Christchurch City Council* [1996] NZRMA 289 at 304-306.

19 (1978) 6 NZTPA 361.

20 Ibid, 367.

21 This finding was made ibid, 365; the fishery was so described ibid, 264.

22 Ibid, 365.

23 The association was so described ibid, 365, and the certain loss accepted by the Board ibid, 366.

acknowledged to be among New Zealand's endangered species.[24] Despite these significant costs, the Tribunal held unanimously that the rights should be granted.

The case illustrates that under the balancing test, proposals offering significant current human benefit could proceed even where the environmental costs were high. While many may agree that the benefits in this case were rightly found to outweigh the costs,[25] the point is simply that in general the tolerance for environmental damage was determined exclusively by comparison with anticipated human benefits. There were no environmental standards or bottom lines which had, at all costs, to be maintained; the sole issue was balance.[26]

The *Royal Forest and Bird* case also illustrates how members of the Tribunal were often faced with balancing obvious and measurable developmental benefits against more indiscernible and uncertain environmental costs.[27] This led the Tribunal into obvious difficulties.[28]

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24 Ibid, 365.

25 Or that the decision should be confined to its time, that a similar decision would not be made today, even under a straightforward balancing test. This is obviously impossible to know, though had the proponents of the proposal to build a hydroelectric dam at Tuapeka Mouth decided to proceed, today's decision-makers could soon have been faced with a similar choice to that of the Town and Country Planning Board in 1978.

26 Unless a classification, or water conservation order or notice was in place, see n 17 above.

27 This disparity was expressly acknowledged by two members of the Board (as the Tribunal then was), Mr Broker ((1978) 6 NZTPA 361, 367) and Mr Martin (ibid, 368).

28 Part of the difficulty is clearly associated with the uncertainty of the recreational and environmental losses, see the comments referred to in n 27 above, Mr Martin's descriptions of the loss of the fisheries as "possible", the destruction of the wildlife

The loss of the Wheao River's wildlife refuge quality was described as "painful",[29] but the Tribunal was clearly swayed by the fact that the proposal would not actually render extinct any of the four waterfowl species.[30] The association of the four species was devalued by being seen as of scientific, but not community, importance,[31] and the loss of the fishery justified by reference to its inaccessibility and exclusivity.[32] The uncertainty of the environmental consequences as compared to the certainty of electricity generation was clearly influential on the outcome of the case.

In *Auckland Acclimatisation Society* v *Waikato Valley Authority (No*

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habitat as "probable" (ibid, 368), and the same Board member's statement that "... whilst strong evidence was given that the fishing would probably be destroyed forever and the wildlife leave the area, no evidence was adduced that this was absolute. I judge therefore that the chances of the waters recovering as a fishing habitat and possibly for a wildlife refuge, are not that remote" (ibid, 369). The difficulty is also submitted to be a product of the Board's failure to properly appreciate everything that was important about the association of the four waterfowl species – the Chairman described the situation as one "... highlight[ing] the challenge to man's skill and ingenuity that he would assist rare species to survive in a modified habitat" (ibid, 366).

29 Ibid, 366.

30 This point is expressly made by the Chairman (ibid, 366) and Mr Broker (ibid, 367). Extinction would, at least, be something definite to go on.

31 See the conclusions of Mr Broker ibid, 367.

32 Three of the four Board members referred to this point to balance out the loss of the Wheao River fishery, the Chairman noting that while "... [t]he fishery which would be lost ... is of very high quality ... it is enjoyed by very few people and relatively only a few people would benefit from the fishing compared with the large numbers who would be assisted by the energy produced" (ibid, 366), and Mr Broker describing the fishery as "... the prerogative of a somewhat elite class of discerning and well-informed sportsmen ..." (ibid, 367).

2),[33] the applicants sought to divert and discharge water so as to drain some 172 hectares of the Whangamarino swamp. The principal advantage of the proposal was that "... certain land at present unproductive from the owner's point of view ... would be converted into productive farm land".[34] One of the landowners would also enjoy the further benefit of integration because the proposal would drain an arm of the swamp bisecting its farm.[35] The principal disadvantage of the proposal was ecological – the land would "... cease to be part of the Whangamarino swamp, an area of some 7,700 ha, which is an important wetland, with a consequent diminution in ecological values".[36] The applications were declined, the Tribunal being persuaded on the evidence that "... the loss to ecological values ... would be more significant than the benefits which would flow from the exercise of the rights".[37] Despite the findings that the area affected was ".. small relative to the area of the swamp as a whole ...", and that the proposal would "... not cause any substantial harm to the ecosystem as a whole, nor cause any complete loss of any rare or endangered species ...",[38] the Tribunal was swayed by the irreversibility of the proposal,[39] and the fact that "[o]n a national basis the areas of wetland are now relatively small and the areas of existing farmland are very large".[40]

While I would not disturb the Tribunal's conclusion, it does seem incongruous that the significant alteration of two rivers, and the loss of a unique association of four waterfowl species (all indigenous, two

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33 (1985) 11 NZTPA 168.

34 Ibid, 169.

35 This is noted ibid, 171. "Its" because the landowner was a company.

36 Ibid, 169.

37 Ibid, 170.

38 Both of these findings are noted ibid, 170.

39 This point is made ibid, 171.

40 Ibid, 170.

endangered) was authorised while the loss of part of a wetland, without significant harm to the ecosystem as a whole or the destruction of any endangered species, was not.[41] In the final analysis, of course, it was the benefits offered by each proposal that made the difference to the decision-makers.[42] On one level, this is reasonable and predictable. On another, however, it is short-sighted and environmentally flawed. Environmental

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41 Especially, it is submitted, because the association of the waterfowl species was unique. The rarity of the natural feature or values threatened by the proposed use of water was a factor emphasised both by the Planning Tribunal and by the High Court in other cases – see for example: *Auckland Acclimatisation Society* v *Waikato Valley Authority* (1983) 9 NZTPA 299 at 305-307 and *Auckland Acclimatisation Society* v *Sutton Holdings Ltd* (1984) 10 NZTPA 225 (HC) at 236; and the discussion in Milne, P.J., supra, note 15, at 253.

42 Others have argued that the *Auckland Acclimatisation* case may be explained by some kind of new environmental leaning in decision-making under the 1967 Act. This new leaning is said to come from the Court of Appeal's decision in *Auckland Acclimatisation Society Inc* v *Sutton Holdings* [1985] 2 NZLR 94 (CA), an appeal from the decision of Barker J (*Auckland Acclimatisation Society Inc* v *Sutton Holdings Ltd* (1984) 10 NZPTA 225 (HC)), itself an appeal from the Planning Tribunal's first decision in the same case (*Auckland Acclimatisation Society Inc* v *Waikato Valley Authority* (1983) 9 NZPTA 299). The Tribunal had, in its first decision, deliberately given greater weight to farming over conservation interests. This was rejected by the Court of Appeal (see supra, note 13). It is emphasised, however, that the Court of Appeal had simply held that all interests should be weighed with no presumptions in favour of any, not that greater weight should be given to the ecological issues in this or any other case. It is also stressed that *Royal Forest and Bird Protection Society of New Zealand Inc* v *Bay of Plenty Regional Water Board* (1978) 6 NZTPA 361 did not involve the soil conservation and land drainage interests which the Planning Tribunal, by error, had assumed to have greater priority. Even without this (erroneous) prioritising the dam had been authorised. Conversely,

costs are easily (if unintentionally) devalued in decision-making. On a balancing test, they can often be outweighed and their true impact overlooked.

III: ALLOCATION UNDER THE RESOURCE MANAGEMENT ACT 1991

The mechanisms for water allocation under the Resource Management Act closely parallel those in place under its 1967 predecessor. Allocation for exclusively conservation purposes is still possible via a water conservation order regime[43] which builds on the conservation provisions of the 1967 Act by extending both the range of water bodies covered, and the range of values in natural water able to be protected.[44] As for other uses of water, allocation was and is controlled by a system of restriction and exemption. Sections 14 to 15C of the 1991 Act, like s 21 before them, impose the initial restrictions[45] which may then be avoided by statutory

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once the (erroneous) prioritising had been ruled out by the Court of Appeal, the Tribunal decided that the relevant part of the wetland could not be drained.

43 See Part IX of the 1991 Act, and ss 20A-20H of the 1967 Act (as introduced by the Water and Soil Conservation Amendment Act 1981).

44 The 1991 Act extends the range of water bodies able to be protected to include ponds, wetlands and aquifers, compare the definitions of "water" and "water body" in the 1991 Act with the phrase "river, stream, lake, or part thereof" used in ss 20D (national water conservation orders) and 20H (local water conservation notices) of the 1967 Act.

45 Section 21's primary restriction was imposed via the vesting of all rights to use water in the Crown (see previous text). The 1991 Act more directly prohibits the taking, use, damming and diversion of water or heat or energy from water (s 14), the discharge of contaminants or water into water or onto land in circumstances

exemption,[46] planning provisions,[47] or resource consents.[48] The ability to obtain a resource consent is largely dependent on the classification given to the proposed activity in the relevant regional plan, and on a favourable exercise of the decision-maker's discretion.[49] Section 104 is perhaps the

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which may result in it entering water (s 15), the dumping or incineration of waste in the coastal marine area (s 15A), the discharge of harmful substances, water and contaminants from ships and offshore installations into water in the coastal marine area (s 15B), and the dumping or storage of radioactive or otherwise toxic or hazardous waste or matter in or into water in the coastal marine area (s 15C).

46 Most of the statutory exemptions are set out in ss 14 to 15C themselves – see, for example, those relating to domestic, recreational and firefighting purposes in s 14(3) – otherwise, the main statutory exemption relates to existing uses, see s 20.

47 The restrictions imposed in ss 14(1) and (3) and 15(1) may be avoided by the express authority of a rule in a regional plan, those in s 14(2) apply only if the proposed use of water contravenes a rule in a regional plan, and may then be avoided by an express allowance in a plan.

48 Of the five types of resource consent provided for by the 1991 Act, three relate to activities involving water: coastal, water, and discharge permits (see the definitions in s 87). Unless they are of national significance, or relate to activities designated as restricted coastal activities in the relevant regional plan, applications for such permits are considered and determined at first instance by regional councils (as inferred from s 30). Applications for activities of national significance may be "called in" and determined at first instance by the Minister for the Environment (see ss 140-149). Applications to undertake restricted coastal activities are considered by regional councils and determined by the Minister of Conservation (see ss 117-119).

49 These two factors are closely related in that the extent of the discretion vested in the decision-maker depends on the classification of the activity. Activities in the natural environment may be classified as prohibited, non-complying, discretionary, controlled, permitted, or restricted coastal (a specific form of discretionary or non-

most important of the 1991 Act's resource consent provisions, and sets out the matters which must be considered by those determining applications. The listed matters include the "... actual and potential effects on the environment ...",[50] and any relevant regulations, policy statements, plans, and water conservation orders.[51] All of these matters are to be given regard "subject to" Part II which sets out the governing purpose (s 5) and principles (ss 6 to 8) of the Act. Despite earlier consideration by the Court of Appeal of the phrase "subject to" in the context of the Town and Country Planning Act 1977,[52] some controversy remains as to its exact effect.[53] In one of the most recent cases to address the issue the Tribunal described s 5, the principal

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complying activity). Consents are required for all but permitted activities (see s 68 and the s 2 definitions). According to s 105 consent authorities: are bound to grant applications for controlled activities, but may impose conditions on the consent; may not grant applications for non-complying activities unless satisfied that the environmental effect will be minor, or that granting the consent will not violate the objectives and policies of relevant plans; and retain a full discretion to grant or decline applications for discretionary activities. No consents may be granted for prohibited activities (see s 105(2)(c) and (d)).

50 Note that "effect" is very widely defined in s 3 of the Act.

51 Section 104(1), and note s 104(4) in relation to applications for coastal permits.

52 The phrase was considered by the Court of Appeal in the context of ss 3 and 4 of the 1977 Act in *Environmental Defence Society* v *Mangonui County Council* [1989] 3 NZLR 257; (1988) 13 NZTPA 197 at 216 (CA). The Court held that the phrase is a "... 'standard drafting method of making clear that the other provisions referred to are to prevail in the event of conflict' ..." (per the Planning Tribunal in *Reith* v *Ashburton District* [1994] NZRMA 241, 252).

53 The conflicting cases are summarised in *Lee* v *Auckland City Council* [1995] NZRMA 241, 245-248.

section in Part II,[54] as "... the lodestar which guides the provisions of s 104 ...".[55] Section 5 sets out and defines the purpose of the Act as the promotion of the sustainable management of natural and physical resources. It is always worth a reminder that "sustainable management" is defined in s 5(2) as:

> [M]anaging the use, development, and protection of ... resources in a way, or at a rate which enables people to provide for their social, economic, and cultural wellbeing ... while-
> (a) Sustaining the potential of ... resources ... to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The question is: has section 5 – and, to a lesser extent, the rest of the Part II principles which must be considered in achieving the purpose of the Act[56] – brought into play a greener basis for the allocation of water than existed

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54 Section 5 sets out the purpose of the Act, ss 6-8 matters to be considered "[i]n achieving the purpose". This clearly creates a structure with s 5 at the apex, and ss 6-8 providing further guidance on its meaning and application.

55 These are the words of Judge Kenderdine in *Lee* v *Auckland City Council* [1995] NZRMA 241, 248. Note however the possibly less demanding recommitment to *Environmental Defence Society* v *Mangonui County Council* [1989] 3 NZLR 257; (1988) 13 NZTPA 197 (CA) in *New Zealand Suncern Construction Ltd* v *Auckland City Council* [1996] NZRMA 411, 421, where the Tribunal observed that "[s]ection 104(1) ... requires that when considering a resource consent application, the consent authority is to have regard to matters listed in that subsection. That requirement is expressed to be subject to Part II, which means that in the event of conflict, the provisions of that part are to prevail over it". Similar statements also appear in *McIntyre* v *Christchurch City Council* [1996] NZRMA 289, 291.

56 Section 6 lists five matters "of national importance" which must be "... recognise[d]

under the Water and Soil Conservation Act and its beneficial use or balancing test?

This question is addressed below, but to anticipate somewhat, it seems that while the 1991 Act looks greener and has the potential to be greener, in practice its new philosophy of sustainable management has so far had only a limited impact on decision-making in respect of water allocation.

1. A Greener Potential

On the face of it, Part II of the Act is promising. It expressly lists relevant considerations for decision-making in respect of water. While the Water and Soil Conservation Act was "... profuse in its long title ... [it did] not specify any list of relevant considerations for deciding applications ...".[57] Section 5 introduces sustainable management as the goal to be promoted in water allocation decisions. Sustainability might not have been irrelevant under the 1967 Act, but neither was it the express and driving philosophy behind the Act. Sections 6 and 7 also include, as expressly and mandatorily relevant considerations, other matters which could have been considered under the 1967 Act, but were not necessarily relevant.[58] Some of these

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and provide[d] for ...", s 7 lists eight "other matters" to be given "... particular regard ...", s 8 provides that the principles of the Treaty of Waitangi must be "... take[n] into account ...".

57 *Keam* v *Minister of Works and Development* [1982] 1 NZLR 319 at 322 per Cooke J (CA). This was, of course, not necessarily a bad thing – as was observed by Cooke J. who pointed out the flexibility which this implied.

58 This is not necessarily a reference to ss 6(e) ("[t]he relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga") or 8 (which requires that the principles of the Treaty of Waitangi be taken into account) – while these matters were not expressly included in the Water and Soil Conservation Act, they were legally relevant according to *Huakina Development Trust* v *Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

matters – such as those encapsulated in ss 6(a) and (c) and 7(d)[59] – give the 1991 Act a greener flavour than its predecessor. The 1967 Act's Long Title was far less specific and, as originally enacted, made only peripheral references to water conservation.[60] A further reference was added in 1981, but this was done to acknowledge and support the introduction of the water conservation regime, rather than to affect the weighting of values in other allocation decisions.[61] In *Machinery Movers Ltd* v *Auckland Regional Authority*, the High Court specifically noted the difference between the 1967

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59 Section 6(a) refers to the "... preservation of the natural character of the coastal environment ..., wetlands, and lakes and rivers and their margins ...", s 6(c) to the "... protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna", and s 7(d) to the "[i]ntrinsic values of ecosystems".

60 As originally enacted, the Long Title declared that the 1967 Act was "... to promote a national policy in respect of natural water, and to make better provision for the conservation, allocation, use and quality of natural water, and for promoting soil conservation and preventing damage by flood and erosion, and for promoting and controlling multiple uses of natural water and the drainage of land, and for ensuring that adequate account is taken of the needs of primary and secondary industry, water supplies of local authorities, fisheries, wildlife habitats, and all recreational uses of natural water".

61 The Long Title was amended principally by the addition of the phrase "... and of the preservation and protection of the wild, scenic and other natural characteristics of water". The amendment occurred via the Water and Soil Conservation Amendment Act 1981, which Act was enacted for the sole purpose of introducing the water conservation regime. In *Ashburton Acclimatisation Society* v *Federated Farmers of New Zealand Inc* (1987) 12 NZTPA 289 at 299 (CA), Cooke P noted that the change to the Long Title had been necessitated by the introduction of the conservation regime.

Act's Long Title and s 5 of the Resource Management Act, and said:[62]

> The RMA is informed by a wholly different environmental philosophy which places far greater emphasis on environmental protection ... than did the 1967 Act. As to the different philosophies, these can be discerned by comparing the original long title to the 1967 Act with the key provisions of the RMA.

Having set out the Long Title, the Court stated simply: "[t]he contrast with s 5 is obvious".[63]

Furthermore, if s 5(2) is interpreted and applied as the principles of statutory interpretation tend to suggest it should be, and as most decision-makers have held it is to be, then the provision has a certain potential. This is the potential to establish that some kinds of environmental degradation (as defined in s 5(2)(a)-(c)) are intolerable, no matter how much current human benefit is to be derived from the proposed use of water. In this way, paragraphs (a) to (c) would form a bottom line protection for water. From the green point of view this is a more satisfactory outcome than that offered by the 1967 Act. Depending on the interpretation and application of

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62 [1994] 1 NZLR 492 at 499 (HC). A similar statement emphasising the difference between the respective purposes of the Town and Country Planning Act 1977 and the Resource Management Act can be found in *Te Aroha Air Quality Protection Appeal Group* v *Waikato Regional Council (No 2)* (1993) 2 NZRMA 574, 582. There, the Tribunal said: "... the statutory purpose of district planing [sic] in ... the Town and Country Planning Act 1977 ... gave value to the convenience and welfare of people and to amenities in the context of direction and control of development of the district. By comparison, the meaning given by s 5(2) of the present Act to sustainable management ..., though still giving value to use and development of ... resources for people and communities ..., also expressly gives value to potential to meet future needs, to life-supporting capacity, and to avoiding or mitigating adverse effects".

63 *Machinery Movers Ltd* v *Auckland Regional Authority*, ibid.

paragraphs (a) to (c), it also provides a more consistent, and therefore predictable, outcome. This is advantageous to both the proponents and the opponents of development.

The issue relates, of course, to the meaning of "while", the word which joins the first part of s 5(2) (which speaks of enabling people to provide for their wellbeing) to its second limb (that is, paragraphs (a)-(c)). It would be repetitious to review this issue in any detail, but there has been some (mainly academic) dispute as to whether "while" should be read as a coordinating or subordinating conjunction.[64] The difference being that only the subordinating approach leads to an outcome where people can pursue their current economic, social and cultural wellbeing *provided that in so doing* they do not breach paragraphs (a)-(c).[65]

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64 The dispute began with Douglas Fisher's comments in "The Resource Management Legislation of 1991: A Juridical Analysis of its Objectives" in *Resource Management* (1991) 13, and was continued by other authors such as John Milligan ("Pondering the 'While'" *Terra Nova* (May 1992) 50), Bruce Harris ("Sustainable Management as an Express Purpose of Environmental Legislation: the New Zealand Attempt" (1993) 8 *Otago LR* 51) and the Hon. Simon Upton ("Keynote Speech to the Resource Management Law Association Conference" Proceedings of the Second Annual Conference of the Resource Management Law Association of New Zealand Inc *Practice Makes Perfect* (1994)). See also the recent discussion in Williams, supra, note 11, at 73-77.

65 As a coordinating conjunction, "while" would mean "and", and would imply a balancing test in which "human values and ecological values ... carry the same weight in any decision-making process" (Fisher, ibid, 13), so that on a given set of facts current human interests could displace or outweigh ecological issues and a proposal could proceed despite a failure to meet the demands of one or all of paras (a)-(c). As a subordinating conjunction, "while" would mean "if" and would serve to introduce a superior clause in the form of paras (a)-(c). Thus, people would be able to promote their current wellbeing only for "so long as [their actions did] not

Thus:[66]

> [I]f the [subordinating] interpretation is adopted, then the statutory purpose set out in s 5 represents a significant shift away from the former approach of balancing benefits against detriments embodied in the *Keam* test [employed under the 1967 Act]. Although some sort of balancing would inevitably occur, the factors set out in s 5(2)(a) to (c) would be accorded a degree of priority.

This subordinating interpretation of s 5(2) seems well supported by the ordinary principles of statutory interpretation which enjoin us, first and foremost, to apply the ordinary meaning to statutory words, and then to consider purpose and context.[67] The plain and ordinary meaning of "while" implies contemporaneity, and so it seems clear that a proposed use of water would have to enable people to provide for their wellbeing *at the same time as* sustaining the future potential of the water and other resources affected, safeguarding the life-supporting capacity of the water and relevant ecosystems, and avoiding, remedying or mitigating any adverse environmental effects to be consistent with s 5.[68] This interpretation has

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fail to uphold" (Milligan, ibid, 50) the requirements of paras (a)-(c).

66 Milne, P., "The Water Regime: Management of Water Under the Resource Management Act 1991" *Resource Management* (1991) WR–9.

67 In *Commissioner of Inland Revenue* v *Alcan New Zealand Ltd* [1994] 3 NZLR 439, 443-444 the Court of Appeal held that "[t]he ... proposition ... that words are to be given their ordinary meaning ... is fundamental to all statutory interpretation. There must be a strong and sufficient reason before words can be given some other meaning which they are capable of bearing in a particular context. ... If, however, the words are capable of more than one meaning and the object of the legislation is clear, then the words must be given 'such fair, large and liberal construction' as will best ensure the attainment of the object of the Act". Later, the Court affirmed that "[o]ne should also have regard to the total context of the words used and to the purpose of the legislation ...".

68 It is submitted that this plain and ordinary meaning of "while" should be applied as

been promoted by the Minister for the Environment both on, and subsequent to, the enactment of the Act,[69] and supported by the Tribunal.[70] The clearest

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there are no contextual arguments of sufficient weight to promote any other meaning, and as it is impossible to apply the Acts Interpretation Act 1924, s 5(j) requirement of aiming to ensure the attainment of the Resource Management Act's object when dealing with the very section which purports to define that object.

69 See, for example: the Minister's speech on the Third Reading of the Resource Management Bill ((1991) *New Zealand Parliamentary Debates* 3018-3021 (4 July 1991)), where he described s 5 as being "... about sustaining, safeguarding, avoiding, remedying, and mitigating the effects of activities on the environment" and said: "[i]t is not a question of trading off those responsibilities against the pursuit of well-being"; his comment in his "Keynote Speech to the Resource Management Law Association Conference" (supra, note 64) to the effect that s 5(2)(a)-(c) are "non-negotiable"; and his description of paras (a)-(c) as spelling out "... certain environmental bottom lines or constraints ..." in his decision on the *Air Discharge Permit Taranaki Combined Cycle Power Station* (1995), 12.

70 The best-known earlier cases are *Foxley Engineering Ltd* v *Wellington City Council* unreported, Planning Tribunal Wellington, 16 March 1994, W12/94, *Shell Oil New Zealand Ltd* v *Auckland City Council* unreported, Planning Tribunal Auckland, 2 February 1994, W8/94, and *Plastic and Leathergoods Company Ltd* v *Horowhenua District Council* unreported, Planning Tribunal Levin, 19 April 1994, W26/94. More recent examples include: *Burnett* v *Tasman District Council* [1995] NZRMA 280 at 284 where the Tribunal held: "[c]entral to s 5 is the concept of managing the use and development of land "in a way ... which enables people ... to provide for their ... wellbeing". Those ends must be achieved [so] *as to ensure that* [emphasis added] the land is preserved ... to; meet the reasonably foreseeable needs of future generations, safeguard its lifesupporting capacity, and avoid, remedy or mitigate any adverse effects on the environment"; *Marlborough District Council* v *Southern Ocean Seafoods Ltd* [1995] NZRMA 220 at 227 where the Tribunal held, without any suggestion that a significant benefit would lead it to find otherwise, that "[i]f

pronouncement by the Tribunal in support of the subordinating reading was made by His Honour Planning Judge Treadwell sitting alone in *Marlborough District Council* v *New Zealand Rail Ltd*:[71]

> I do not wish to deal at great length with positive effects because I do not consider [that] a balancing procedure ... is contemplated by s 5. A particular activity may be a high benefit activity, but the Act as I read it indicates that if such an activity if deleterious to the environment of this country in the manner contemplated by s 5, then the matters which s 5 addresses must prevail.

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the resource consent sought will result in the resource not enduring ... then the proposed activity is contrary to s 5"; *MacIntyre* v *Christchurch City Council* [1996] NZRMA 289, 319, where the Tribunal said that "[t]he objective of sustainable management already addressed [enabling people to provide for their wellbeing] is *subject to* achievement of the matters described in paras (a), (b), and (c)" (emphasis added); and *Brook Weatherwell-Johnson* v *Tasman District Council* Environment Court, Nelson, 6 December 1996 W181/96, at 17 where the Court used the phrase "whilst at the same time" in place of the word "while" and so promoted the word's more literal temporal meaning.

There are, however, cases which go against the subordinating interpretation by specifically rejecting an "environmental bottom lines" approach for s 5. These cases appear fewer in number than those supporting the subordinating reading and include *Mangakahia Maori Komiti* v *Northland Regional Council* [1996] NZRMA 193 at 215, where the Tribunal said: "[p]aragraphs (a), (b) and (c) ... are sometimes spoken of as "bottom line" requirements. Yet, one's immediate inclination is not to place too much reliance upon such a catch phrase. It seems preferable to approach the three paragraphs on the footing that each is to be accorded full significance and applied accordingly in the circumstances of the particular case", and *Royal Forest and Bird Protection Society of New Zealand Inc* v *Manawatu-Wanganui Regional Council* [1996] NZRMA 241 at 269, where the Tribunal expressed reservations about the phrase "environmental bottom line", which it felt fails to "... express[] lucidly and exactly the intention of the provisions".

If this view is accepted, the question then becomes: what kind of activities are "... deleterious to the environment ... in the manner contemplated by s 5"? Which activities will be precluded by paragraphs (a), (b) and (c)? This is really where, from the green perspective, s 5 seems to fall down.

2. Section 5 in Practice

Section 5(2) (a), (b) and (c) are framed in wide terms. The flexibility which this imports is clearly deliberate as there is no way of making practical sense of s 5(2) if these three paragraphs are read strictly. Read literally paragraph (b) would mean that:[72]

> [L]ittle in the way of human activity, or development could take place. Arguably, draining a puddle would not be safeguarding the life-supporting capacity of the water in that puddle. A squirt of fly-spray would not be safeguarding the life-supporting capacity of the air in a particular room.

Clearly this kind of absurdity was not intended by the legislature,[73] and has been rejected by the Tribunal.[74] Paragraph (b), like paragraph (a), is intended

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71 [1995] NZRMA 357, 382.

72 Harris, supra, note 64, at 64. I disagree, however, with Harris's suggestion that this means that "while" should be read as a coordinating conjunction. It simply means, as he also concedes, that s 5(2)(b) should be read in a flexible manner (see infra note 73).

73 One need only read as far as 5(2)(c) to see that the Act contemplates that there will be some environmental degradation.

74 See, for example, *Becmead Investments Ltd* v *Christchurch City Council* 2 ELRNZ 368, 386; [1997] NZRMA 1, 17, where the Environment Court noted that "... para (b) ... is concerned with safeguarding the life-supporting capacity of air, water, soil and ecosystems in a general sense – that is, the provision alludes to the need to safeguard the capacity of the four specified fundamentals of earthly reality to support

to be read more generally.[75] Paragraph (c) is apparently so flexible that it even fails to create any priority as between its directions to "... avoid[], remedy[], or mitigat[e] ..." adverse environmental effects.[76] Indeed, the "... deliberate openness ..." of the language used in Part II of the Act has been expressly noted by the High Court as being "... intended to allow the application of policy in a broad and general way".[77]

The consequence of the generality of paragraphs (a) to (c) is that "[i]n practical terms it is necessary to make a careful value judgment on whether the spirit and intent of [each] paragraph will be met and given due

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life in its multifarious forms and interrelationships".

75 For example, the word "needs" in s 5(2)(a) has been interpreted more widely than some commentators at the outset suggested it could be (see, for example, Harris, supra, note 64, at 62). The Tribunal has held that future generations have reasonably foreseeable social, cultural and sporting needs (*Wellington Rugby Football Union* v *Wellington City Council* Planning Tribunal, Wellington, 30 September 1993 W84/93), needs for food production (see, for example, *Thorn* v *Grey District Council* Planning Tribunal, Greymouth, 13 December 1993 C95/93 and *Pickmere* v *Franklin District Council* Planning Tribunal, Auckland, 29 April 1993 A46/93), needs for support from local industry (*Jessep* v *Marlborough District Council* [1994] NZRMA 472), needs to "... experience a sand dune coastal environment having natural character" (*Minister of Conservation* v *Kapiti Coast Borough Council* [1994] NZRMA 385), and needs to "... the continued existence of some land in a natural or virgin state free from any developments ..." (*Burnett* v *Tasman District Council* [1995] NZRMA 280, 284).

76 Hon. Simon Upton, Minister for the Environment *Air Discharge Permit Taranaki Combined Cycle Power Station* (1995) 12.

77 *New Zealand Rail Ltd* v *Marlborough District Council* [1994] NZRMA 70, 86 (HC).

weight ...".[78] This internal balancing process is apparent in many of the more recent cases. For present purposes it may be adequately illustrated by reference to cases including *Te Runanga o Taumarere* v *Northland Regional Council*,[79] an important water allocation decision.[80]

The *Taumarere* case was an appeal against the grant of consent to discharge residual high quality treated effluent into a natural wetland in the Te Uruti Bay catchment. Te Runanga o Taumarere appealed on the grounds that Te Uruti Bay "... has great historical and spiritual significance to, and is a traditional shellfish-gathering area of the Ngapuhi people ..." and that:[81]

> [T]he proposed discharge ... would mean that [the Ngapuhi] people would regard the mauri of the bay as altered and the waters and shellfish as contaminated, and

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78 These words are from *Becmead Investments Ltd* v *Christchurch City Council* 2 ELRNZ 368, 386; [1997] NZRMA 1, 17. In that case, the Court was referring specifically to s 5(2)(b), but it seems reasonable to apply similar sentiments to paras (a) and (c).

79 [1996] NZRMA 77.

80 There are, of course, other cases which serve to illustrate the balancing occurring within the confines of each paras (a), (b) and (c), such as *Olsen* v *Minister of Social Welfare* [1995] NZRMA 385 (where there was a conflict between sustaining the existing residential environment for future generations, and sustaining the resource represented by an existing Boys Home), *New Zealand Suncern Construction Ltd* v *Auckland City Council* [1996] NZRMA 411 (where the question was whether the resource to be safeguarded and sustained for future generations should be the pinus radiata trees which the applicant sought to remove, or the residences being adversely affected by shading from the trees), and *Shell Oil New Zealand Ltd* v *Wellington City Council* (1992) 2 NZRMA 80 (the Tribunal's assessment at 82-83 of the argued effects of the proposal in this case involves implicit balancing of the visual effect, commercial profitability, need, and public safety issues).

81 Both of these quotes may be found at [1996] NZRMA 77, 85.

it would effectively delete Te Uruti Bay as a shellfish-gathering resource for the Ngapuhi.

Considering the requirements of s 5(2)(a), the Tribunal held:[82]

> [The] collection, treatment and harmless disposal of sewage from towns is a reasonably foreseeable need of future generations, and to that extent the current proposal is consistent with the statutory purpose. However it is also our opinion that it is a reasonably foreseeable need of future generations that the tangata whenua and other sections of the community are enabled to provide for their social and cultural needs, and that provision for wellbeing and health of people and communities is not done at the expense of enabling the tangata whenua or any other section of the community to provide for their social and cultural wellbeing (except perhaps if that is demonstrably unavoidable). We find that the proposed disposal of treated effluent would fail to enable the tangata whenua to provide for their social and cultural wellbeing in a traditional customary way. ... To that extent we find that the proposal fails to meet the objective of s 5(2)(a).

The balancing exercise is manifest both in this passage, and in the following consideration of s 5(2)(c):[83]

> [W]e find that the proposal has been designed so as to avoid and remedy adverse effects on the physical environment. However, the effluent disposal would not avoid, remedy or mitigate adverse effects on the amenity values enjoyed by the tangata whenua in respect of the natural resources of Te Uruti Bay, nor the social, economic, aesthetic and cultural conditions of the tangata whenua which are affected by those values, in that the effluent discharge deprive [sic] those resources of the quality of freedom from association with human wastes that contribute to their appreciation of the pleasantness, aesthetic coherence, and cultural utility of those resources. To that extent the proposal would not meet the objective stated in s 5(2)(c).

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82 Ibid, 91.

83 Ibid, 92.

The Tribunal went on to conclude that the proposal "... f[ell] short ..." of compliance with s 5 in that it failed to provide for the "... attitudes of the tangata whenua ...", and that "... the feasibility of another option for effluent disposal which would avoid those adverse cultural effects ha[d] not been adequately investigated".[84] Recognising that:[85]

> [T]he individual contents of Part II are not absolutes to be achieved at all costs (see *New Zealand Rail Ltd* v *Marlborough District Council* [1994] NZRMA 70 at 86) and that in some cases some of them conflict with others of them, and difficult judgments can be required about which is to yield to another and to what extent[,]

the Tribunal reserved its judgment in order to allow the Council time to reconsider its position.

Although the competing interests in this case were mainly social, the case illustrates very clearly the extent of the discretion involved in paragraphs (a) and (c). That same discretion would, of course, be available if the Tribunal was instead asked to consider a case where the economic interests of future generations conflicted with future interests in the maintenance of the natural environment. The conflict would fall under s 5(2)(a), and the Tribunal would be required to make a value judgment in order to determine whether or not that paragraph had been breached.

Canterbury Regional Council v *Selwyn District Council*[86] and *Becmead Investments Ltd* v *Christchurch City Council*[87] are two land use

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84 Ibid, 94.

85 Ibid, 95. The Tribunal cited *Mangakahia Maori Komiti* v *Northland Regional Council* [1996] NZRMA 193 in support of this proposition. That case involved a balancing of interests within the parameters of the first limb of s 5(2), which refers to enabling people to provide for their current wellbeing.

86 2 ELRNZ 395; [1997] NZRMA 25.

87 2 ELRNZ 368; [1997] NZRMA 1.

cases which further illustrate the balancing exercise involved in assessing applications under s 5(2). Both cases involved private plan changes seeking rezoning of land from rural to residential. In *Canterbury Regional Council*, counsel submitted that allowing residential development on land with food production potential would:[88]

> [N]ot safeguard the life supporting capacity of soils but destroy[] their capacity and further ... [would] not sustain the resource represented by the soil for the reasonably foreseeable needs of future generations.

The Tribunal observed that "... an equally valid argument could be advanced ..." that:[89]

> To blindly protect soils of high value does not sustain the resource represented by the community ... for its foreseeable future needs if it deprives future generations of the ability to live in an expanded community.

Having found the land in question to "... suffer[] from severe [production] limitations ... having regard to its proximity to urban boundaries ..."[90] the Tribunal allowed the change, noting that:[91]

> [A] Regional Council can set out to protect versatile lands, but whether it can support those policies if other resource demands in terms of Part II of the Act impinge upon it, is a different matter.

In *Becmead Investments* the Tribunal took a similar approach to s 5(2). In

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88 2 ELRNZ 395, 407; [1997] NZRMA 25, 35.

89 Ibid.

90 Ibid, 419 and 46.

91 Ibid, 420 and 47.

particular, it held that:[92]

> [Section] 5(2)(b) is couched in a general way. It falls to be applied so that its broad requirements are met. Obviously, it is not to be taken as meaning that land containing soil of good quality, whatever its location, size and other features, is effectively proscribed from use in any circumstance for residential development and activity.

Whether or not s 5(2)(a) and (b) have been met will, it seems, depend on the Tribunal's assessment of the land's potential value for food production, and on the relative worth of competing future interests. If the land has low production potential,[93] or if setting it aside for food production would "... deprive[] future generations of the ability to live in an expanded community",[94] then the need to sustain land for future food demands, or to safeguard the soil's capacity to support life by producing food, may be outweighed. Thus, these cases illustrate a balancing exercise occurring

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92 2 ELRNZ 368, 393; [1997] NZRMA 1, 23.

93 In *Becmead Investments*, ibid, the land was held to have low production potential because of its "... location, size and other features ...". Note however that in other cases it has been held that land of very high quality should be protected *despite* its size and location. For example, in *Pickmere* v *Franklin District Council* Planning Tribunal, Auckland. 29 April 1993 A46/93, pp 11-12, the Tribunal held that while the land in question did "... not have high present value for primary production because of its small useable area and awkward shape", "... because economic conditions vary, and recognising the quality of the soil, ... the land ha[d] high potential value for production".

94 These words are repeated from *Canterbury Regional Council* v *Selwyn District Council* 2 ELRNZ 395, 407; [1997] NZRMA 25, 35.

within the confines of paragraphs (a) and (b).[95]

3. Possible Solutions

In the final analysis, whether "while" is read as subordinating or coordinating, there is room for balancing and trade off within each of paragraphs (a), (b) and (c).[96] Whenever any kind of value judgment is required in this way, other difficulties follow. First, there is the difficulty of uncertainty for all involved in resource management. Second, there is room to doubt that the natural environment is getting a fair deal because of the problems involved in ascertaining the true worth of environmental interests.[97] These difficulties could be met in two ways.

First we could try to give s 5 more meaning – by prescribing specific goals and standards within the parameters of paragraphs (a), (b) and (c), we might make these constraints more certain. This would reduce the discretion available to decision-makers, and so could lessen the chances of environmental interests being devalued and then outweighed. This has the potential to make the 1991 Act greener.[98] The flexible approach to s 5(2) which has been taken by decision-makers is hardly surprising. It sits

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95 Note that the balancing occurs within the confines of each paragraph. Future needs for food production are being balanced against future (not current) needs for urban expansion. The balance is *within* s 5(2)'s second limb, not *between* its two limbs.

96 It is again emphasised that this balancing is confined to *within* the three paragraphs. I do not agree that the broadness of the three constraints justifies a balancing exercise between the two limbs of s 5(2) (that is, between enabling current generations to provide for their wellbeing, and paras (a)-(c)), contra Harris, supra, note 64.

97 See supra, note 18 and accompanying text.

98 This is the response promoted by Janet McLean in "New Zealand's Resource Management Act 1991: Process with Purpose?" (1992) 7 *Otago LR* 538. Note also that the discretionary nature of decision-making under s 5 has been further criticised

comfortably with decision-making as it used to be under the Water and Soil Conservation Act. To invest paragraphs (a) and (b) especially with a more specific meaning would require change. Decision-makers (and so those who bring decisions to them – applicants, Councils, private individuals) would require access to a wealth of scientific information which simply does not yet exist.[99]

This, of course, does not mean that there *should* not be more certainty, specifically in the form of definable environmental bottom lines operating within paragraphs (a) to (c). Despite the reluctance of some decision-makers

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for more wide-ranging reasons by Bruce Pardy, "Planning for Serfdom: Resourced Management and the Rule of Law" [1997] *NZLJ* 69.

99 If, for example, they were required to apply the test proposed by Pardy for s 5(2)(b) ("Sustainability: An Ecological Definition for the Resource Management Act 1991" (1993) 15 *NZULR* 351). Pardy proposed that para (b) be read as prohibiting ecosystem change which is human-induced and not beneficial to the ecosystem. Pardy asserts that such change will occur where "... the collective environmental impact of the human population in an ecosystem overwhelms the capacity of the system to absorb the impact ..." (at 360-361). In order to assess whether or not any given proposal will lead to this result, Pardy suggests that a formula where "ecological share" is taken to equal the carrying capacity of an ecosystem divided by the total number of human users, be used (at 362). This formula will reveal whether the proposal exceeds its "ecological share", and so if it should be allowed (at 363). Pardy's formula, though attractive in its certainty, would require decision-makers to be able to identify the relevant ecosystem, identify the human members of the ecosystem, determine (with relative certainty) the impact of the proposal, and determine the carrying capacity of the ecosystem (at 363). I am not at all sure that the necessary scientific information exists, or that the necessary resources would or could be made available. There is also dispute among ecologists as to whether or not the avoidance of ecosystem change is an appropriate test for ascertaining the

to accept a bottom lines approach,[100] this is apparently what the Act's framers always envisaged.[101] The Act is replete with opportunities for both central and local government to invest decision-making under s 5 with more specificity and certainty. At the national level, there is provision for the creation of national environmental standards and national policy

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desirability of a proposal – see, for example: the dispute following *Marlborough District Council* v *New Zealand Rail Ltd* [1995] NZRMA 357 (the *Fast Ferries* case) recorded in Pardy, B., "New Equilibrium Versus Ecological Sustainability" [1995] *NZLJ* 202 and Kos, S. and Bielby, S., "Fast Ferries Decision: Seeing Sense in its Wake" [1995] *NZLJ* 363; and Weiner, J.B., "Law and the New Ecology: Evolution, Categories, and Consequences" (1995) 22 *Ecology LQ* 325. If even ecologists are uncertain as to the "naturalness" of ecosystem change, and end up proposing that we should seek instead to differentiate between acceptable and unacceptable change (see Weiner at 354-357), how will value judgments ever be avoided?

100 See *Mangakahia Maori Komiti* v *Northland Regional Council* [1996] NZRMA 193 and *Royal Forest and Bird Protection Society of New Zealand Inc* v *Manawatu-Wanganui Regional Council* [1996] NZRMA 241, as discussed in note 70 above.

101 According to Geoffrey Palmer, the Act's principal proponent, "... the virtue of establishing bottom lines in respect to development ... was always the broad policy aim of the Act's framers ..." (*Environment: The International Challenge* (1995) 173). Palmer thus approves of the test proposed by Pardy for s 5(2)(b) (see note 99 above), and endorses it as "more optimistic" (ibid, 172). Harris (supra, note 64, at 59) argues that if the intention was indeed to "... impose environmental limits which cannot be compromised in the interests of development [w]hy ... was this not made clearer in the wording of s 5?" To this, Palmer has since responded (ibid, 172): "[t]he time when Parliament can spell everything out in black-letter law in statute has passed, however, and I would argue that the intended policy is clear enough".

statements.[102] Locally, much can be, and is being, done by way of regional policy statements and plans.[103] Still, there is room for more, especially when it comes to the application of s 5 itself in the decision-making context.

Otherwise, we might choose to accept the balancing, or value judgment, approach and instead focus our attention on improving (that is, greening up) the values which decision-makers bring to the decision-making process. This would tend to reduce the chances of nature's interests being devalued in decision-making without requiring a huge resource investment or inviting the problems encountered in other jurisdictions which have sought to protect nature by standard- and rule-setting.[104] This approach, however,

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102 See ss 43-58. Only New Zealand coastal policy statements are mandatory (see s 57(1)). Thus far, only one policy statement has been made by central government – the mandatory Department of Conservation *New Zealand Coastal Policy Statement* (1994).

103 Regional policy statements may address any of the matters set out in s 62. Regional plans are more specific, and have the advantage of being able to house regional rules - see ss 68-70. An example of a plan which introduces greater certainty to the notion of sustainability is the Manawatu-Wanganui Regional Council's *Oroua Catchment Water Allocation and River Flows Regional Plan* (1995). This Plan introduces the means (regional rules which, among other things, prescribe maximum rates of abstraction and minimum flows for the Oroua River and Kiwitea Stream, and provide for the transferability of water permits for abstraction, at 34-40) for achieving the objectives of "... maintain[ing] flows in rivers and streams of the Oroua Catchment at a level that safeguards their life-supporting capacity and minimises any adverse effects on the environment", "... avoid[ing], remedy[ing] or mitigat[ing] the adverse effects of low flows ... in the Oroua Catchment", and "achiev[ing] efficient and equitable use of surface water in the Oroua Catchment" (at 21).

104 See, eg, Emond, D. P., "The Greening of Environmental Law" [1991] 36 *McGill LJ* 743, 753.

seems more remote and somewhat idealistic. It would also take time (which we, and nature, may not have) and the results would remain uncertain and unpredictable.

IV: CONCLUSION

The Resource Management Act will be six years old in October next. It promised much by introducing sustainable management as the central purpose of water allocation, and by requiring decision-makers to address such matters as "[t]he preservation of ... natural character of ... wetlands, and lakes and rivers", "[t]he protection of outstanding natural features[,] ... areas of significant indigenous vegetation and significant habitats of indigenous fauna", the "[i]ntrinsic values of ecosystems", and the "... finite characteristics of ... resources" in the decision-making process.[105] So far, however, the Act's bark has proved greener than its bite.

The general wording of s 5(2) has offered decision-makers plenty of room to balance up interests, and make value judgments. Thus, the old danger that nature's interests will be devalued and so outweighed in decision-making persists. While this problem could be addressed by the indirect approach of trying to influence the values which decision-makers take to their task, the Act already offers avenues by which the extent of discretion available might be constrained. Central government has proved reluctant to exploit these opportunities, and so "... has left more things at large than need to be ...".[106] This, however, is a political (as opposed to legal) issue, and requires political redress. Statutory change is not necessarily required, but more intervention may be. We must be vigilant for "[t]he eyes of the environmental world are upon New Zealand. It must not drop the ball".[107]

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105 These matters are contained in ss 6(a), (b) and (c), and 7(d) and (h).

106 Palmer, supra, note 101, at 171.

107 Ibid.