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National environmental standards

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**NATIONAL ENVIRONMENTAL
STANDARDS -
AMENDMENTS TO THE RESOURCE
MANAGEMENT ACT 1991
TO REDUCE THE RISK OF
JUDICIAL REVIEW**

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**NATIONAL ENVIRONMENTAL STANDARDS -
AMENDMENTS TO THE RESOURCE MANAGEMENT ACT 1991
TO REDUCE THE RISK OF JUDICIAL REVIEW**

ABSTRACT

This paper starts with the proposition that the production of national environmental standards under sections 43 and 44 of the Resource Management Act 1991 would expose the Minister for the Environment to a high risk of judicial review. This risk comes partly from the unclear limits about the contents of the regulations, known as national environmental standards. More dangerous is the requirement, in section 44, that a public process be undertaken by the Minister without any specific details in the legislation of what that process should contain.

In examining this proposal the paper reviews the history of public participation in the creation of the Resource Management Act and the particular history of the introduction of national environmental standards. It considers the theory of public participation and what the purpose of such a process is.

The paper then considers examples of public participation in other areas of the Resource Management Act and other New Zealand legislation. As a result of these examples, and an understanding of the intention of the proposers of national environmental standards, the paper concludes with a redraft of sections 43 and 44 to overcome the risk of judicial review caused by the legislation.

Word length

The text of this paper (excluding contents page, footnotes, bibliography and annexure) comprises approximately 15800 words.

I	INTRODUCTION	
A	<i>National Environmental Standards - An Overview</i>	1
B	<i>The Layout of This Paper</i>	4
II	NES AND THE RMA - BACKGROUND AND RELATIONSHIPS	
A	<i>The RMLR Process</i>	6
B	<i>The Resource Management Act 1991</i>	8
C	<i>How NES Got Into The RMA</i>	10
D	<i>Regulations</i>	14
III	JUDICIAL REVIEW OF NES	
A	<i>Judicial Review</i>	19
B	<i>How NES Could Affect Resource Management</i>	20
C	<i>Section 43</i>	23
	1 <i>Standards</i>	24
	2 <i>"Use, development, and protection"</i>	25
	3 <i>"Natural and physical resources"</i>	26
	4 <i>Bottom lines</i>	28
	5 <i>Summary</i>	29
D	<i>Section 44</i>	29
	1 <i>The Minister's process</i>	30
	2 <i>Timing</i>	30
	3 <i>Opportunity</i>	31
	4 <i>Subject-matter</i>	32
	5 <i>Public</i>	33
	6 <i>Report</i>	33
	7 <i>Summary</i>	33
IV	PUBLIC PARTICIPATION	
A	<i>Theories of Participatory Democracy</i>	35
B	<i>Application of the Theories to NES</i>	38
C	<i>Problems With Public Participation</i>	41
V	EXISTING MODELS OF PUBLIC PARTICIPATION	
A	<i>Models From The RMA</i>	45
	1 <i>National policy statements</i>	45
	2 <i>Local authorities' plans</i>	47
	3 <i>Guidelines</i>	49
	4 <i>Independent review by commissioner</i>	50

B	<i>Other Legislative Models</i>	51
1	<i>The Building Act 1991</i>	52
2	<i>The Privacy Act 1993</i>	54
3	<i>The Land Transport Act 1993</i>	56
4	<i>The New Zealand Sports Drug Agency Act 1994</i>	58
5	<i>Summary</i>	59
VI	WILL THESE MODELS WORK FOR NES ?	
A	<i>Incorporation with National Policy Statements</i>	61
B	<i>The Guideline Approach</i>	65
VII	RMA AMENDMENT	
A	<i>Amendments to Section 43</i>	68
1	<i>"Use, development, ? protection"</i>	68
2	<i>Adverse effects</i>	68
B	<i>Amendments to Section 44</i>	69
1	<i>Link to NPS</i>	69
2	<i>NES by themselves</i>	70
3	<i>Emergencies and validation</i>	72
4	<i>The draft</i>	73
C	<i>Other Amendments</i>	75
VIII	CONCLUSION	76
	BIBLIOGRAPHY	78
	APPENDIX	

**NATIONAL ENVIRONMENTAL STANDARDS -
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I INTRODUCTION

A *National Environmental Standards - An Overview*

The Resource Management Act 1991 (RMA) introduced new concepts to "planning law", many of which have come under scrutiny as the RMA has progressively influenced resource management. However, some aspects of the RMA are still in limbo, three years after the RMA came into force. One key area is "National Environmental Standards" (NES) - regulations which prescribe technical standards and the methods of implementing them.¹

To date no NES has been promulgated. There have been requests to the Ministry for the Environment (the Ministry) to produce NES.² These have generally related to discharges and acceptable levels of contaminants in the receiving environment.³

The Minister for the Environment has indicated:⁴

¹ A copy of these sections is attached as Appendix I.

² Alan Dormer *The Resource Management Act 1991 - The Transition and Business* (New Zealand Business Roundtable, New Zealand, August 1994) 65.

³ Personal communications with Mr David Brash, Manager Pollution Risk Management Directorate, Ministry for the Environment. For an example of the push for NES see Brooker's Resource Management Gazette, 26 August 1994, which, in a comment on *Stevens v Dunedin City Council* (C76/94), said:
"If the current trend towards part-time farming blocks continues, it may pay to have a set of National Environmental Standards to clarify the issues for councils and applicants and save the Tribunal's time in the process."

⁴ Given the subject-matter listed in section 43 it is in fact difficult to see how such a NES would be possible.
Address to the New Zealand Planning Institute Conference, Nelson by the Minister for the Environment, Hon Simon Upton, 28 April 1994, 22.

"... I am pressing the Ministry to move in the direction of developing standards so that we've got some nationally validated baselines."

The Ministry's latest Corporate Plan⁵ specifies in the work programme that the Ministry will be:⁶

"Producing a consultation document on the need for, approach to, and priorities for national environmental standards under the Resource Management Act.

...

"Advising on national environmental standards ...".

Both the Minister's and Ministry's statements support the expectation that NES will be made in the near future.

To date, although there has been a great deal of comment on the RMA,⁷ no analysis of NES at either an academic or policy level has been published. This paper aims to fill the gap between the request for NES and the final product by providing both an academic analysis and practical recommendations on amending the RMA to ensure any NES are effective.

These matters warrant urgent consideration. There is a high risk of judicial review if NES are developed without amendments to the RMA. I have no wish for the Ministry to bow to the threat of judicial review and not make NES.

⁵ Ministry for the Environment *Corporate Plan 1994-1995* (Ministry for the Environment, Wellington, August 1994).

⁶ Above n 5, 12.

⁷ See for example: Christopher Milne (ed) *Handbook of Environmental Law* (Royal Forest and Bird Protection Society of New Zealand Inc., Wellington, 1992) 48, 110.

However, given the way the legislation is drafted at present I consider that I would have no choice but to advise against the making of NES.⁸

The legislation, as it stands, assumes a public process without providing any guidance on how that process is to be undertaken. Even given the Minister's function to recommend the making of NES,⁹ the Minister following the requirements of section 32¹⁰ and following the principles of natural justice, the Minister could still face a claim that any public process provided for NES does not give the public adequate time and opportunity to comment on the regulations as required by the RMA. Without identification in the legislation of what is required, the Minister has little to anchor any chosen process to.

This combination of requiring public input with a lack of specified process appears to be unique internationally.¹¹

⁸ This could be seen as reflecting Ison's view that "judicialization can tend to induce timidity in public administration and can enhance regulatory capture". Terence G Ison, "The Sovereignty of the Judiciary" ((1985-1986) 10 Adelaide Law Review) 2. In my case I trust it is common-sense more than "timidity". I doubt that I am one of the public servants that Ison identifies that are disposed to inertia and therefore have a better prospect of a quiet life! For a more traditional view see G M Bates *Environmental Law in Australia* (3ed, Butterworths, Australia, 1992) 27.

⁹ Section 24(b) provides that the Minister for the Environment has the function of the "recommendation of the making of regulations under section 43".

¹⁰ Section 32(2)(a)(ii) imposes a duty on the Minister in relation to "the recommendation of the making of any regulations under section 43" to have regard to the extent it is necessary to achieve the purpose of the Act, the other means available, and the reasons for and against adopting the regulations and the principal alternative means (including taking no action). The Minister must also carry out an evaluation on the likely benefits and costs (including implementation and compliance costs) and in the end be satisfied that the regulation is necessary to achieve the purpose of the Act and is the most appropriate means of exercising the function having regard to efficiency and effectiveness. As a result of this analysis it is possible that the Minister may decide not to make the NES.

¹¹ Section 32 is presently being amended through the Finance No. 2 Bill but this will not affect the requirements on the Minister. To check my perception I spoke to Professor Ben Boer (holder of the Corrs Chambers Westgarth Chair of Environmental Law at the University of Sydney) who confirmed for Australia that, although different State and Federal jurisdictions have different requirements for public participation in

B The Layout of This Paper

There is a certain inevitability about NES being developed. The political will and the availability of resources to produce them is increasing. The bureaucrats are considering NES as a method of providing a central government influence on local authorities' decisions. These external factors have to be aligned before the Ministry will leap into the unknown of NES.

What this paper does is shed some light on the unknown and point out the present legal problems. It does this by first looking at the past to understand the environment NES were developed in. "Public participation" was in the air and it is therefore not surprising that a public process was included within NES, even if this did not follow the normal model for regulations.

Having considered the background, I dissect, in Part III, the substance of sections 43 and 44 to identify the possibilities for judicial review. Two areas of concern appear. The first are claims of *ultra vires* if the regulations do not conform with the regulation-making power granted by the Act. The second,

environmental law processes, he was not aware of anything equivalent to the open process in the RMA. Beverley Thorpe of the Ontario Ministry for the Environment and Martin Phillipson (VUW) confirmed this also to be the case for Canada.

David Hughes *Environmental Law* (2 ed, Butterworths, London, 1992) discusses the importance of standards but makes no reference to public participation. My enquiries at the Department of Environment, London (James Cressy) again confirm there is no equivalent to section 44 RMA. He indicated that consultation with affected groups took place as a matter of course. As far as he was aware there was no code of practice or procedural note governing such consultation. There appears to be nothing in the environmentally-related legislation. At the other end is the United States practice which has a detailed public process including details in specific legislation. Regina Thompson (ex-EPA) advised that this had resulted in paralysis in the Courts and now a process "reg-neg" (regulations by negotiation) is used to try and avoid the formalised public process.

See Alistair Lucas "Legal Foundations For Public Participation In Environmental Decisionmaking" in *Natural Resources Journal* (Vol 16, January 1976) 73 for a discussion on the Canadian situation in comparison to Britain and the USA.

the major focus of this paper, is that the sections are virtually written to ensure that there will be a failure to follow an appropriate public process. None of this would be a problem if it was not for the potential impact of NES on resource users. The incentives exist to make judicial review an attractive proposition.

Before proposing amendments to reduce this risk, I undertake a study of what the role of public participation in NES appears to be, including a consideration of the theories of participatory democracy.

In Part V, I review existing models of participation, both in and outside the RMA, to obtain some guidance on what should be considered for any amendment.

Having shed light on what NES are and what was intended, I conclude that two different models of public process are appropriate. Part VI describes these models and Part VII discusses the amendments needed to sections 43 and 44 to incorporate these models.

Fixing the sections does not guarantee that NES will be developed and, if they are, that they will not be challenged - but at least it will ensure a better chance than exists at present.

II NES AND THE RMA - BACKGROUND AND RELATIONSHIPS

Public process has been an important aspect of the RMA throughout its history. As NES are a product of that history it is important to recognise this influence in understanding the background to the conception of NES.

A The RMLR Process

In January 1988 the Rt. Hon. Geoffrey Palmer,¹² announced that Government's intention to undertake a comprehensive review of the major laws that governed New Zealand's natural and physical resources.¹³ The Resource Management Law Reform (RMLR) process encouraged public participation.¹⁴

¹² The then Minister for the Environment.

¹³ Ministry for the Environment *People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform* (Ministry for the Environment, Wellington, December 1988) 12. This publication was also known as the "Blue Book".

¹⁴ The following is information from the "Blue Book" detailing some of the public participation. Phase one of the law reform project started with the release of an information kit in early May 1988. About 400 written and 500 oral submissions were received. A discussion document "Directions for Change", which outlined four management models and their implications, followed in August 1988. A further 693 submissions were made. The Minister acknowledged the value of this consultation:

"In order to encourage the widest possible public participation in this law reform, the Government has already invited two sets of submissions. Many people have demonstrated the weight they place on these issues by submitting clear, practical and careful opinions for consideration. As well, a series of regional meetings and hui held throughout the country, and a national Freephone, provided opportunities for many individuals to make their views known. This extensive input has made a major contribution to the development of new ideas in the review, and has been highly valued by Government."

By the release of "People, Environment, and Discussion Making" over 1330 groups and individuals in 1664 submissions had contributed. This document provided still further opportunity for consultation with public meetings involving the RMLR Core Group from Invercargill to Whangarei and another Freephone in which the Minister was involved. Public consultation continued after the introduction (5 December 1989), of the Resource Management Bill into the House. The Resource Management Bill Select Committee "received a total of 1325 submissions, of which 329 were oral". It heard evidence in Auckland, Wellington and Christchurch as well as "at a specially convened hui at the Te Puea Marae in Mangere".

Philip Woollaston (Chairman) *Report of the Committee on the Resource Management Bill* (House of Representatives, New Zealand, August 1990).

The desire for public involvement was a recognition that the review would affect every New Zealander and the environment New Zealanders want now and for their children and grandchildren. In his introductory speech to the Resource Management Bill, the then Minister for the Environment said:¹⁵

"The Bill is a significant advance in the way we manage our natural and built environments, and the way we plan for the future. It has been the subject of lengthy and considerable consultation for more than 2 years. More than 50 public meetings have been held on it around the country, dozens of hui, many informal meetings, and two freephone sessions. More than 3500 submissions were received. In many ways the Bill is a product of the views of all sectors of society that have an interest in resource management."

This public involvement was a reflection of developments at the international environmental level. The importance of public participation in environmental issues was identified in the Brundtland Report¹⁶ which states that:¹⁷

"the pursuit of sustainable development requires ... a political system that secures effective citizen participation in decision making".

Acceptance of public participation was "illustrated by the prominent role of non-government organisations (NGOs) at the recent Rio de Janeiro Earth Summit".¹⁸ Principle 10 of the Rio Declaration proclaimed:¹⁹

¹⁵ NZPD, No. 68, 14166, 5 December 1989.

¹⁶ World Commission on Environment and Development *Our Common Future* (Oxford University Press, Oxford, 1987). The Commission was chaired by Gro Harlem Brundtland of Norway. Above n 16, 65.

¹⁷ David Robinson "Public Participation in Environmental Decision-Making" in *Environmental and Planning Law Journal* (The Law Book Company Limited, Australia, October 1993) 320.

¹⁸ Ministry of External Relations and Trade, Ministry for the Environment *United Nations Conference on Environment and Development - Outcomes of the Conference* (Ministry of

"[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level."

Section III of Agenda 21 picked up on this theme when it looked at strengthening the role of major groups. The preamble to that section stated.²⁰

"[o]ne of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making."

B The Resource Management Act 1991

The desire for public involvement with resource management not only applied to the RMLR process, but carried over into the legislation. In early 1988 a task group on public participation was established because "individual and group involvement in making decisions about resources is of importance for the law reform."²¹

The resulting working paper²² outlined three perspectives based on:

External Relations and Trade and Ministry for the Environment, Wellington, 1992) 4.

The principle goes on to read:

"At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

²⁰ Above n 19, 369.

²¹ RMLR Public Participation Task Group *Resource Management Law Reform Public Participation, Working Paper No. 12* (Ministry for the Environment, Wellington, July 1988) 19.

²² Above n 21.

- * The Treaty of Waitangi interpretation of governance;
- * The market/property rights/ownership argument; and
- * The citizens' rights/democratic argument.

The last two were alternatives, quite separate from the Treaty of Waitangi perspective.²³ The desire to incorporate the Treaty of Waitangi consultation perspective can be seen in sections 8, 93(1)(f) and clause 3(1)(d) of the First Schedule for example.²⁴

The market approach was based on the presumption that ownership confers the right to decide how resources will or will not be used. Decisions on commonly owned resources (air, water) are a matter purely for the community involved. It is up to governments and local bodies to decide how resources are used.²⁵

The citizens' rights approach assumes that all people are provided with the freedom and the necessary information to take part in discussions. Being a citizen is the only qualification needed to participate. The government may intervene in the market on the grounds of public interest.

²³ Above n 21, 10.

²⁴ Throughout this paper, unless otherwise indicated, sections referred to are within the RMA. I have therefore dropped the reference to the Resource Management Act from the text.

²⁵ "[W]e elect representatives in the first place because it is complicated and expensive (and at times not especially fruitful) to reach decisions on all issues through a debate that actively involves all members of a local community or the country as a whole - both in terms of administration, and in terms of producing and disseminating all the necessary informations. ... [O]n average this is the most efficient way that we have yet found of doing things. Local body reform and reform of electoral process at a national level are the primary mechanisms for improving on this process (includ[ing] ... more extensive use of referenda).
"But this does not mean that elected bodies have no incentive to promote broader public participation on specific issues ...; governments and local bodies that fail to make (sic) sufficient account of the public's ability and desire to participate actively are not likely to be re-elected."

Although no recommendation was made for either approach, it appears that the citizens' rights perspective was translated into the RMA. Nowhere is this more evident than the open standing provisions.²⁶ This applies to making submissions on resource consent applications,²⁷ including call-in.²⁸ "Any person" also has the opportunity to make submissions on national policy statements and New Zealand coastal policy statements,²⁹ water conservation orders³⁰ and regional councils' policy statements and local authorities' plans.³¹ As well "any person" can apply for an enforcement order.³²

Standing with this group of RMA provisions providing for public participation, but slightly apart from it, are NES. Although a process for public input must be established, the "any person" formula is not used in section 44.

C How NES Got Into The RMA

NES were a late development in the drafting of the RMA; no detailed study on how they were to be made was undertaken. Assumptions appear to have been made about how a NES would be produced, without those assumptions being articulated in the legislation.

Neither the Bill as introduced by the fourth Labour Government or the version reported back from the specially-created Select Committee on the Resource Management Bill contained any reference to NES. Clause 390(1), which provided for regulations, contained the seed of the idea in paragraph (d).³³

²⁶ These provisions are discussed in greater detail throughout the paper.

²⁷ Section 96.

²⁸ Section 145.

²⁹ Section 49.

³⁰ Section 205.

³¹ First Schedule, clause 6.

³² Section 316.

³³ Paragraph (d) read:

"Prescribing the technical standards relating to use of natural and physical resources and any other technical standards relating to the quality of the environment, or the methods of determining these standards".

The Resource Management Bill was not passed before the 1990 elections but was held over for consideration by the post-election Government. Incoming Environment Minister, Simon Upton, "established a review group to look at specific issues in the Bill to secure greater certainty about its effect and workability."³⁴

The review group's terms of reference included:³⁵

"The development and placement of clauses that enable national minimum environmental standards to be set ... to ensure close linkage with Statements of Government policy and adequate mechanisms for public participation in the formulation of any such standards."

In its discussion paper, the review group³⁶ noted that it "is tending toward the view that regulations are the most appropriate means of setting national environmental standards, provided there is an adequate means of public consultation."³⁷

In its report,³⁸ the review group considered the framework provided in the Bill was adequate for the development of environmental standards. It considered that standards could be established through national policy statements, technical schedules to the legislation, narrative standards and duties, and regulations. It was lack of public consultation that the review group saw as the disadvantage of maintaining the status quo of clause 390(1)(d). The review group also felt there was a need to ensure that the validity of any regulation

³⁴ Alec Neill, NZPD, No 20, 3033, 4 July 1991.

³⁵ Anthony Randerson (Chairman) *Report of the Review Group on the Resource Management Bill* (Ministry for the Environment, Wellington, 11 February 1991) Appendix I, p ii.

³⁶ The review group was comprised of Anthony Randerson (Chairman), Prue Crosson, Guy Salmon, Ken Tremaine and Brent Wheeler.

³⁷ Anthony Randerson (Chairman) *Discussion Paper on the Resource Management Bill* (Ministry for the Environment, Wellington, December 1990) 19.

³⁸ Above n 35, 28 - 29.

was not susceptible to attack on the grounds of *vires*. To this end it recommended that:³⁹

"The Bill should be amended by new clauses 40B and 40C requiring a public consultation process before regulations are made defining environmental standards."

The recommended new clauses were included (with minor drafting changes) in SOP No 22.⁴⁰ This SOP was sent to the Planning and Development Select Committee, and over 20 submissions on these two clauses were received.⁴¹

"The NZ Planning Institute and a number of individuals and environmental groups supported the two clauses. Generally industry and local authorities did not support it as they considered the local and regional level was more appropriate for prescribing environmental standards."

There were suggestions that the making of these proposed regulations should follow the same process as national policy statements. Officials considered that the clauses were already a significant addition to the process set out in the Regulation (Disallowance) Act 1988 by allowing public comment on the subject matter.⁴² The provision of allowing comments and a report was considered similar to the national policy statement process.

³⁹ Above n 35, 29.

⁴⁰ Supplementary Order Paper, No. 22, Tuesday 7 May 1991.

⁴¹ Ministry for the Environment *Departmental Report on Supplementary Order Paper No. 22* (Ministry for the Environment, Wellington, June 1991).

Alec Neill, then Chairman of the Planning and Development Select Committee noted the committee received 525 submissions and heard 128 oral submissions on SOP 22. Above n 34, 3034.

⁴² Above n 41, 37.

The report of the Select Committee⁴³ noted that two minor changes should be made to ensure that the subject matter was not unnecessarily restrained. As a result "noise" was substituted for "noise emission" and air quality was not restrained by "in relation to the discharge of contaminants". The Committee also commented on the need for subsequent amendments to ensure the primacy of national environmental standards over regional rules.

The third reading of the Bill occurred on 4 July 1991. Clauses 40A and 40B were very similar to those recommended by the Select Committee, although a cross-reference to deal with the effect of the regulations was made to section 360 (the regulation-making provision). The Bill was enacted on 22 July 1991 and came into force on 1 October 1991, with clauses 40A and 40B being renumbered as sections 43 and 44.

The wording of the terms of reference appear to have been proposed by the Minister without any background policy analysis.⁴⁴ The Minister's ideas on standards were rewritten as legislation without any fundamental change or analysis having been done by the review group. Even the placement of sections 43 and 44 was suggested by the Minister's terms of reference. No reasoning for the proximity to national policy statements was given by the review group, and no legislative links were made.

⁴³ Alec Neill (Chairman) *Report of the Planning and Development Committee on Supplementary Order Paper No. 22 (Relating to the Resource Management Bill)* (House of Representatives, New Zealand, 1991).

⁴⁴ Perusal of files from the time and discussions with Ministry staff involved with the review group.

D Regulations

It is useful to consider regulations generally to try and understand why this subordinate legislative tool⁴⁵ was used for NES.

The term "regulations" is defined as including:⁴⁶

- "(a) Regulations, rules or bylaws made under the authority of any Act-
- (i) By the Governor-General in Council; or
 - (ii) By any Minister of the Crown."

There are no formal rules on the making of regulations except for those in the Regulations (Disallowance) Act 1989,⁴⁷ and the Acts and Regulations Publications Act 1989.⁴⁸

I have described the history of regulation-making power elsewhere.⁴⁹ It is sufficient to note that the growth of the welfare state and two world wars

⁴⁵ "Delegated (or subordinate) legislation refers to rules of law promulgated by a delegate of Parliament entrusted with specific legislative powers. Delegated legislation is a major source of law. The number of instruments made annually under delegated authority far exceeds that of statutes, The primary forms are government regulations, promulgated by the Governor-General in Council, and local authority by-laws ..."

P.A. Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Company Limited, Sydney, 1993) 745.

⁴⁶ Section 2 of the Regulations (Disallowance) Act 1989.

⁴⁷ Section 4 reads "All regulations made after 30th day of September 1992 shall be laid before the House of Representatives not later than the sixteenth sitting day of the House of Representatives after the day on which they are made."

⁴⁸ Its Long Title reads:

"An Act -

(a) To provide for the printing and publication of copies of Acts of Parliament and statutory regulations; and

(b) To ensure that copies of Acts of Parliament and statutory regulations are available to the public; ..."

⁴⁹ B H Arthur *The Development of the Regulations Review Committee* (Public Law LLM Seminar Paper, Victoria University, Wellington) presented 11 April 1994.

provided the impetus for regulations throughout the Commonwealth, although not without debate.⁵⁰

"The reasons for delegating legislative powers to the Executive can be summed up in one phrase; the promotion of efficiency".⁵¹ As such regulations are considered a necessary evil:⁵²

"In these new and sometimes very complex areas (social welfare, technical and scientific matters) the State intervenes in order to establish and then supervise legal relations. In principle, in a democratic system, this function should be fulfilled by Parliament, representing the popular will. However, various imperatives have forced Parliament to delegate a part of its power to the Administration: Parliamentary activity would grind to a halt if its members had to

⁵⁰ "The most celebrated denunciation of delegation to the Executive came in 1929 from Lord Hewart, the then Lord Chief Justice of England. In his book, "The New Despotism", he attributed over-generous delegations of legislative power to a deep-laid bureaucratic conspiracy."
S de Smith and R Brazier *Constitutional and Administrative Law* (6 ed, Penguin Books, London, 1989) 334 - 335.

In New Zealand the high water mark of interventionist policies exemplified by the frequent use of regulations under the Economic Stabilisation Act 1948 was reached in the final years of the Muldoon administration. Criticism included:
"It is axiomatic that rule by decree is entirely anti-democratic: a Government which rules largely by regulations while retaining a system of delegated legislation with the flaws noted above may be justly suspected of having less than wholehearted commitment to the principles of the democratic process and debate. Extensive use of the power to make regulations results in Parliament being denied the opportunity to debate matters of substance that it is competent to consider and on which the public is entitled to the publicity of public debate."

Auckland District Law Society Public Issues Committee
"Government by Regulation" [1979] NZLJ 250, 253.

⁵¹ S de Smith and R Brazier *Constitutional and Administrative Law* (6 ed, Penguin Books, London, 1989) 338.

⁵² R Dussault and L Borgeat (translated by M Rankin)
Administrative Law Vol 1 (2 ed, Carswell, Toronto, 1985) 306.

examine and discuss every technical detail relating to the application of a statute."

In New Zealand:⁵³

"When the Algie Committee reported to Parliament in 1962 it listed the following matters as justifying the practice [of regulations]: (a) pressure of parliamentary time; (b) technicality of subject-matter; (c) unforeseen contingencies that may arise during the introduction of comprehensive schemes of reform; (d) need for flexibility; (e) opportunity for experiment; and (f) emergency."

Relating these justifications to NES, the first may have some relevance. If there had been more time it may have been possible to introduce standards through the Schedules to the legislation, as is the case with Water Quality Classes.⁵⁴

Parliament would have needed to have known what standards were required and what they should contain at the time the legislation was proposed. The review group noted "that while schedules are subject to a certain form of scrutiny, where issues of major policy are involved, this method may not allow sufficient policy input to occur."⁵⁵

The second reason, the technicality of the subject matter, appears to be the main justification for these regulations. Prescribing technical standards, by

⁵³ Above n 45, 748.

In 1961 the Delegated Legislation Committee (known as the Algie Committee) was established "to consider the desirability of introducing an effective form of Parliamentary control of delegated legislation." Report of the Delegated Legislation Committee 1962, 1962 AJHR Vol IV I.18, 4.

⁵⁴ It was possible to quickly develop the Third Schedule to the RMA because there was already the precedent in the nine Schedules to the Water and Soil Conservation Act 1967.

⁵⁵ Above n 35, 27.

their very nature, must incorporate detailed, scientific material. The review group noted that matters to be considered included:⁵⁶

"the highly technical nature of the issues involved in setting certain specific standards and the need for a significant level of industry and other input so as to ensure appropriate outcomes".

The other reasons given by the Algie Committee do not appear relevant to NES.⁵⁷

Regulations are made by virtue of parliamentary authority. Thus:⁵⁸

"It is the task of the executive to prepare the material for the regulations, draft them, advise the Governor-General in the Executive Council to make them, and then administer them once they are made."

The opportunity for public involvement in this process is normally limited. Unlike legislation, regulations are not generally debated in the House⁵⁹ nor sent to a Select Committee for consideration.⁶⁰ They are required to be laid

⁵⁶ Above n 35, 29.

⁵⁷ Meeting unforeseen contingencies and emergency are not justifications for these regulations as both reasons suggest urgent action, which is not practicable with a public process. The need for flexibility is an unlikely justification in this situation because of the specification of standards. Standards suggest rules, which by definition are not flexible. The opportunity for experiment also has problems because of standards being set. A public process would mean that an experiment that went wrong could not be quickly undone.

⁵⁸ M Chen and G Palmer *Public Law in New Zealand* (Oxford University Press, Auckland, 1993) 888.

⁵⁹ "It is most unusual for the House to have the opportunity to consider regulations before they are promulgated, but occasionally, when the House has a bill before it, the Minister produces a draft of regulations proposed to be made under powers to be conferred by the bill."

D McGee *Parliamentary Practice in New Zealand* (Government Printer, Wellington, 1985) 373.

⁶⁰ "The purpose of the select committee is to provide an opportunity for well informed and detailed scrutiny of

before the House for 16 days⁶¹ before they take effect, although this can be altered. The Regulations Review Committee⁶² may have the opportunity to consider them before they have effect, but the real scrutiny of regulations, from a public perspective, is through the Courts once regulations have become law.⁶³ Officers such as the Ombudsman⁶⁴ or the Privacy Commissioner may also, through their reports, curb or expose abuse.

Regulations are rules of law, made for the promotion of efficiency and are not subject to formal public scrutiny.⁶⁵ NES, although rules of law, do not conform to this model, as they require a public process. Whether NES are efficient is debatable.

government bills and policy by both Parliament and public.

...

"There is substantial opportunity for public input by way of submissions to select committees of Parliament. Select committees do make big changes to bills in light of the submissions. Select Committees are far more potent engines of scrutiny than the procedures of the debating chamber and their powers have recently been enhanced."

Above n 58, 622 and 623.

61

See above n 47.

62

All regulations are automatically referred to the Regulations Review Committee which may draw the special attention of the House to the regulations. It can also consider specific complaints. The Regulations (Disallowance) Act is the Committee's ultimate weapon in that enables "automatic disallowance" if a notice of motion is not dealt with within 21 sitting days. It has been described as an "illusory weapon" and "[a]t best, the potential publicity generated by a notice of motion to disallow would encourage the Government to change its attitude."

BWJ Perham *Despotism Disallowed?* (LLB Honours) Research Paper, Victoria University, Wellington, 1992) 32.

63

Judicial review by the Courts is the ultimate safeguard but "[t]he most effective safeguard against abuse of delegated powers is not to delegate them in such terms as to invite abuse".

DC Pearce *Delegated Legislation in Australia and New Zealand* (Butterworths, Australia, 1977) 9.

64

"The Ombudsmen's report in 1986, for instance, drew attention to two examples of government departments actually enforcing draft regulations before they became law."

JB Ringer *An Introduction to New Zealand Government* (Hazard Press, Christchurch, 1991) 183.

65

However, "prior consultation with advisory bodies and organized interest groups is a more conspicuous characteristic of delegated legislation than of parliamentary legislation". Above n 44, 335.

Making NES through regulations removes Parliament's responsibility for considering "every technical detail", and therefore enables more efficient use of Parliament's time. However legislation follows a set process and cannot be questioned in the Courts through judicial review. If NES are subject to judicial review then efficiency, from a cost and timing perspective, may not occur.

III JUDICIAL REVIEW OF NES

This Part considers whether judicial review is a realistic possibility by identifying the incentives for such action and then reviewing sections 43 and 44 to confirm whether there are potential grounds for judicial review.

A *Judicial Review*

Fundamentally judicial review "is not an appeal from a decision, but a review of the manner the decision was made."⁶⁶ Taylor⁶⁷ identifies 35 grounds of judicial review, which he considers is not an exhaustive list.⁶⁸ He limits the grounds which can generally apply to subordinate legislation to:

- * Power to embark on the process before acting;
- * Acting beyond the scope of the power conferred;
- * Breach of natural justice (fairness) by breach of procedural provisions of enactment; and
- * Fraud.

The RMA does not specify any prior requirements for NES regulations, and fraud by another in obtaining action is an unlikely possibility.

⁶⁶ Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155 (HL), 1174. Quoted in GDS Taylor *Judicial Review A New Zealand Perspective* (Butterworths, Wellington, 1991) 17.

⁶⁷ GDS Taylor *Judicial Review A New Zealand Perspective* (Butterworths, Wellington, 1991).

⁶⁸ Above n 67, 216 - 217.

What is of concern is, firstly, the possibility that the correct process is not followed and, secondly, that the regulations could be *ultra vires*, as regulations can only be made to the limit of the power granted by the legislation:⁶⁹

"[E]mpowering provisions should indicate with precision the matters on which delegated legislation can be made. Not only is this desirable from the point of view that there should be constraints on the power of the executive to make legislation, but also it is only where a defined legislative power is given that the courts can review legislative action by a delegate. Delegated legislation will be invalid if it exceeds the powers granted by the empowering Act: the wider the grant of power, the more limited is the courts' power of review."

Judicial review is costly and time-consuming. NES must therefore have a substantial affect for anyone to justify disrupting them through judicial review.

B How NES Could Affect Resource Management

There is potential for NES to have a profound impact on the interpretation and operation of the RMA. The RMA is touted as "enabling legislation" which devolves power to the local community of interest.⁷⁰ The community registers its interest and concern through regional policy statements which provide an overview of resource management issues in the region, and regional and district plans which assist local authorities to carry out their functions.⁷¹ Included in the plans are rules governing the use and development of natural resources in the area. Some activities will be permitted, but many will require

⁶⁹ Above n 63, 9.

⁷⁰ See for example P. Ali Memon *Keeping New Zealand Green* (University of Otago Press, Dunedin, 1993).

⁷¹ Purpose of regional policy statements is specified in section 59, regional plans in section 63 and district plans section 72. Functions of regional councils are specified in section 30 and district councils in section 31.

resource consents. Enforcement provisions exist for breaches of the Act and the documents produced under it.

All of these could be influenced by NES.

Where a regional council is preparing or changing any regional plan it shall have regard to any "[r]egulations made under this Act, including regulations made under section 43"⁷² to the extent that their content has a bearing on the resource management issues of the region.

A regional plan must state issues, objectives, policies and methods - including rules.⁷³ Those rules have the force and effect of a regulation "but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail."⁷⁴ An existing NES may determine the content of a rule; any new NES may require revision of existing plans.

The situation is slightly different with district plans. Although regulations are given priority over rules,⁷⁵ in preparing or changing a plan there is no requirement to have regard to regulations made under the RMA.⁷⁶

In considering applications for resource consents, a consent authority shall have regard to "any relevant regulations".⁷⁷ NES will therefore inform the refusal or granting of a resource consent application, and any conditions which attach to any resource consent.

⁷² Section 66(2)(c)(iv).

⁷³ Contents of a regional plan are specified in section 67.

⁷⁴ Section 68(2).

⁷⁵ Section 76(2).

⁷⁶ There does not appear to be any logical reason for this. The most obvious example is "noise". Section 31 provides:

"every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district: ...

(d) The control of the emission of noise and the mitigation of the effects of noise:".

If a NES on noise was made then its effect on district plans may be limited due to this omission from section 76.

⁷⁷ Section 104(1)(b).

Finally, regulations are referred to in relation to enforcement. Both enforcement orders and abatement notices can require a person to -

- * Cease or prohibit commencing anything which contravenes, or is likely to contravene, a regulation; or
- * Do something to ensure compliance with a regulation.⁷⁸

Contravention of an enforcement order or abatement notice is an offence. Not complying with a NES could result in a person facing a fine of \$200,000 or imprisonment of up to two years.⁷⁹

NES could be devastating for particular groups. Consider the ramifications if technical standards were set for air quality. A new NES restricting the discharge of sulphur dioxide could cause major problems for the oil refining, steelmaking and aluminium smelting processes which use feedstocks with substantial amounts of sulphur.⁸⁰ Not only would the regulations impact directly, but they would also over-ride any rules specified in regional plans which industry may have already fought a long battle to limit. Although it would not have immediate effect if the industry had a resource consent,⁸¹ the NES would affect the granting of any later consent. Trying to update old plant to meet the NES may be expensive. A "best practicable option"⁸² approach would not be appropriate, as the NES is likely to specify levels. The NES could therefore impose major costs of refurbishment, cause the closure of the industry, or result in the prosecution of managers for breaching new conditions.

⁷⁸ Section 314(1)(a)(i) and 314(1)(b)(i) - enforcement orders
Section 322(1)(a)(i) and 322(1)(b) - abatement notices.

⁷⁹ Sections 338(1) and 339(1).

⁸⁰ Ministry for the Environment *Ambient Air Quality Guidelines* (Ministry for the Environment, Wellington, July 1994) 28.

⁸¹ Sections 319(2)(c) and 325(5)(c) provide that an enforcement order or abatement notice cannot be granted if a person was complying with a resource consent. There are some exceptions.

⁸² Defined in section 2 RMA.

A similar picture could be painted for water quality conditions if restrictions were imposed on the faecal contamination of our waterways. Agriculture is a major contributor to this form of contamination.⁸³ Dairy shed effluent may be able to be dealt with (although for some farmers this will be costly) but non-point source pollution (run-off from paddocks) is technically difficult to control. The NES will flow through into regional and district plans. The result could be that farming in riverside paddocks is no longer viable.

Faced with these types of effects from NES, it is easy to envisage that those industries directly affected would contemplate judicial review if they considered there was a chance that the regulation could be over-turned, or that the Minister could be required to reconsider.

The Bill of Rights Act 1990 also provides encouragement for judicial review as a right to justice.⁸⁴ This may have the effect of inspiring people to use this type of remedy where they perceive that their personal rights have been attacked.

C Section 43

Section 43 provides that NES -

⁸³ Ministry for the Environment *Agricultural Impacts on Water Quality* (Ministry for the Environment, Wellington, August 1994).

⁸⁴ Section 27 Bill of Rights Act 1990 provides:

- (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
- (2) Every person whose rights, obligations, or interest protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination."

Section 14 provides for freedom of expression which includes the freedom to express opinions, presumably including on NES.

- * Prescribe technical standards and/or the methods of implementing such standards;
- * Relate to "use, development, and protection"; and
- * Are for natural and physical resources.

Elsewhere⁸⁵ it is suggested that NES are "bottom lines". The following review identifies potential *ultra vires* arguments which could apply to these aspects of section 43.

1 Standards

A technical standard, by its very nature, must be something measurable. This does not rule out narrative, as opposed to numerical standards.⁸⁶

The common link is the focus on environmental objectives. Instead of controlling the inputs into a process, environmental standards "seek to

⁸⁵ The terms of reference for the review group refer to "national minimum environmental standards". (Above n 35, Appendix I, ii.)
 In its discussion document the review group said of clause 390(1)(d) that it "will enable regulations to be prepared which include minimum standards". (Above n 37, 18.)
 In its summary of recommendations the review group notes "that the various frameworks in the Bill allow for the development of minimum environmental standards on a national basis". (Above n 35, 29.)

The Minister stated in his third reading speech:
 "The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised."
 (Above n 34, 3019.)

⁸⁶ The review group considered that environmental standards fell into three broad categories:

- "(i) Numerical or quantitative statements which specify a specific outcome in respect of particular environmental objectives. An example would be specifying the number of parts per million of a given substance in water.
- (ii) Broad narrative standards which establish a level of performance which is expected to be achieved in respect of a given environmental outcome.
- (iii) Combinations and narrative style outcomes which are to be achieved in respect of a given environmental objective."

Above n 35, 25.

establish or ensure specific and particular environmental outcomes regardless of the process used."⁸⁷ This emphasis on outcomes fits with the stated philosophy that the RMA is an effects based statute.⁸⁸

" ... the Government has moved to underscore the shift in focus from planning for activities to regulating their effects ... The Government's focus is now on externalities - the effects of those activities on the receiving environment ...".

The technical standards should deal with what level of emissions are acceptable, and not how that level should be achieved. In the liberal market economy how the public meet the level set is their affair. This being so, the regulations prescribing the methods of implementing such standards should not tell the public how to go about reducing emissions, but should instead advise those who are required to monitor emissions how they can undertake their functions. If the NES deal with the methods of reducing emissions as opposed to concentrating on effects and monitoring there is a possibility of judicial review, but in my opinion it is unlikely to succeed by itself.

2 *"Use, development, and protection"*

The technical standards are to relate to the "use, development, and protection" of resources. This phrase appears frequently throughout the RMA, most notably in section 5. In that section it makes sense to consider all three aspects together - "Managing the use, development, and protection of natural and physical resources" equals sustainable management.

When it comes to technical standards, there could be a potential problem with the standards having to relate to use, development and protection. These terms are not defined generally in the RMA, although "use" in relation to land

⁸⁷ Above n 35, 25.

⁸⁸ Simon Upton, Above n 34, 3019.

is defined in section 9(4).⁸⁹ It covers the erection of structures and excavation of land which could readily fall within a definition of "development". It is possible to consider these words as synonyms and therefore regulations which limit an activity will relate to limiting "use" and "development". It follows that the end result of the regulations will be "protection" of the resource.

Careful drafting of regulations will ensure that all three aspects are covered. Legal arguments could be made that "and" should be read as "or", but as the review group suggested in its draft of these provisions the word "or",⁹⁰ an interesting argument could be raised on what Parliament's intention was in changing "or" to "and". To avoid any possibility of judicial review the technical standards must relate to all three - use, development and protection.

3 *"Natural and physical resources"*

The definition of "natural and physical resources" is broad, including "land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures".⁹¹ The wording of section 43 suggests, however, that it is not standards relating to resources, but relating to externalities which is relevant. The standards are for noise, contaminants or the quality of water, air or soil; not the resources themselves.

Regulations could not be made in relation to a particular resource such as plants and animals. For example, it would not be possible for technical standards to be made on the number of kereru/kukupa/pigeons that could be harvested because there is more specific legislation (Wildlife Act 1953) that covers this issue. The same is true of harvesting fisheries and plant material.

⁸⁹ See Appendix I.

⁹⁰ Above n 35, Appendix VI, xiii.

⁹¹ Section 2.

The *ejusdem generis* rule also applies. The matters listed in section 43(1)(a)(i) to (v) relate to externalities. It is the end result of using natural and physical resources which is the focus of the regulations. Noise is not a resource in itself - but the by-product of developing a resource. Although contaminants might be a resource, for NES they are "environmental nasties" which need controlling when resources are used or developed. To use another animal example, technical standards could specify the number of pigs that can be kept x metres from the neighbour's boundary to control odour problems. This would focus on the effects of using resources.

Regulations can be made on those matters listed in 43(1)(a)(i) - (v). Even then, paragraph (v) is not clear. Why is soil quality restricted "in relation to the discharge of contaminants" when the Select Committee recommended the removal of that phrase for air quality?⁹² The effect of this qualification appears to be that regulations can not be made on soil quality if they do not cover discharge of contaminants. Technical standards trying to control soil erosion may not be possible.

The word "including" is used and therefore standards for things other than (i) to (v) may be made. Any such standard would be constrained by the rest of section 43 and so be limited to externalities. Other possible subjects for NES include the rates of use of water or the ranges of temperature or pressure of geothermal water. Dealing with buildings would probably not be possible.⁹³

⁹² Above n 43, 23.

⁹³ Section 7(2) of the Building Act provides:
"Except as specifically provided to the contrary in any Act, no person, in undertaking any building work, shall be required to achieve performance criteria additional to or more restrictive in relation to that building work than the performance criteria specified in the building code."

4 Bottom lines

Although the RMA does not specify it, the review group and the Minister's speeches assume that NES will provide bottom lines.⁹⁴ Within the RMA definition of "sustainable management", this concept of "bottom lines" relates closely to section 5(2)(b).⁹⁵

RMA has set as one of its bottom lines that particular resources can not be degraded to a level where life can not be supported. There is no judicial determination yet on whose life has to be supported, but it was indicated⁹⁶ that the constraints found in paragraphs 5(2)(a), 5(2)(b) and 5(2)(c) are refined and given further meaning by sections 6, 7 and 8.

The Minister, in recommending NES, is exercising a function under the RMA, and must therefore give effect to the requirements in sections 6 and 7. When such matters as protection of areas of significant indigenous vegetation, the relationship of Maori to their taonga, intrinsic value of ecosystems and protection of the habitat of trout and salmon are considered, I submit that the technical standards can do more than just establish a bottom line in human life (health) terms.

The technical standards can provide a baseline which does more than safeguard the life-supporting capacity of ecosystems. The baseline can be much higher, taking into account human needs, but also the requirements of the environment generally. It is a baseline only in as much as it is the agreed acceptable minimum level. It cannot be below the level of life-supporting capacity, as that is a bottom line set by the Act. If it was set at a below bottom line level there would be justification for judicial review.

⁹⁴ See above n 85.

⁹⁵ See Appendix I for the full text of Part II, RMA.

⁹⁶ Board of Inquiry Memorandum re the Inquiry into New Zealand Coastal Policy Statement 3 NZPTD 109.

Sections 43 and 44 do not refer to bottom lines, so it would be possible for the regulations to provide technical standards which are not a minimum. They could instead specify a goal to be achieved. A precedent exists in section 68(7)(b) which provides for the possibility of rules in plans specifying new minimum levels but allowing for resource consent holders to comply with the rule "in stages or over specified periods". However, as regulations are in effect rules, it is difficult to envisage any drafting possibility which in the end does not provide for bottom lines.

5 Summary

The power to make regulations provided in section 43 is constrained. A valid concern exists about the potential for regulations made under this section to be judicially reviewed. Careful drafting will be required to ensure that regulations are *intra vires*.

D Section 44

The making of regulations under section 43 is not just constrained by the possible content, but also by the process. Although the normal regulation making formula of "the Governor-General may from time to time, by Order in Council, make regulations" is used in section 43 it is "subject to section 44".

Section 44 provides that the Minister for the Environment can not recommend the making of regulations unless the Minister has established a process for public participation. The details of that process are sketchy. The public must have adequate time and opportunity to comment. The comment is on the proposed subject-matter of the regulations. The process must result in a report and recommendation being made to the Minister, which the Minister must publicly notify.

1 *The Minister's process*

The first point to note is that section 44 requires the Minister to establish a process. It is not possible for any other group to establish a process. For example, if Greenpeace wished to specify standards for air quality it could not set up a public process to discuss the standards and then present a report and recommendation to the Minister. Even if the Minister was satisfied that Greenpeace's process had given the public adequate time and opportunity to comment, it would not have been a process established by the Minister.

It is not even possible for the Minister of Conservation to recommend NES, although, in relation to the coast, that Minister generally has authority.⁹⁷ In theory the Minister for the Environment can, through NES, affect regional coastal plans.⁹⁸

2 *Timing*

The process must give the public adequate time. "Adequate time" is a vague term, upon which the Minister will have to exercise discretion.

The technicality of the subject matter implies some degree of difficulty and therefore time being required to resolve the scientific issues. Time for resolution of differing views of the positioning of the "bottom line" may be required.

As it is a public process the timing must take into account that private individuals will have to respond in their own time while non-government

⁹⁷ See for example sections 56 to 58 on New Zealand coastal policy statements, sections 63(2) and 64 on regional coastal plans, and 117 to 119A on restricted coastal activities.

⁹⁸ I do not intend to consider this issue any further as a review of all the coastal issues needs to be undertaken at some time. The result of that review will affect whether the Minister of Conservation should have the power to make NES or not.

organisations may wish to consult members. Maori often state that insufficient time has been provided for discussion with iwi on issues and, given section 8,⁹⁹ the Minister must take these concerns into account when establishing the process.

To ensure the public has adequate time to comment on the subject-matter of the NES, the Minister will have to balance competing issues of lack of certainty and further environmental degradation until the NES is in place with the requirement to ensure everyone that wants to comment has had adequate time. It would not seem possible to limit the time frame on the basis of urgent need.

3 *Opportunity*

The Minister's process must also provide an opportunity to comment. "Opportunity" can be limited to asking for submissions, but many groups do not become involved in such forms of public participation. To involve them the process has to be appropriate. This may mean that seeking written submissions only will disenfranchise those who do not respond well to that process. The oral tradition of Maori may mean that it is appropriate to provide for hui. A "travelling road show" with public meetings may be appropriate to provide an opportunity for those out of the main centres to be involved.

Although "consultation" is not referred to in section 44,¹⁰⁰ it may be an appropriate formula to apply to "an opportunity to comment". In the Wellington International Airport case¹⁰¹ the Court held that, for consultation to be meaningful, there must be made available to the party being consulted sufficient information to enable it to be adequately informed so as to be able to

⁹⁹ See Appendix I.

¹⁰⁰ Unlike clause 3 of the First Schedule which requires local authorities in preparing policy statements and plans to consult with Ministers, local authorities and tangata whenua.

¹⁰¹ Wellington International Airport Ltd v Air New Zealand [1993] 1 NZLR 671.

make intelligent and useful responses. The party making the decision must enter the meetings with an open mind, take due notice of what is said, and allow the other parties to have their say. However there need not be agreement.

"Opportunity" includes having all information available in a timely fashion, either free or at a reasonable cost. Financial assistance to some groups, or specific targeting of organisations representing groups who are not usually heard may have to be investigated. "Opportunity" may therefore be much wider than setting up a postbox.

4 *Subject-matter*

The public comment is to be on the "proposed subject-matter of the regulations". This is an interesting phrase as it suggests two possibilities - the public comment may be restricted to the topic of the regulation or it may cover the actual wording of the proposed regulation. Elsewhere¹⁰² the Minister may define the issue to be considered and give public notice of that before publicly notifying the proposed national policy statement. This differentiation between the issue and proposed contents is clear, unlike section 44.

It may well be appropriate to obtain the public's views on what issues should be dealt with by NES,¹⁰³ but such identification would not result in a NES. To undertake a public process which would comment only on whether the issue the NES was dealing with was appropriate would be an excessive waste of

¹⁰² Section 46(a) provides that the Minister may before notifying a proposed national policy statement "define the issue to be considered and give public notice of his or her intention to prepare a proposed national policy statement on that issue".

¹⁰³ "Ironically, work on a statement of "Principles and Priorities for Standards under the Resource Management Act" has not yet resulted in even a draft being available for discussion. Ideally that might have been the first paper produced. Its publication is awaited as it will provide business with an opportunity to have an input into a variety of issues of national significance."
Above n 2, 65.

resources and is unlikely to be helpful. Dealing with a particular issue may or may not be appropriate depending on the substance of the NES. As a matter of common-sense and efficient use of resources, "subject-matter", in this context, must relate to the actual wording of the NES.

5 *Public*

Linking all these aspects of section 44 is "the public". It is the public who must have adequate time and opportunity to comment on the subject-matter. The use of the term "public" must mean that the process is open to everyone. Identified interest groups do not constitute the whole "public". The process must be accessible to all.

6 *Report*

Finally, section 44 requires the production of a report and recommendation to the Minister. Unlike other provisions,¹⁰⁴ there is no statement on what the Minister has to do with the report, except publish it. Presumably the Minister will need to take it into account before making a recommendation to the Governor-General, but what weight it has is not indicated. The purpose of its publication is not clear, except perhaps to show the reasoning.

7 *Summary*

In comparison to the process outlined for national policy statements¹⁰⁵ and the Minister's call-in powers¹⁰⁶ the lack of detail in sections 43 and 44 is surprising. It is even more surprising given that officials recognised that¹⁰⁷:

¹⁰⁴ Section 52 requires the Minister to consider a report on national policy statements, section 149 requires the Minister to have regard to the report and recommendations of a board of inquiry on a call-in, and section 215 provides that the Minister has to give reasons to the House of Representatives if the Minister does not act in accordance with a Planning Tribunal report on a water conservation order.

¹⁰⁵ Sections 45 - 55.

"The procedure for promulgating regulations is set out in Regulations (Disallowance) Act 1989.

"Clause 40C [section 44] is a significant addition to this process by requiring the Minister to allow public comment on the subject matter and the report and recommendation. It is the only legal requirement for any proposed regulations under any Act to go through beyond Regulation (Disallowance) Act 1989."

The explanation for this lack of process appears to be based on the mistaken presumption that "[i]f a more detailed process is prescribed it challenges the appropriateness of the Regulation (Disallowance) Act."¹⁰⁸ That Act does not provide a process for promulgating regulations.¹⁰⁹

Without more details, the promoter of a regulation is left in the dark, and is vulnerable to judicial review if an appropriate public process is not followed.

IV PUBLIC PARTICIPATION

It is necessary to examine public participation at a general level to gain some understanding of what may have been intended before considering how the potential problems can be redressed.

¹⁰⁶ Sections 140 - 150.

¹⁰⁷ Above n 41, 37.

¹⁰⁸ Above n 41, 37.

¹⁰⁹ Above n 47. The only exception is section 4 which requires that regulations must be laid before the House not later than the sixteenth sitting day after the day on which the regulations were made.

A *Theories of Participatory Democracy*

Democracy, the notional basis of our political system, has its roots in public participation. The "contemporary" theory of democracy identified by Pateman,¹¹⁰ provides that:¹¹¹

"'participation', so far as the majority is concerned, is participation in the choice of decision makers. Therefore, the function of participation in the theory is solely a protective one; the protection of the individual from arbitrary decisions by elected leaders and the protection of his private interests."

From a market perspective, this model can be categorised as "one where the majority (non-elites) gain maximum output (policy decisions) from leaders with the minimum input (participation) on their part."¹¹²

By contrast, the "classical theory", which Pateman refers to as the theory of "participatory democracy",^{113 114}

"is built round the assertion that individuals and their institutions cannot be considered in isolation from one another. ... The major function of participation in the theory of participatory democracy is therefore an educative one, ... including both the psychological aspect and the gaining of practice in democratic skills and procedures. ... Thus there is no special problem about the stability of a participatory system; it is self-sustaining ...".

¹¹⁰ Carole Pateman *Participation and Democratic Theory* (Cambridge University Press, London, 1970).

¹¹¹ Above n 110, 14.

¹¹² Above n 110, 14 (quoted from Bachrack 1967).

¹¹³ Above n 110, 20. The theorists identified by Pateman include John Stuart Mill, GDH Cole and Rousseau.

¹¹⁴ Above n 110, 42.

Thus:¹¹⁵

"One might characterise the participatory model as one where maximum input (participation) is required and where output includes not just policies (decisions) but also the development of the social and political capacities of each individual, so that there is 'feedback' from output to input."

The key difference between these two theories is the level of public participation. The "contemporary" theory is a "minimalist form of democracy, relying on less rather than more public involvement in decision making"¹¹⁶ - the minimalist form being limited to voting for competing parties in periodic elections. This contrasts with "participatory democracy", which Hayward¹¹⁷ identifies as having three goals:

- * Achieving self government, (the ability of citizens to determine their own lives);
- * Strengthening public commitment to democracy through direct personal experience;
- * Developing a more active and informed citizenry with a concern for collective problems and a better understanding of the nature of these problems.

Extending these participatory aspects of democracy to legal paradigms, Robinson¹¹⁸ distinguishes between the Diceyan (or formalist) theory and legal pluralism. The first postulates that:¹¹⁹

¹¹⁵ Above n 110, 43.

¹¹⁶ Bronwyn Hayward "Participatory Democracy: Questions Raised by Feminist Involvement with Practice and Theory" in *Political Science July 1993 Vol 45 No 1* (Department of Politics, Victoria University of Wellington, Victoria University Press 1993) 28.

¹¹⁷ Above n 116, 28 - 29.

¹¹⁸ Above n 18, 320.

¹¹⁹ Above n 18, 321.

- "* good government is unitarian (dominated by parliament);
- * majority democracy is self-correcting, tending towards harmony;
- * administrative justice is fundamentally a question of process - the judicial review of administrative action. Formal law is preferred over quasi-law;
- * positivism is accepted; laws are considered to be neutral commands which subjects obey;
- * the executive arm of government is accountable through the ultimate accountability of ministers to parliament;
- * the expertise, "top down" model of bureaucratic decision-making is accepted".

Robinson notes there are many strands of pluralist thought, but that they all consider power should be decentralised to enable better bargaining between interest groups. They also consider that interests, not just individuals, should be involved in the decision-making process. In a pluralistic legal system, says Robinson:¹²⁰

- "* good government needs parliament, judges and bureaucrats checking and balancing each other;
- * majority democracy is regarded as insufficient - participation in decision-making by a plurality of interest groups is desirable;
- * administrative justice necessarily involves procedural fairness, but also questions of merit and substance. Administrative justice involves "green light" considerations as well as judicial review;
- * positivism inadequately accommodates the participation of "subjects" in decision-making;

¹²⁰ Above n 18, 321.

- * additional avenues of accountability to that of ministerial responsibility are advocated;
- * the expertise model of decision-making is regarded as needing legitimation through public involvement."

Thus, the "contemporary" approach propounds the rational development of policy by experts which is translated into legislation by politicians. If the public does not like the policy then it has the opportunity to express its displeasure at periodic elections or through the formal administrative justice process. This "thin democracy" contrasts with "strong democracy"¹²¹ which incorporates citizens' values on an explicit basis into the policy process. "Efforts are made to ensure no one group is excluded from the chance to voice its concerns or to learn more about collective problems by listening to the concerns of others."¹²²

These theories can be readily compared with the market and citizens' rights approach discussed in Part II and incorporated into the development of the RMA.

B Application of the Theories to NES

The "contemporary" model assumes that "government will get it right", and if it does not, then the court processes or ministerial responsibility will correct the faults. Public involvement will cause delays, additional expense and will pander to pressure groups. In essence public participation is inefficient.¹²³

The "participatory democracy" model suggests that participation is an end in itself by having a social development component. Thus¹²⁴

¹²¹ Peter deLeon "The Democratization of the Policy Sciences" in *Public Administration Review* (March/April 1992, Vol 52, No 2) 126.

¹²² Above n 116, 29.

¹²³ Above n 18, 323.

¹²⁴ Above n 18, 329.

"participation is seen to develop both civic awareness of the individuals who are involved and the well-being of society as a whole."

Not only may public participation lead to an acceptable solution to a dispute, but it will give the participants an opportunity to understand each other's points of view.

Neither of these theories fit well with NES as defined by the RMA. We have seen that the "contemporary" model anticipates little involvement in the actual formation of administrative procedures; but the need for public participation was never questioned by the review group.¹²⁵ Instead there is an indication in the report¹²⁶ that, with the highly technical nature of the issues involved, there is a need for a significant level of industry and other input to ensure appropriate outcomes. In that case, public participation should ensure there is an adequate information base before decisions are made. It is an acknowledgement that the Minister (and the Ministry) are not the only experts, and that the assistance of others should therefore be sought. Thus the "contemporary" theory is not an appropriate model for NES.

Neither do the extremes of the "participatory" model appear to apply to NES. There is no support in any of the background papers for the view that participation is an end in itself.¹²⁷ There is not even a suggestion that public input will enable the sharing of power, although under section 8 the Minister, in exercising functions under the RMA, shall take into account the principles of

¹²⁵ Cliff Prophet "Public Participation, Executive Discretion and Environmental Assessment: Confused Norms, Uncertain Limits" (Spring 1990) 48 University of Toronto Faculty of Law Review starting at page 283 tries to address the question of "Why must allowance be made for participation in administrative decision-making?"

¹²⁶ Above n 35, 29.

¹²⁷ See for example RMLR Public Participation Task Group *Resource Management Law Reform Public Participation, Working Paper No. 12* (Ministry for the Environment, Wellington, July 1988).

the Treaty of Waitangi. The principle of "partnership"¹²⁸ could require the participation of iwi in the regulation making process as the Treaty partner.

However, a modified version of the "participatory" theory appears to have some support from the background papers. It also appears to have been the theory adopted in the RMA as described in Part II of this paper. The rationale for such an approach appears to be "legitimation".¹²⁹

The increase of the information base is one aspect of legitimation. There is also a suggestion in the report¹³⁰ that public input and consultation is required on the appropriateness of using standards at a national level. It can be implied from this statement that if the public is consulted and accepts that a NES is appropriate then it has legitimised the making of a regulation. If the report and recommendations confirm the public's support of a regulation then the government has a powerful ally against any groups opposing the regulation.

During Parliamentary debate on the Bill, the Minister for the Environment indicated that legitimation is the reason for public input. His third reading speech states that the Bill provides a more liberal regime for developers but that their activities will need to be compatible with hard environmental standards, "and society will set those standards."¹³¹

The fact that NES are also regulations and therefore have the legitimation of being legally enforceable, indicates that the public process legitimation is not so much to ensure that the public has "bought into" the standards, but is an effort to ensure that the standards are correct. A spin-off may be that the NES are more readily acceptable.

¹²⁸ New Zealand Maori Council v Attorney General [1987] 1 NZLR 641.

¹²⁹ Above n 18, 321.

¹³⁰ Above n 35, 29.

¹³¹ Simon Upton, Above n 34, 3019.

C *Problems With Public Participation*

Before discussing the possible public processes which could be developed to meet the requirements of section 44, it is important to be aware of some of the pitfalls.

Robinson states that "'Political participation' is the taking part in the formulation, passage and implementation of public policies."¹³² At the local community level "techniques including public meetings, referendums and workplace organisations"¹³³ have been tried while¹³⁴:

"[a]t the level of national government where the size and scale of communities might prohibit direct involvement on every issue, experiments should constantly occur to work out ways in which the public can have access to society's central institutions".

deLeon argues:¹³⁵

"that the realization of participatory democracy, or a variation some call 'empowerment', is much more nettlesome than its proposition - maybe unattainable".

He identifies "formidable operation hurdles":¹³⁶

* "How does one ensure an informed citizenry?"

¹³² Above n 18, 321.

¹³³ Above n 116, 27.

¹³⁴ Above n 116, 28.

See also David Fox *Public Participation in the Administrative Process* (Ministry of Supply and Services, Canada, 1979). This publication was prepared for the Canadian Law Reform Commission and discusses a number of ways of obtaining public involvement including surveys, "people's commissions" and the availability of funding.

¹³⁵ Above n 121, 127.

¹³⁶ Above n 121, 127.

- * "Or an involved citizenry ?"
- * "And, lastly is it functional ? Would it work ?"

He acknowledges the problems of the present system where:¹³⁷

"the analyst consistently makes recommendations that the recipient finds oddly inadequate or inappropriate; as a consequence, the program flounders and often flunks. ... [T]he intended recipient now has a revised and probably lower opinion of government."

Besides the "separation syndrome" there is also "a strong bias [which] exists in this arrangement towards recognizing the policymaker as the analysts' legitimate - often, only - client, thus reinforcing the isolation of the analysts."¹³⁸

The policymaker (politician) may be able to inject some representational aspect to the analysis:¹³⁹

"They listen to constituent opinion on some issues, and they communicate with constituents in a regular manner because they are concerned about re-election. ... Obviously, if they vote only in accordance with district opinion, they may not make a rational decision on the merits of the legislation."

However, taking it full circle, the "increasing size and complexity of the legislative workload due to increased governmental function in the twentieth century ... has resulted in a new way to deal 'rationally' with legislation and

¹³⁷ Above n 121, 125.

¹³⁸ Above n 121, 126.

¹³⁹ Susan Bowker Schwarz "Legislation and Legislatures" in *Social System and Legal Process - Theory, Comparative Perspectives and Special Studies* (Harry M Johnston (ed), Jossey-Bass Publishers, San Francisco, 1978) 249 - 250.

makes representation more difficult."¹⁴⁰ That new way is a deferral to experts for most legislative decisions.¹⁴¹

These criticisms indicate the need to get the public participation process "right". If it is not right the end result is resentment by those who have participated in the process but do not see their concerns reflected in the final policy, and disillusionment among officials involved who do not understand public resentment because they did undertake a process. Thus it is easier for the bureaucratic experts to rely on themselves and the judgment of politicians than attempt a public process.

Other critics consider public participation to be flawed because not all interests are equally represented. The local elite, the affluent well-organised liberals, are more likely to participate than others such as the poor, ethnic minorities, the old or teenagers. Again it is the process which needs to be considered. Those that do not participate should be encouraged, including providing them the means to do so while the process should be robust enough to ensure it is not hijacked by any particular interest group.¹⁴²

Another related criticism of public participation is that it is inefficient. The process of working groups, public forums and reports can be laborious and expensive with little to show for it. The public issue of concern as portrayed in the media may not be the "real issue" (that is, the issue identified by the scientific experts) and therefore resources are diverted from the problem to address public opinion.

The same response can be made.¹⁴³

¹⁴⁰ Above n 139, 249.

¹⁴¹ Above n 139, 249.

¹⁴² Above n 18, 325.

¹⁴³ Above n 18, 323.

"The inefficiency arguments of cost, delay and foregone opportunities through long-winded participation processes only apply to inappropriate models of participation. The issue is not 'participation, more participation and at all costs'. Of course, participation itself needs to be efficient. The scope and time frame for public involvement must be appropriate for each issue."

Part of the decision on what is appropriate is based on why public participation is required. The goal of public participation, as earlier established, is to ensure that the best information is made available to the decision makers. With NES, we have technical standards which may have a major adverse effect on industrial and manufacturing processes and a positive effect in raising the environmental bottom lines. The public interest in ensuring economic growth in an environmentally sensitive way, that is, sustainable management, is high.

The history of the RMLR and RMA, as discussed in Part II, raised public expectations that everyone will have the opportunity to be involved in resource management issues that affect them. NES were conceived in this environment of public participation, and were adopted into the RMA without due consideration of the difficulties.

If the legitimization of NES through public participation is to be effective, then the process must be appropriate - or judicial review becomes a risk. This in turn will weaken the legitimization:¹⁴⁴

"A major problem with judicial review is that after the balance has been struck by the legislature, it may then be shifted, by those who are not answerable to the electorate [Judges], in favour of corporate interests."

¹⁴⁴ Terence G Ison, "The Sovereignty of the Judiciary" (1985 - 1986) 10 Adelaide Law Review) 15.

V EXISTING MODELS OF PUBLIC PARTICIPATION

To assist with the design of an appropriate public process I have considered some recent examples of legislation requiring such a procedure. This Part first looks at examples in the RMA and then examples in other legislation.

A *Models From The RMA*

As noted in Part II, seeking public comment has been a feature of RMA. Some requirements are specified in the Act itself. The Ministry has also used various methods of consultation to assist in its work. These provide possible models for the development of NES.

1 *National policy statements*

The process for national policy statements (NPS) is specified in the RMA.¹⁴⁵ The Minister notifies a proposed NPS and appoints a board of inquiry of three to five members. The board arranges for notification of the inquiry and invites submissions. The submissions can be made by "any person" and shall be in writing. A summary of decisions requested in the submissions has to be prepared and notified. Further submissions can be made but only in relation to existing submissions. The general provisions relating to the conduct of hearings¹⁴⁶ apply to the board's hearing of submissions.

On completion of the inquiry, the board must prepare a written report and recommendations for the Minister. The Minister must publish that report. The Minister then considers the report and recommendations and may, if the Minister wishes, change the proposed NPS. If the Minister intends that the NPS will have effect, the Minister recommends to the Governor-General to

¹⁴⁵ Sections 45 - 55.

¹⁴⁶ Section 39 - 42A.

approve the NPS. It is issued by a notice in the *Gazette* and the statement is published.

No NPS have yet been prepared. The New Zealand Coastal Policy Statement (NZCPS) does provide an example of how the process may work. Section 57 provides that the NPS process is followed for an NZCPS, except the Minister of Conservation is the responsible Minister.

The Department of Conservation started work on an NZCPS before the RMA was enacted.¹⁴⁷ Sarah Bagnall of that Department's coastal section outlined the process for the first NZCPS as follows. A coastal advisory group which comprised interest group representatives was established. It discussed the proposal with regional councils and held public meeting (including five hui which culminated in a national hui). Working papers were produced by experts and national workshops on those papers were held. A draft NZCPS was notified in 1990 and public submissions sought.

As a result of that feedback, more consultation and drafting was undertaken. Expert policy writers were used, and a non-government review group¹⁴⁸ was established to consider the policies. All policies were put through a "Treaty workshop". At the same time, consultation with government departments and particular interest groups such as the port companies continued.

In September 1992 the proposed NZCPS was notified and a board of inquiry of five members¹⁴⁹ was appointed. Submissions were received,¹⁵⁰ hearings

¹⁴⁷ Personal communication, Sarah Bagnall, Coastal section, Department of Conservation.

¹⁴⁸ This group included Maori representatives, the fishing industry and the National Council of Women.

¹⁴⁹ "The members of the board, as originally appointed were: Arnold R. Turner CMG - Presiding Member, Kaye Thorn, Denis Nugent, Colin Macnab and Maui Solomon. In June 1993, Kaye Thorn resigned, due to pressure of other work and Dr. Margaret Mutu was appointed in her stead."
A. Turner *Report and Recommendations of the Board of Inquiry Into the New Zealand Coastal Policy Statement* (Department of Conservation, Wellington, February 1994) 1.

held,¹⁵¹ and a report and recommendations made.¹⁵² The NZCPS was issued by notice in the *Gazette* on 5 May 1994.¹⁵³

It could not be classified as either a quick or cheap process, but it gave time and opportunity for comment. The NZCPS has not been judicially reviewed. It is too early to decide whether the NZCPS will be effective as only five regional coastal plans have been notified.¹⁵⁴

2 Local authorities' plans

The First Schedule to the RMA sets out the process for preparation of local authority plans.¹⁵⁵ First a proposed plan is prepared in consultation with those listed in clause 3.¹⁵⁶ Those with designations must also be advised.¹⁵⁷ Public notification not only requires notice in newspapers but also direct notification to

¹⁵⁰ Public notice of the inquiry was given on 31 October 1992, with the final closing date for submissions being 15 February 1993. There were a total of 590 written submissions received by the due date and 66 late submissions. A month was provided for further submissions, resulting in 45 such submissions.

Above n 149, 1.

¹⁵¹ The board conducted public hearings in Wellington, Auckland, Thames, Whangarei, Napier, Nelson, Christchurch and Dunedin. The hearing in Whangarei was conducted on the Pehiawera Marae, and part of the hearing at Napier was conducted on the Matahiwi Marae. 137 oral submissions by those who lodged written submissions were heard. The Department of Conservation was the only central government organisation to be heard by the Board.

Above n 149, 1.

¹⁵² After the Board had made its report and recommendations to the Minister of Conservation, government departments had an opportunity to consider the report. A few minor changes were recommended to the Minister which were incorporated in the final NZCPS.

¹⁵³ Department of Conservation *New Zealand Coastal Policy Statement 1994* (Department of Conservation, Wellington, 1994) inside cover.

¹⁵⁴ Being Taranaki, Wellington, Waikato, Otago and Canterbury.

¹⁵⁵ It also covers regional policy statements, but to simplify the discussion I have just referred to plans. Plans include both regional and district plans.

¹⁵⁶ Minister for the Environment, other affected Ministers and local authorities, tangata whenua.

¹⁵⁷ Clause 4, First Schedule.

those likely to be affected.¹⁵⁸ Copies of the proposed plan are to be made available in every public library.¹⁵⁹

Submissions are made in writing.¹⁶⁰ The local authority must prepare a summary and notify "through a prominent advertisement"¹⁶¹ that the summary is available and that further submissions can be made. After further submissions have been received a hearing will normally occur. This must follow an appropriate and fair procedure.¹⁶² Normally the council officials produce a report which has to be pre-circulated.¹⁶³ Negotiations by officers occur during the production of this report to clarify issues. Some councils use this opportunity to try and resolve any disputes.

Notification of any decisions must be made specifically to those who made submissions on that provision¹⁶⁴. All decisions must have reasons¹⁶⁵ and can be referred to the Planning Tribunal on appeal.¹⁶⁶

This model identifies the importance of consultation before notifying a proposal. It specifies the form of notification, both generally and to those specifically affected. It also provides details on the hearing process, although Councils have the freedom to move outside the strict process to try and resolve disputes. As there is an appeal to the Planning Tribunal procedural unfairness issues are unlikely to be dealt with through judicial review. Its precedent value for NES is limited except to identify possible notification formula.

¹⁵⁸ Clause 5, First Schedule.
¹⁵⁹ Clause 5(5), First Schedule.
¹⁶⁰ Clause 6, First Schedule.
¹⁶¹ Clause 7(1), First Schedule.
¹⁶² Section 39.
¹⁶³ Section 42A.
¹⁶⁴ Clause 11, First Schedule.
¹⁶⁵ Clause 10, First Schedule.
¹⁶⁶ Clause 14, First Schedule.

3 Guidelines

Although no NES has been produced, the Ministry has provided guidelines which include standards.¹⁶⁷ The process of developing guidelines could feed into a NES model and has been indicated in the documents.¹⁶⁸

¹⁶⁷ "Both for this reason [section 32 analysis] and the desirability of trialling draft standards before committing the whole country to a less than satisfactory regulatory regime, the Ministry has adopted the practice of producing draft standards as guidelines for discussion with both industry and local government and appropriate interim application. This approach is eminently sensible and may have avoided the imposition of onerous burdens on industry." Above n 2, 65.

¹⁶⁸ In November 1992 the Ministry published a discussion paper entitled "Air Quality Guidelines". It proposed a set of national ambient air quality guidelines for some key pollutants:

"They are intended as a set of baseline values which will assist regional councils to develop their air quality management policies and plans. The implementation of air quality guidelines will be monitored. At a later date consideration will be given to establishing a national environmental standard, based on these guidelines, as provided for in sections 43 and 44 of the [RMA]."

Ministry for the Environment *Air Quality Guidelines* (Ministry for the Environment, Wellington, 1992) 3. Submissions were invited with the promise of a final version of the national guidelines being published:

"Subject to a further review of the implementation of national guidelines, and to the requirements of sections 32 and 44 of the [RMA], in relation to considering the costs and benefits and the need for public consultation on any proposed regulations, the guidelines may be further developed into a national environmental standard under section 43 of the Act."

Ministry for the Environment *Air Quality Guidelines* (Ministry for the Environment, Wellington, 1992) 19. In July 1994 the Ambient Air Quality Guidelines were published. In the Introduction it acknowledges that:

"This document provides guidelines for air quality. These are not air standards. Development of such standards will be considered at some later time, after experience is gained in setting up programmes of air quality management."

A further discussion document entitled "Odour Measurement and Management" was released in July 1994. In the Foreword it states:

"After submissions have been reviewed, the Ministry will prepare a guideline on odour measurement and management. This discussion document and the odour guideline to follow may be used to develop regional

The process has been one of discussion with experts, including working groups and peer review of drafts before the production of a draft document for public consideration. All of the submissions have been considered by Ministry staff with assistance from experts. Submissions have been sought from members of existing networks (including councils) and through Ministry publications. No public advertisements have been undertaken. Copies have only been available through the four Ministry offices.

4 *Independent review by commissioner*

It may be possible to establish NES using an independent commissioner. Such a model is presently being used for coastal rentals. The Minister appointed Mr Wayne Kimber to review the coastal rental situation and report to him.

In June 1994 the Ministry published a discussion document¹⁶⁹ which incorporated specific questions for the public to answer. The discussion document was originally a short summary produced for Cabinet so, although there had been a great deal of discussion about the issue, there was no public discussion on the document's contents. The availability of the document and the public meeting programme was advertised in the major newspapers. Copies were sent to over 400 people who in the last two years had written to the Ministry on this issue. Copies were also sent to regional councils and organisations identified as having an interest in the coast. As well as providing for public meetings, written submissions were sought.

odour standards and/or practices and procedures for odour management."

There is no reference to the development of NES, but the similarity of purpose to NES is inescapable.

¹⁶⁹ Entitled *Resource Rentals for the Occupation of Coastal Space*.

Before meeting with the public, separate meetings were held with regional council representatives and government departments. Any group or individual that asked for private meetings with Mr Kimber were accommodated. Contact with iwi was sought through the iwi liaison committees of regional councils.

Although the process has not yet been completed Ministry staff consider¹⁷⁰ that the individual meetings with particular interest groups were the most successful, as they allowed for real discussion as opposed to the "letting off steam" and "grand-standing" which occurred in the public meetings. Ministry staff anticipate that the liaison with iwi may not have been sufficient. There were some complaints from provincial cities that using the four major daily papers was not appropriate and that public notices were seldom read anyhow. Dissemination of information by national bodies to their members proved to be the most successful form of communication.

This process has identified some of the strong and weak points of reaching the public which need to be taken into account when designing each NES process.

B Other Legislative Models

I have tried, in vain, to locate in other New Zealand legislation regulation making powers that require a public process identical to that specified in section 44 of the RMA. There are examples¹⁷¹ of where some consultation

¹⁷⁰ Personal communication, Jolanda Meijer, Ministry for the Environment policy analyst assisting Mr Kimber.

¹⁷¹ An earlier example is section 7(1) of the Petroleum Demand Restraint Act 1981 which reads -

"Petroleum demand restraint regulations may authorise the Minister, after he has held appropriate consultations, to give, or revoke or vary, for the purposes of those regulations, directions-

(a) To any person carrying on an undertaking in the course of which he acquires, supplies, or distributes petroleum products, as to the acquisition, supply, or distribution thereof by him in New Zealand:

(b) To any person carrying on an undertaking which involves the use of petroleum products, as to the use

has to be undertaken, but no recent examples were found where the public generally had to be involved. Several existing statutes provide procedures that may have a bearing on any proposed revisions of the RMA.

1 *The Building Act 1991*

The Building Act 1991 provides, in section 48, that the Governor-General may make regulations to be called the building code. These regulations are to be made on the advice of the Minister of Internal Affairs following the recommendation of the Building Industry Authority.¹⁷²

Section 48(4) provides for a public process. The Authority shall-

- "(a) Do everything reasonably practicable on its part to advise all persons and organisations, who or which in its opinion will be affected by any regulations made in accordance with the recommendation, of the proposed terms of the regulations, and give such persons and organisations a reasonable opportunity to make submissions on them to the Authority; and
- (b) Give notice in the *Gazette*, not less than 21 days before making the recommendation, of its intention to make the recommendation and

thereof by him, whether for the purposes specified by the Minister or during periods specified by him or otherwise."

"Appropriate consultations" is defined in section 7(3) to be consultations "the Minister thinks practicable and appropriate" with the representatives of those involved in the petroleum industry.

This 1981 Act does not require consultation over the regulations, but over the directions which flow from the regulations. Section 4 does provide that the Governor-General may make regulations to restrain demand for or restrict consumption of petroleum products. Section 5 requires that the Governor-General be satisfied that there is insufficient stocks. This imposition of an obligation on the Governor-General differs from the other examples, including RMA.

¹⁷²

Section 48(3), Building Act 1991.

state briefly in the notice the matters to which the recommendation relates; and

(c) Make copies of every recommendation available for inspection by any person who so requests before any regulation is made in accordance with the recommendation."

This requirement for an input is much more limited than under the RMA. There is a subjective decision about who is affected. There is a requirement to notify such people and give them an opportunity to make submissions, but in both cases these requirements are qualified.

Regulations governing the construction of buildings affect the public and not just industry groups. As far as the general public is concerned, the chances of knowing that there is an opportunity for input into the building code are very limited. The *Gazette* is not widely read. The emphasis in the Building Act is on allowing input, but not actively seeking it from the public.

John Hunt of the Building Industry Authority acknowledged¹⁷³ that the capacity for input from "Joe Bloggs" was limited. The Authority has taken a pragmatic approach to its consultation by involving key building industry players in drafting the code. After a draft is accepted by the Minister, it is advertised in the *Gazette* and sent to those the Authority considers are directly involved, including government departments and industry groups. Generally there is between four to six weeks for comment. Submissions are considered and any issues clarified. A final proposal is then sent to the Minister.

As far as Mr Hunt could tell, no submissions at all were made as a result of advertising in the *Gazette*. Information about the amendments and invitations to respond were made through the Authority's magazine "Building Industry

¹⁷³ Personal communication with Mr John Hunt, Building Industry Authority.

News". This reaches 3000 people and it appeared some submissions resulted.

Mr Hunt was not aware of any complaints about the process. He considered that the public accepted the rules because experts had made the decisions which had formulated the regulations.

The Building Act demonstrates some ambivalence on the value of consultation and public participation. If it is deemed "desirable in the public interest" that regulations be made urgently, then subsection 48(4) need not be followed. In any case, a failure to follow that subsection does not affect the validity of any Order in Council.¹⁷⁴ It would appear that although public involvement is provided for, it is not seen as a necessary part of regulation making.

2 *The Privacy Act 1993*

The Privacy Act 1993 (Part VI) provides for codes of practice. These can be prepared either by the Privacy Commissioner or on the application of any other person. In either case the Commissioner must give public notice of the proposal and invite submissions.¹⁷⁵ Under section 48(1)(b) the Commissioner cannot issue a code of practice unless-

"The Commissioner has done everything reasonably possible on his or her part to advise all persons who will be affected by the proposed code, or representatives of those persons, of the proposed terms of the code, and of the reasons for it, has given such persons or their representatives a reasonable opportunity to consider the proposed code and to make submissions on it to the Commissioner, and has considered the submissions."

¹⁷⁴ Section 48(5) (urgency) and 48(6) (validity), Building Act 1991.

¹⁷⁵ Section 47(4) for privately initiated codes and section 48(1)(a) for Commissioner initiated codes, Privacy Act 1993.

Again this legislation is more specific than the RMA about the people who should be advised. It also establishes a process for making submissions, and stipulates that it is the Commissioner who considers them.

Only two codes have been prepared - Health and Government Computer Services. The Health proposal went through a number of redrafts, each redraft being sent to the most affected bodies for comment. Comments were also sought from the public on a developed draft through advertisements in the *Gazette* and newspapers, and also by directly targeting those groups considered interested. Over 100 submissions were received, but it was considered that most of these came from the people targeted.¹⁷⁶

The fact that the final code is published in the *Gazette* is "conclusive proof" that the requirements of section 48 have been complied with.¹⁷⁷ The Commissioner does have the authority to adopt "any additional means of publicising the proposal to issue a code of practice or of consulting with interested parties in relation to such a proposal."¹⁷⁸ The Commissioner can also issue, alter or revoke a code urgently, ignoring the provisions of section 48, but such a code only has a maximum life of one year.¹⁷⁹

All codes of practice are deemed to be regulations for the purpose of the Regulations (Disallowance) Act 1989, but need not be published.¹⁸⁰ This means they will have to be laid before the House and could be disallowed and/or considered by the Regulations Review Committee.

¹⁷⁶ Personal communication, Privacy Commissioner's office.

¹⁷⁷ Section 48(2), Privacy Act 1993.

¹⁷⁸ Section 48(3), Privacy Act 1993.

¹⁷⁹ Section 52, Privacy Act 1993.

¹⁸⁰ Section 50, Privacy Act 1993.

3 The Land Transport Act 1993

Part II of the Land Transport Act 1993 gives the Minister of Transport the power to make rules,¹⁸¹ which are regulations for the purpose of the Regulations (Disallowance) Act 1989, but again need not be published.¹⁸²

Ordinary rules are notified in the *Gazette*, and generally take effect 28 days after notification.¹⁸³ The subject matter is wide, covering "safety and licensing, including technical requirements and standards, for the land transport sector".¹⁸⁴

Pursuant to section 10, before making an ordinary rule the Minister shall-

- "(a) Publish a notice of his or her intention to make the rule in the daily newspapers published in Auckland, Hamilton, Wellington, Christchurch, and Dunedin, respectively, and publish the notice in the *Gazette*; and
- (b) Give interested persons a reasonable time, which shall be specified in the notice published under paragraph (a) of this subsection, to make submissions on the proposal; and

¹⁸¹ This is based on Part III of the Civil Aviation Act 1990.

¹⁸² Section 4(7), Land Transport Act 1993.

¹⁸³ The rule can specify a later date than 28 days (section 10(3)) or a rule's commencement can be suspended until it is applied by the Minister by notice in the *Gazette*, section 4(4), Land Transport Act 1993.

¹⁸⁴ Section 4(1)(a), Land Transport Act 1993. More specific details are spelt out in sections 5 and 6. This includes section 5(e), which may produce some conflict with aspects of the RMA, :

"Rules specifying standards in respect of the construction of vehicles, ... vehicle emissions, the environmental requirements of vehicles ... including ... rules providing for the following:

- ...
- (ii) Limiting or prohibiting vehicle noise and vehicle emissions:
- (iii) Other environmental restrictions on vehicles.

(c) Consult with such persons, representative groups within the land transport industry and elsewhere, Government departments, and Crown agencies as the Minister in each case considers appropriate."

Land Transport is in the process of developing its first rules. A sophisticated process has been established to meet the requirements of the Act.¹⁸⁵ Having agreed to a proposal, a "red draft" of the rules is prepared, and consultation is undertaken with industry and those people Land Transport considers would be affected. Any submissions are analysed and an in-house review undertaken. A "yellow draft" is then prepared; this is the public discussion document. Land Transport sends it to the groups already consulted and sends a copy to every library in the country so that it is readily available. Its availability is required to be notified.¹⁸⁶

The submissions will again be analysed and a final "green draft" will be produced to be sent to interested groups before becoming rules. The Minister must sign the rule and include a statement on the extent of the consultation undertaken.¹⁸⁷

Thus a public process is provided through advertising and anyone who is interested can make a submission, but there is no requirement to provide an opportunity to comment. The only requirement is that a reasonable time be provided. Besides the submission process, consultation must be undertaken but the Minister makes a subjective decision of who will be consulted.¹⁸⁸

¹⁸⁵ This process is specified in Land Transport Safety Authority *Land Transport Rules - A description of the rule-making process* (Land Transport Safety Authority, Wellington, October 1993).

¹⁸⁶ Section 10(a), Land Transport Act 1993.

¹⁸⁷ Section 8, Land Transport Act 1993.

¹⁸⁸ This process is similar to that undertaken by the Civil Aviation Authority (CAA), except for the sending of copies to every library. Land Transport considered that ready access was necessary. Unlike CAA issues which are of interest to only a small group, transport rules have a high degree of public interest because of their coercive impact on the public.

There is also the opportunity for the Director of Land Transport Safety to make emergency rules which prevail over ordinary rules.¹⁸⁹ Before making such a rule the Director must consult with "persons, representative groups within the land transport sector or elsewhere, Government departments, and Crown agencies as the Director in each case considers appropriate."¹⁹⁰ An emergency rule takes effect as soon as it is notified in the *Gazette*, but if this notification is impracticable or inappropriate, the lead time can be shortened by direct notification to appropriate persons.¹⁹¹ The emergency rules only last for 90 days, with a renewal of 30 days.¹⁹²

Unless there is evidence to the contrary, the production of a copy of an ordinary or emergency rule is legal proof of the rule and the fact that it has been made in accordance with the provisions of the Act.¹⁹³

4 *The New Zealand Sports Drug Agency Act 1994*

The latest example of regulations requiring public input is found in the New Zealand Sports Drug Agency Act 1994. Before the Minister for Sport, Fitness, and Leisure recommends that the Governor-General makes regulations, the Minister shall request the New Zealand Sports Drug Agency to -¹⁹⁴

"(a) Do everything reasonably practicable on its part to advise all persons and organisations, who or which in its opinion may be affected by any regulations made in accordance with the recommendation, of the proposed terms of the regulations; and

Personal communication, Alan Malthus, Manager Legal Services, Land Transport Safety Authority.

¹⁸⁹ Section 11(6), Land Transport Act 1993.

¹⁹⁰ Section 11(1), Land Transport Act 1993.

¹⁹¹ Section 11(4), Land Transport Act 1993.

¹⁹² Section 11(5), Land Transport Act 1993.

¹⁹³ Section 14, Land Transport Act 1993.

¹⁹⁴ Section 31(2), New Zealand Sports Drug Agency Act 1994.

- (b) Give such persons and organisations a reasonable opportunity to make submissions on them to the Agency; and
- (c) Advise the Minister of any submissions received and any comments the Agency wishes to make on the proposed regulations."

As this organisation has just been established, the process for the establishing legislation and regulations has been run by the Department of Internal Affairs.¹⁹⁵ There was wide consultation with identified interested parties. All national sports agencies were circulated about the Bill and the proposed regulations. No direct effort was made to contact the public generally.

Once again, the Minister may waive the public process "if the Minister considers it is desirable in the public interest that the regulations be made urgently."¹⁹⁶ The Act also includes an "insurance policy" against judicial review by providing that any failure to comply with the public process does not affect the validity of the regulations.¹⁹⁷

5 Summary

An analysis of these four Acts shows -

- * In three of the four Acts, decision-makers need only involve those persons who are (or, who in the decision-maker's opinion may be) directly affected.¹⁹⁸

¹⁹⁵ Personal communication Hugh Lawrence, Solicitor, Department of Internal Affairs.

¹⁹⁶ Section 31(3), New Zealand Sports Drug Agency Act 1994.

¹⁹⁷ Section 31(4), New Zealand Sports Drug Agency Act 1994.

¹⁹⁸ The Land Transport Act 1993 provides that the intention to make the rules be published and those that are interested are given the opportunity to make submissions. It does however specify that consultation must be undertaken with appropriate organisations.

- * Two Acts explicitly provide for public notification¹⁹⁹ while the other two implicitly support it.
- * Three Acts require that those persons identified be given a reasonable opportunity to make submissions, while the fourth specifies a reasonable time.²⁰⁰
- * Three of the Acts specify who the submissions will be made to.²⁰¹
- * All provide the opportunity for emergency provisions without public submissions, although one Act requires some consultation.²⁰²
- * All four Acts provide that failure to follow the defined public process does not invalidate the legislation, although one allows evidence to the contrary to be produced.²⁰³

The practice of seeking comment ranged from an elaborate procedure of advertisements and ready access to the material in a public place to direct targeting of interest groups with no attempt to seek comments from the public.

Use was made of established networks of identified people and "house" magazines. Although the *Gazette* was required to be used, it was not considered to be an effective way of advising the public.

¹⁹⁹ The Building Act 1991 provides for notification in the *Gazette*, while the Land Transport Act 1993 provides for notification in daily newspapers and the *Gazette*.

²⁰⁰ The odd one out is the Land Transport Act 1993, section 10(1)(b).

²⁰¹ The Land Transport Act 1993 just states that submissions are to be made but as the Minister is responsible for the notification and for identifying who should be consulted it is reasonable to assume that the submissions are to the Minister, that is the Ministry.

²⁰² Section 10(1)(c), Land Transport Act 1993.

²⁰³ Section 14, Land Transport Act 1993.

Each of the examples has its differences from the others, but there is a consistency between them which highlights the differences with the RMA. Section 44 does not specify -

- * Affected persons;
- * The form of notification;
- * Who the submissions are to made to;
- * The opportunity for emergency regulations; and
- * A validation clause.

The only matter in common is the requirement for opportunity or time to make comments, and yet the RMA differs in requiring both time and opportunity and this must be "adequate" as opposed to "reasonable".

VI WILL THESE MODELS WORK FOR NES ?

Two general models emerge from the above descriptions. One is based on an independent hearing either through a board of inquiry, hearing committee or Commissioner. The other is based of the production of draft documents with an invitation for submissions and consideration of them by the parent agency.

As I identified in Part IV, the purpose of the public process for NES is legitimation. The legitimation process has two goals, the first being information gathering to ensure the end result is based on the best information possible and the second is public support or "buy in". The question arises of whether either of the models can deliver these goals.

A *Incorporation with National Policy Statements*

In the RMA the sections on NPS follow immediately after the NES provisions. This is no accident. The terms of reference for the review group asked that it consider the placement of the provisions on NES to ensure a close linkage

with statements of Government policy.²⁰⁴ The review group recommended placing NES immediately in front of NPS but there was no discussion on why this position was appropriate.

The review group noted that:²⁰⁵

"The provisions for national policy statements contained in clause 41 could, in principle, be used to establish environmental standards. Given that the purpose of a national policy statement is to provide guidelines, they would be used to set Government's broad policy in respect of environmental standards with the specifics being laid down in regional and district plans."

(This interpretation of the role of a NPS is supported by the report on the NZCPS.)²⁰⁶

As section 45 states, the "purpose of national policy statements is to state policies on matters of national significance that are relevant to achieving the purpose of" the RMA. Unlike section 62, which spells out the contents of regional policy statements, there is no such direction for NPS:²⁰⁷

²⁰⁴ The change of name from "government policy" back to "national policy statements" was seen as "not merely cosmetic but identifies the well recognised distinction between regional and district responsibilities and national responsibilities". Above n 35, 36.

²⁰⁵ Above n 35, 27.

²⁰⁶ The board concluded: (Above n 149, 6)
"the word policies means 'course of action adopted as advantageous for achieving the purpose of the Act in the coastal environment' and that policies are something different from objectives and rules. They are courses of action designed to lead to objectives; and they should not be prescriptive in form".

²⁰⁷ Lindsay Gow, *CO₂ Reduction and a National Policy Statement* (Ministry for the Environment, Wellington, 14 July 1994) 2. This was a "think piece" produced in relation to the Taranaki Combined Cycle Power Station hearing.

"As a policy has a focus on actions achieving an end, any supporting objective should incorporate an end or result. Ideally, policies should derive logically from an objective or objectives. Objectives, in turn, logically derive from a statement of the issue or problem to be addressed or resolved. The logical structure of issue - objective - policy, as specified for regional policy statements, would therefore make sense if applied to national policy statements."

Following that structure, section 62(1)(e) provides that regional policy statements shall state the "methods used or to be used to implement the policies".

It may therefore be possible for a NPS to state the methods by which the policies would be implemented. The structure of the RMA would suggest however that it would be inappropriate for a NPS to specify rules. The review group suggests local authorities' plans could do this.²⁰⁸ An alternative proposal could be that the NES could state the rules.²⁰⁹

"National policies and standards should be seen as complementary since policies express national goals and objectives, whereas standards express strict and precise standards which are clearly measurable."

If this was the case, it may be possible to link the public process for the NES into the requirements for a NPS. The NPS could identify the issue, explain and define the objective(s) sought, the policies to achieve them and identify NES as an appropriate method to implement the policy.

In deciding whether an NPS is desirable, the Minister has to have regard to a number of matters. The first is the "actual or potential effects of the use,

²⁰⁸ Above n 35, 27.

²⁰⁹ Above n 7, 45.

development, or protection of natural and physical resources". This paragraph²¹⁰ clearly links to NES, although other provisions are also likely to be appropriate. It should be possible to include NES under the umbrella of NPS, where the subject matter is linked.

The process for NPS does have some similarities to the NES requirements. It is possible to envisage that the Minister may, at the same time as notifying a proposed NPS, notify a proposed NES as the rules which relate to the proposed policy. The Minister could request the board of inquiry to consider the NPS and NES together. If the board, in considering the NES, follows the process specified for NPS, the Minister could reasonably consider that the public has been given "adequate time and opportunity to comment".

This joint process appears to have been what was anticipated by the review group and implied in its terms of reference. It is submitted that this was the process envisaged by officials. The departmental report²¹¹ refers to the close relationship between NPS and NES. It claimed that section 44 "sets out a similar process to that for national policy statements with comments and the report."²¹² It is a logical relationship and there would be a minimal increase in costs and effort to run such a joint process.

If this is what was intended, there needs to be an explicit link between section 44 and the NPS provisions. NES produced under this process would be considered as part of the NPS.

210 Section 45(2)(a).

211 Above n 41, 37.

212 Above n 41, 37.

B The Guideline Approach

The recent production of guidelines suggests that the Ministry does not envisage NES as flowing inevitably from NPS.

The guideline procedure the Ministry has used to date would suggest that NES will be preceded by a discussion document circulated amongst interested persons (being local authorities/industry most likely to be affected). Their comments will be incorporated in a revised document which will be produced as "Ministry guidelines". These guidelines are likely to be picked up by local authorities who may incorporate them in their plans as rules and as conditions on resource consents.²¹³

Once the guidelines have been tested in the real world (even though they have no statutory effect) the potential is there for them to emerge as regulations. It seems unlikely that the regulations produced through this process will differ greatly from the guidelines.

By the time the guidelines are converted into draft NES for the public to consider there will have been a great deal of personal investment in the guidelines by those most concerned - staff of the Ministry for the Environment, other government departments, local authorities and industry. It is unlikely that the public could add to the information base after the subject-matter of the regulations has been through a detailed review during its development as guidelines. The public may be able to indicate areas where the guidelines appear to have failed, but they will be competing with the experienced technocrats who formulated the original guidelines. Unless individual

²¹³ All the hearings I have been involved in for greenhouse gases have also included discharges of other gases. The levels suggested in the Air Quality Guidelines Discussion Document were relied on in all cases by the applicant. Council staff also referred to them in their reports. These levels were not always accepted but they were seen as a valuable base line for decision-making.

members of the public can identify the failings of the guidelines and recommend appropriate changes it seems unlikely that their voices will be heard.

Even the most basic elements of what should be contained in the regulations have already been determined by the guidelines. The possibility of expanding the contents through public submission is remote. We are left with the possibility that comment is sought on the subject-matter which has already been through a detailed process of peer review. The tendency may be to ignore all of those comments made by the non-experts. Instead of legitimising the NES, it will appear that the decisions have already been made and that the public process is only a public relations exercise.

The other legislative models referred to in Part V also suffer to a certain extent from the perception that decisions have already been made. Some of these processes offer a much greater opportunity for public involvement than others, which dilutes the feeling of a public relations exercise. The more sophisticated the public process the higher the costs of producing the regulations will be. Costs however will be incurred if the regulations are not right either from a technical or legal perspective. Working thorough experts and comments on drafts assists in reducing these costs.

The process followed by Land Transport²¹⁴ appears to be the most robust, providing for in-house, interested parties and expert consideration to start with, a full public process in the middle and then a final review by experts and those who are interested at the end.

If the Ministry simply adopted the Land Transport process for the NES regulations I still consider that the possibility of judicial review exists. As an example, the process for public comment is a written submission process. It could be argued by Maori that this only provides for those who communicate in

²¹⁴ For a full description see above n 185.

the written form. Being a verbal community such a submission process does not enable iwi to express their views. Judicial review of regulations could be sought on the basis that the process did not provide iwi with an adequate opportunity to comment.²¹⁵

If the discussion document/guideline process is incorporated within the legislation there will need to be some detail about it. Even so, there is probably little that can be done to ensure the public generally have a say. Experts and those with particular interests will dominate. What would be required is a recognition by those who recommend to the Minister the making of regulations that the rules of natural justice still apply. Submissions must be fairly dealt with and officials cannot have made up their minds before considering any submissions. If this process is entered into honestly then the public relations label should be avoided. Submissions to the Ministry on a draft NES could then be an appropriate process. This is especially so if flexibility on the type of submissions is incorporated and the Ministry creatively considers techniques for public involvement as was done with the RMLR process.

VII RMA AMENDMENT

I believe that there is the opportunity for both the NPS and guideline models to be included in the legislation. Integrating NES with NPS is logical. Recognising that not all NES need to derive from NPS is also realistic. I therefore propose that sections 43 and 44 be redrafted to incorporate both approaches.

²¹⁵ A similarity can be seen with the present review being sought on the "Maori option".

A Amendments to Section 43

My concerns about section 43 related to potential *ultra vires* challenges. As discussed in Part III most of these concerns can be dealt with by careful drafting of the regulations. Alteration of the section will not help as far as the issues of standards and bottom lines are concerned.

1 "Use, development, ? protection"

Changing "use, development and protection" to "or" would be appropriate. This phrase is used in a number of sections including the functions of regional councils and territorial authorities²¹⁶ and Ministerial consideration of NPS.²¹⁷ This consideration of alternatives will flow into regional policy statements and local authority plans which in turn will flow into resource consents. The wording in section 43 should be consistent with these other sections, although the end result as far as drafting NES is concerned may be no different.

2 Adverse effects

The other issue was the subject matter itself. I indicated that what is covered by this section is not the actual physical and natural resources as suggested by the text, but the externalities of using those resources. What the NES are trying to control is the "avoiding, remedying or mitigating of any adverse effects on the environment".²¹⁸ A clarification of this could be made, although I consider the intention of the section is reasonably clear. Words could be added in paragraph 43(1)(a), for example:

²¹⁶ Sections 30(1)(b) and 31(a).

²¹⁷ Section 45(2)(a).

²¹⁸ Section 5(2)(c).

"Prescribing technical standards relating to avoiding, remedying or mitigating any adverse effects on the environment from the use, development or protection"

This does not greatly assist the meaning of the section; it does provide some confusion when referring to water or air quality as qualities do not cause an adverse effect. It is neither necessary or prudent to add any reference to externalities.

The section could be tidied up with the rewriting of paragraph 43(1)(a)(v) so that it refers to "soil quality" only, and not "soil quality in relation to the discharge of contaminants" as this imposes an unnecessary restraint.

Thus, for section 43, the only necessary changes are the replacement of "and" with "or" and a shortening of paragraph 43(1)(a)(v).

B Amendments to Section 44

Section 44 is more challenging as I wish to incorporate two public processes. This will provide the Minister with the choice of two distinct routes for public participation. It will vary if the NES is the rule component of an NPS or not.

1 Link to NPS

If it is a component of an NPS, then the new provision should link to the NPS sections which follow immediately after section 44. Specific provision can be provided for the Minister to direct the board of inquiry to deal with the proposed NES. Sections 48 to 52 will readily apply if the term "national policy statement" is read to include "national environmental standards". The making of NPS in section 52 differs from the process for regulations and therefore further specific requirements for NES will be required, including a cross-reference to the

section 32 benefit/cost analysis. This will indicate that the Minister is not bound by the report and recommendations of the board.

As the board's report is published there is no need to require the Minister to publish a report, although if the Minister does not follow the board's report it is likely, given the emphasis in the RMA on public involvement and giving reasons, that a further report would be published. It would be an unnecessary legal requirement.

2 *NES by themselves*

If the NES is not a component of a NPS, some details of the public process should be included in the legislation. These only have to indicate what is required. If too many details are provided a strait jacket could result.

In the other legislative examples in Part V a great deal of flexibility was provided for including a specific statement in the Privacy Act.²¹⁹ The inclusion of such a separate statement here would be appropriate.

The new provisions need to refer to giving "the public adequate time and opportunity to comment". This phrase is now an essential aspect of the Act politically. To remove it could be misconstrued as Parliament trying to restrict public involvement. There is probably nothing to be gained from changing "adequate" to "reasonable" (the word used in the legislative examples).

Greater details of what is meant by "adequate time" can be provided. Specifying a minimum time period ensures that it would be difficult to argue on judicial review that adequate time was not given (assuming the minimum was

²¹⁹ Section 48(2), Privacy Act 1993.

provided). As NPS provide for at least 20 working days for submissions²²⁰, this seems appropriate on the basis of consistency.²²¹

Details of "adequate opportunity" will not be as explicit. The first aspect is that people should know. Referring to public notification is sufficient as this term is already defined in the RMA.²²² This definition does not require notification in the *Gazette*, but the earlier examples indicated that this did not reach the public so there appears to be no reason to specifically refer to notice in the *Gazette*.

The details of what should be in the public notice need to be clear but not to precise. They can provide some indication of the non-statutory process; in this case by referring to supporting documentation. This could include any earlier discussion documents and guidelines for example.

The public notice should also specify where any documentation can be inspected. Although the First Schedule requires local authorities to make available copies of their documents at public libraries²²³ this detail seems unnecessary. It is likely that any documents will be in form and size that can be readily posted unlike some local authority plans. Not referring to positioning in public places does not of course exclude this possibility as the Land Transport example showed.

²²⁰ Section 48(2)(c).

²²¹ This is in contrast to the submission period for regional policy statements and plans where the First Schedule, clause 5(3)(a) requires at least 40 working days after notification.

²²² Section 2 defines it as:

"Public notice" means-

(a) When given by a Minister of the Crown in relation to any matter other than a restricted coastal activity, a notice published in one or more daily newspapers circulating in the main metropolitan areas:".

²²³ Clause 5(5), First Schedule.

Besides public notification an explicit requirement to advise those who are likely to be affected would also incorporate some of the ideas of the legislative examples. This should be qualified by ensuring the decision on who is affected is the Minister's subjective view.

Once submissions have been made it is relevant to identify what the Minister is to do with the submissions. They should be taken into account but the Minister should be free to consider other information including the section 32 analysis.

The vexing question is whether the Minister should publish a report. It is likely that a report would be in existence as the Ministry, not the Minister, would in fact be doing the work and in due course would report to the Minister. As well the section 32 analysis is likely to generate a report even though this is not required by the legislation.

The question is what use is such a report as it can not be appealed. Its relevance will be to showing how decisions are made and so might become the basis for judicial review. It might also be of assistance in interpreting the regulations. It is to be hoped that after an appropriate public process that neither of these would occur.

My preference is not to include a statutory requirement for publishing a report and instead rely on the manner the process will evolve to produce a report when NES are made. However, such a requirement could be included.

3 *Emergencies and validation*

The legislative examples included provision for emergency regulations. These seem inappropriate for NES. Parliament has devolved the regulation-making authority because of the technical nature of the subject and not because of a perceived need for an urgent response. The RMA provides other methods of

controlling the adverse effects of use or development of resources and therefore there should not be an emergency situation where NES need to be rushed through.²²⁴

The same is true of the validation clause which appears in the examples. There is no excuse for not following the correct process. The validation clause would however mean that the regulation making process would not later be questioned, adding to the efficiency of regulations. From the Ministry's perspective, such a clause would provide an "insurance policy", but given the political environment I doubt that it would be publicly acceptable. As my recommended amendment is a draft I have, however, provided for this possibility.

4 *The draft*

To incorporate the above proposals I recommend deleting section 44 and replacing it with the following, which I consider retains the essence of the present section:

44. Requirement for a public process to make regulations-(1) The Minister shall not recommend to the Governor-General the making of any regulations under section 43 unless the public process requirements of either section 44A or section 44B are followed.

(2) A failure to comply with the public process requirements shall not affect the validity of any Order in Council made under section 43.

44A. National environmental standards pertaining to national policy statements-(1) Where a proposed national policy statement contains policies that deal with matters in section 43(1)(a) and the

²²⁴

If it was considered appropriate to include provision for emergency provisions I would recommend using section 52 of the Privacy Act 1993 as a precedent and limiting the life of such regulations to one year.

Minister considers that national environmental standards should be prescribed to implement the proposed national policy statement, the Minister shall-

- (a) Publicly notify the proposed national environmental standard at the same time as the proposed national policy statement; and
- (b) Direct the board of inquiry established under section 47 to inquire into and report on the proposed national environmental standard at the same time as the proposed national policy statement.

(2) Sections 48 to 51 and section 52(1) shall apply, with all necessary modifications, as if all references to a national policy statement were references to a national policy statement and national environmental standard.

(3) The Minister may recommend the making of regulations under section 43 if, having considered the report and recommendations from the board of inquiry and the Minister's duty under section 32, the Minister considers national environmental standards are appropriate.

44B. Process for other national environmental standards-(1)

Where national environmental standards are proposed, other than those to which section 44A applies, the Minister shall publicly notify his or her intention to prepare a national environmental standard, and give the public adequate time and opportunity to comment on the proposal.

- (2) The public notice shall-
 - (a) Specify where the proposed national environmental standard and any supporting documentation can be inspected;
 - (b) Invite submissions from any person on the proposed national environmental standard;

(c) Specify the address to which submissions may be sent and the closing date for receipt of submissions.

(3) The closing date for submissions shall not be less than 20 working days after public notification.

(4) The Minister shall do everything reasonably practicable to advise-

(a) Every local authority; and

(b) Any other person who, in the Minister's opinion,

will be affected by the proposed national environmental standard-

of the Minister's intention to prepare such a regulation, and invite submissions from those persons.

(5) The Minister shall have regard to all submissions and any other matters the Minister thinks fit (including the Minister's duty under section 32) before making a recommendation to the Governor-General under section 43 on the regulations.

44C. Further publication and consultation-Nothing in section 44B shall prevent the Minister from adopting additional means of publicising the proposed national environmental standard or of consulting with interested parties in relation to such a proposal.

C Other Amendments

The only other change I would recommend²²⁵ is to include a reference in section 74(2)(b) to "Regulations made under this Act, including regulations made under section 43". This would follow the precedent in section 66(2)(c)(iv) and, as discussed in Part III there appears to be no reason for its exclusion.

²²⁵

As noted in Part III, Section D a review of the powers of the Minister of Conservation in relation to NES may also be required.

VIII CONCLUSION

I began this paper with the proposition that producing NES under the present legislative requirements could be dangerous for the Minister. The lack of a public process opened up the possibility for judicial review of any regulations made. The potential effect on resource users of such regulations made judicial review a realistic threat.

In examining where the desire for a public process came from I concluded that its purpose was legitimation of the regulations. Legitimation, for these regulations, has two goals. The primary one is ensuring the NES are correct by seeking information from the public. The second is a hope that, through a public process, "buy into" the regulations.

My aim therefore was to create a process which gave this legitimation without the threat of judicial review. I looked at examples of such processes both inside and outside RMA and concluded that the most appropriate way of dealing with this issue was to rewrite section 44.

This revision has provided the Minister with a choice of two public processes. The first process, drafted as a new section 44A, provides for the incorporation of NES with the consideration of a NPS. There is some indication in the background papers that it was assumed this would happen. The draft makes this assumption explicit.

The second process, as drafted in the new section 44B, accommodates the present reality of preparing discussion documents and guidelines to test standards proposed before developing NES. There is a greater risk of loss of legitimation through this process because it may appear that decisions have already been made and that the public input is little more than public relations. However, this concern can be overcome through recognition of this potential

criticism and officials ensuring an appropriate method for public input is followed. Section 44C provides for this flexibility.

The detail in the provisions for those processes provides the Minister with the protection from judicial review that I was seeking while retaining the flexibility to use appropriate mechanisms depending on the type of NES contemplated. All that is required now to fix these legal problems is an amendment to the RMA.

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APPENDIX

154
24

Resource Management

R.S. Vol. 32

includes a reference to a person acting under a resource consent with the permission (including implied permission) of the consent holder as if the resource consent had been granted to that person as well as to the holder of the resource consent.]

This section was inserted by s. 4 of the Resource Management Amendment Act 1993.

4. Act to bind the Crown—(1) Except as provided in subsections (2) to (5), this Act shall bind the Crown.

(2) This Act does not apply to any work or activity of the Crown which—

- (a) Is a use of land within the meaning of section 9; and
- (b) The Minister of Defence certifies is necessary for reasons of national security.

[(3) Section 9 (1) does not apply to any work or activity of the Crown within the boundaries of any area of land held or managed under the Conservation Act 1987 or any other Act specified in the First Schedule to that Act (other than land held for administrative purposes) that—

- (a) Is consistent with a conservation management strategy, conservation management plan, or management plan established under the Conservation Act 1987 or any other Act specified in the First Schedule to that Act; and

(b) Does not have a significant adverse effect beyond the boundary of the area of land.]

(4) *Repealed by s. 5 of the Resource Management Amendment Act 1993.*

(5) No enforcement order, abatement notice, excessive noise direction, or information shall be issued against the Crown.

Subs. (3) was substituted for the original subs. (3) and (4) by s. 5 of the Resource Management Amendment Act 1993.

PART II

PURPOSE AND PRINCIPLES

5. Purpose—(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, “sustainable management” means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety while—

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

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

- (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
- (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
- (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
- (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
- (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

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

- (a) Kaitiakitanga:
- (b) The efficient use and development of natural and physical resources:
- (c) The maintenance and enhancement of amenity values:
- (d) Intrinsic values of ecosystems:
- (e) Recognition and protection of the heritage values of sites, buildings, places, or areas:
- (f) Maintenance and enhancement of the quality of the environment:
- (g) Any finite characteristics of natural and physical resources:
- (h) The protection of the habitat of trout and salmon.

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

PART III

DUTIES AND RESTRICTIONS UNDER THIS ACT

Land

9. Restrictions on use of land—(1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is—

- (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
- (b) An existing use allowed by [section 10 or section 10A].

(2) No person may contravene [section 176 or section 178 or section 193 or section 194 (which relate to designations and heritage orders)] unless the prior written consent of the requiring authority concerned is obtained.

(3) No person may use any land in a manner that contravenes a rule in a regional plan or a proposed regional plan unless that activity is—

- (a) Expressly allowed by a resource consent granted by the regional council responsible for the plan; or
- (b) Allowed by section 20 (certain existing lawful uses allowed).

(4) In this section, the word “use” in relation to any land means—

- (a) Any use, erection, reconstruction, placement, alteration, extension, removal, or demolition of any structure or part of any structure in, on, under, or over the land; or
- (b) Any excavation, drilling, tunnelling, or other disturbance of the land; or
- (c) Any destruction of, damage to, or disturbance of, the habitats of plants or animals in, on, or under the land; or
- (d) Any deposit of any substance in, on, or under the land; or
- [(da) Any entry on to, or passing across, the surface of water in any lake or river; or]
- (e) Any other use of land—

and “may use” has a corresponding meaning.

(5) In subsection (1), “land” includes the surface of water in any lake or river.

authority with a report on any matter described in section 39 (1).

(2) Any report prepared under subsection (1) may be considered at any hearing conducted by the local authority.

(3) A copy of any written report prepared under subsection (1) shall be sent, so that it is received at least 2 working days before the hearing, to the applicant, or the person who made a requirement for a designation or heritage order (as the case may be), and any person who made a submission and stated they wished to be heard at the hearing.

(4) The local authority may waive compliance with subsection (3) if it is satisfied that there is no material prejudice, or is not aware of any material prejudice, to any person who should have been sent a copy of the report under subsection (3).]

This section was inserted by s. 30 of the Resource Management Amendment Act 1993.

PART V

STANDARDS, POLICY STATEMENTS, AND PLANS

National Environmental Standards

43. Regulations prescribing national environmental standards—(1) Subject to section 44, the Governor-General may from time to time, by Order in Council, make regulations, to be called national environmental standards, for either or both of the following purposes:

(a) Prescribing technical standards relating to the use, development, and protection of natural and physical resources, including standards relating to—

(i) Noise:

(ii) Contaminants:

(iii) Water quality, level, or flow:

(iv) Air quality:

(v) Soil quality in relation to the discharge of contaminants:

(b) Prescribing the methods of implementing such standards.

(2) Section 360 (2) . . . shall apply to all regulations made under this section.

In subs. (2) the expression "and (3)" was omitted by s. 31 of the Resource Management Amendment Act 1993.

44. Restriction on power to make regulations prescribing national environmental standards—The Minister shall not recommend to the Governor-General the

making of any regulations under section 43 unless the Minister has—

- (a) Established a process that—
 - (i) The Minister considers gives the public adequate time and opportunity to comment on the proposed subject-matter of the regulations; and
 - (ii) Requires a report and recommendation to be made to the Minister on those comments and the proposed subject-matter of the regulations; and
- (b) Publicly notified that report and recommendation.

National Policy Statements

45. Purpose of national policy statements (other than New Zealand coastal policy statements)—(1) The purpose of national policy statements is to state policies on matters of national significance that are relevant to achieving the purpose of this Act.

(2) In determining whether it is desirable to prepare a national policy statement, the Minister may have regard to—

- (a) The actual or potential effects of the use, development, or protection of natural and physical resources:
- (b) New Zealand's interests and obligations in maintaining or enhancing aspects of the national or global environment:
- (c) Anything which affects or potentially affects any structure, feature, place, or area of national significance:
- (d) Anything which affects or potentially affects more than one region:
- (e) Anything concerning the actual or potential effects of the introduction or use of new technology or a process which may affect the environment:
- (f) Anything which, because of its scale or the nature or degree of change to a community or to natural and physical resources, may have an impact on, or is of significance to, New Zealand:
- (g) Anything which, because of its uniqueness, or the irreversibility or potential magnitude or risk of its actual or potential effects, is of significance to the environment of New Zealand:
- (h) Anything which is significant in terms of section 8 (Treaty of Waitangi):
- (i) The need to identify practices (including the measures referred to in section 24 (h), relating to economic instruments) to implement the purpose of this Act:

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