

**IN THE MATTER**

of the Resource Management Act 1991

**AND**

**IN THE MATTER**

of hearings by the Board of Inquiry into the  
Proposed National Policy Statement for  
Freshwater Management

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**REPRESENTATIONS BY THE ENVIRONMENTAL DEFENCE  
SOCIETY  
INCORPORATED & ECOLOGIC FOUNDATION**

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JA Burns  
Burns Fraser  
Solicitors  
Auckland

## **Introduction**

1. I am making these representations on behalf of the Environmental Defence Society Incorporated (EDS) and Ecologic Foundation (Ecologic). EDS and Ecologic have lodged very similar submissions on the proposed National Policy Statement for Freshwater Management (NPS) which describe various concerns with the NPS. They have also attached to those submissions a re-worded version of the NPS which seeks to address those issues more specifically.
2. I am aware that the Board has read the submissions and the proposed re-wording of the NPS. Accordingly, I do not intend to repeat the submissions or to traverse EDS and Ecologic's proposed re-write of the NPS. Rather, these representations will briefly address the main points of concern to EDS and Ecologic, and also some of the legal issues which the submissions raise.
3. Mr Taylor from EDS and Mr Salmon from Ecologic are also present, and will make some brief representations of their own following my presentation. However, they are primarily present to answer any questions that the Board may have on their proposals, or arising from their submissions.

## **Issues of concern**

4. In EDS's and Ecologic's submission, the following are the primary matters which the Board needs to address in order to ensure that the NPS is workable and successful.
  - a. A robust set of goals encapsulated within the objectives, with policies implementing these goals;
  - b. A timely response to the goals set;
  - c. Utilisation of section 55(2A)(b) of the Resource Management Act 1991 (RMA);
  - d. Increased recognition, through objectives and policies, that non point source discharges are a major contributor to poor water quality and that this issue needs to be addressed with urgency;
  - e. Land-use development and discharge of contaminants.
5. I will address each of these issues in turn below.

## **Objectives and policies**

6. The NPS lacks robust objectives and policies. EDS and Ecologic's proposed amendments to the objectives clearly set out a structured approach to addressing

freshwater management. They set clear goals for achieving enhanced freshwater quality and quantity.

7. The proposed amendments to the objectives are closely aligned with section 5 of the RMA. EDS and Ecologic's re-written Preamble details this approach. Put simply, the re-drafted NPS seeks to reinforce the Court's interpretation of section 5, that sustainable management is the heart of the RMA and is the sole guiding principle for management of all natural and physical resources, but that sustainable management is qualified by the three bottom lines, set out in section 5 (a), (b) and (c).<sup>1</sup>
8. EDS and Ecologic's proposed objectives also set out a clear path to address non attainability of water quality standards. EDS and Ecologic do not believe that water quality standards should be allowed to be reduced because the standards are too difficult to attain. However, they do understand and acknowledge that in some situations it will be very difficult and expensive for farmers to modify practices to comply with water quality goals set in the NPS. Therefore, EDS and Ecologic have proposed three alternative ways forward for landowners who cannot attain the water quality standards. These are detailed in Objective 5.
9. EDS and Ecologic submit that managing non attainability is crucial to the success of the NPS. Without a process for managing non attainability, the NPS fails to guide farmers as to how to reach, or encourage farmers to reach, the NPS goals. It does not, therefore, follow through on its targets.
10. EDS and Ecologic's proposed objective 7 introduces a precautionary approach into the NPS which at present does not exist. Due to the poor state of water quality and over-allocation of flows in many catchments in New Zealand at present, EDS and Ecologic submit that any approach to freshwater management should be conducted on a precautionary basis.

#### **Timely response to the goals**

11. The NPS does not include a target date for any of its objectives. EDS submits that this will result in inaction and delays in improvement of freshwater standards. EDS's objectives have set a date of December 2015 for recovery of freshwater to a level that is suitable for safe swimming and other recreation in and on the water, and for the protection, propagation and safe harvesting of fish, shellfish, wildlife and mahinga kai (see Objective 1(b)). Ecologic has set a less ambitious date of December 2028 for recovery of freshwater (Objective 1(b)). Mr Taylor and Mr

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<sup>1</sup> This interpretation of section 5 of the RMA started in *New Zealand Rail v Marlborough DC* 04/11/93, Greig J, HC Wellington AP169/93, [1993] 2 NZLR 641, [1994] NZRMA 70, 1&2 NZPTD 720, and has been followed in numerous decisions, including; *Eden Park Trust Board v Eden Park Neighbours Assn* A130/97, 2 NZED 804. See also *North Shore CC v Auckland RC (Okura)* A086/96, (1996) 2 ELRNZ 305, [1997] NZRMA 59, 1 NZED 599.

Salmon will explain the reasons for this difference in their individual representations.

12. In addition to the target for improving water quality, EDS and Ecologic's objectives set deadlines for establishing standards for the life-supporting capacity of all surface freshwater and dates for achieving these standards (see Objective 2 and Policy 7).

### **Section 55(2A)(b) of the RMA**

13. Section 55(2A)(b) of the RMA states:

*"A national policy statement –*

*(b) may direct that specific provisions are to be included in a document, without notification or hearing, under clause 16 of Schedule 1."*

14. This section of the RMA provides a unique opportunity to insert provisions from the NPS straight into district and regional plans, without having to go through the Schedule 1 process. It enables specific provisions of the NPS to have immediate and direct effect throughout the country and is, in EDS and Ecologic's submission, the best tool available with respect to managing freshwater in the interim period while regional policy statements and plans are promulgated.
15. EDS and Ecologic submit that the NPS should direct that the provisions set out at Policy 5 be inserted into all district and regional plans throughout New Zealand, without notification or hearing in accordance with clause 16 of Schedule 1.
16. Direction that these provisions be inserted into district and regional plans, will, in EDS and Ecologic's submission, achieve the objectives of the NPS and will be in accordance with Part II of the RMA and sustainable management of natural and physical resources. It will ensure that there are provisions that will take immediate effect.

### **Non point source discharges**

17. As highlighted in EDS and Ecologic's submission, management of point source discharges has significantly improved over the last few years. However, non point source discharges remain subject to few, if any, controls.
18. Unlike land use activities which can be undertaken as of right, there is no presumption of a right to discharge contaminants into water. Section 15 of the RMA prevents any person from discharging contaminants into the environment unless allowed to do so by a rule in a plan or a resource consent. EDS and Ecologic consider that section 15 has not been effectively utilised to control non

point source discharges from agriculture. The current health of many of New Zealand's waterways is a reflection of this failure.

19. EDS and Ecologic submit that the deposition of dung and urine from farm animals, especially when farming practices involve intensive use of land (such as with dairying) is contrary to section 15 of the RMA (unless permitted by a rule in a regional plan), and therefore, requires a discharge consent.

20. Section 15(1)(b) states:

*“(1) No person may discharge any—*

*(b) Contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water:*

*unless the discharge is expressly allowed by a rule [in a regional plan and in any relevant proposed regional plan], a resource consent, or regulations.”*

21. In determining whether such discharges are caught by section 15(1)(b) there are essentially four questions that must be analysed:

- i. Does the activity involve a “discharge” of a “contaminant”?
- ii. Is there a basis for assuming that the contaminants “may” enter water?
- iii. Is there a sufficient causal nexus between activity of the farmer and/or landowner and the discharge?
- iv. Is the discharge “expressly allowed” by a rule, resource consent or regulation?

*Does Dung and Urine constitute a “Discharge” of a “Contaminant”?*

22. Under the RMA “discharge” includes “*emit, deposit, and allow to escape.*”<sup>2</sup>

23. Contaminant includes:<sup>3</sup>

*“... any substance (including gases, [odorous compounds,] liquids, solids, and micro-organisms) or energy (excluding noise) or heat, that either by itself or in combination with the same, similar, or other substances, energy, or heat—*

*(a) When discharged into water, changes or is likely to change the physical, chemical, or biological condition of water; or*

*(b) When discharged onto or into land or into air, changes or is likely to change the physical, chemical, or biological condition of the land or air onto or into which it is discharged.”*

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<sup>2</sup> Resource Management Act 1991, Section 2, Definition of “Discharge”.

<sup>3</sup> Resource Management Act 1991, Section 2, Definition of “Contaminant”.

24. Whether the depositing of dung and urine from dairy animals onto land changes the physical, chemical or biological condition of the land is a matter of fact to be determined on the evidence, including scientific evidence. EDS and Ecologic contend that such discharges do in fact alter the condition of the land. In *Carter Holt Harvey Limited v Waikato Regional Council*<sup>4</sup> the Environment Court at least implicitly accepted that these farming practices changed the condition of land. The Court accepted the scientific evidence that farming resulted in greater increases in the levels of nitrogen leaching from land into Lake Taupo.<sup>5</sup>
25. The alternative definition of a “contaminant” requires further consideration than the relatively simple aspect of discharging dung and urine onto land. Practically, animals deposit dung and urine on the land (setting aside the separate issue of allowing animals to defecate directly into streams and waterways). Therefore, for a contaminant to actually discharge into water, it must be proved that the contaminant is “allowed to escape” into water and alter the physical, chemical or biological condition of that water.
26. Again, whether the contaminant has such an effect on water is a matter for scientific evidence. In the WRC Variation 5 case, a number of expert witnesses addressed the relationship between dung and urine deposits and the contamination of nearby Lake Taupo.<sup>6</sup> The Environment Court held that pastoral farming was the main reason for the increase in the levels of nitrogen entering the Lake.<sup>7</sup>
27. To pin-point the exact source of any particular contamination associated with pastoral farming to a particular farming activity would be a very costly and difficult exercise. However, for the purposes of determining whether dung and urine discharges are contrary to section 15 of the RMA, it is not actually necessary to prove a point source of the discharge. The fact that dung and urine contaminants discharge into water (most commonly ground water), is enough to satisfy the question of whether dung and urine is a “discharge” of a “contaminant”.
28. Therefore, in EDS’s submission, depositing dung and urine onto land that will in turn “escape” into water with a resultant change to the condition of that water system, is a “discharge” of a “contaminant.”

*What is the Basis for Assuming that Dung and Urine “May” Enter Water?*

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<sup>4</sup> *Carter Holt Harvey Limited v Waikato Regional Council* unreported, EnvC Auckland, A 123/2008, 6 November 2008, Whiting J.

<sup>5</sup> *Carter Holt Harvey Limited v Waikato Regional Council* unreported, EnvC Auckland, A 123/2008, 6 November 2008, Whiting J, para 50 and 207

<sup>6</sup> *Carter Holt Harvey Limited v Waikato Regional Council* unreported, EnvC Auckland, A 123/2008, 6 November 2008, Whiting J, para 34-35

<sup>7</sup> *Carter Holt Harvey Limited v Waikato Regional Council* unreported, EnvC Auckland, A 123/2008, 6 November 2008, Whiting J, para 50.

29. In *Hawkes Bay Dairy Limited v Hawkes Bay Regional Council* the Environment Court considered that one of the matters that needed to be proven when dealing with a breach of section 15(1)(b) of the RMA was “*that the circumstances of the discharge were such that the contaminant may have entered water*”.<sup>8</sup> This decision involved a prosecution for a discharge of dairy effluent containing nitrogen loading in excess of the conditions of the relevant resource consent.

30. In interpreting section 15(1)(b) and the word “may” the Court stated:

*“So, I should understand s15(1)(b) as prohibiting discharges of contaminants onto land in circumstances where there is a possibility of that contaminant entering water. That is a very low threshold, demonstrating that value of the legislation places on maintaining high standards of purity in natural water of whatever form.”*

31. The Court continued:

*“That it [the contaminant] possibly did so is all I have to be satisfied of. I do not need to find that it actually passed into the aquifer or the river water ...”*

32. As stated above, as a matter of fact, animal dung and urine contaminants deposited onto land either do enter water,<sup>9</sup> or at least there is the possibility of such an event occurring which is enough to satisfy the requirement that dung and urine “may” enter water.

#### *Causal Nexus*

33. The High Court in *McKnight v Biogas Industries Limited*<sup>10</sup> held that “*a person allows a contaminant to escape who fails to take the precautions that a reasonably prudent person in the position would take to prevent that escape.*” It continued on to state that it “*is sufficient if there is awareness of facts from which a reasonable person would recognise that escape could occur*” and that the causal link between the person charged and the discharge will be an issue of fact in each case.

34. Farmers voluntarily bring cattle and other stock onto their land. Where and how the stock deposits urine and dung on the land is not within the direct control of the farmer (assuming the stock is grazing freely in paddocks). However, the presence of the animals is, and as a result the animals can be said to be sufficiently within the control of the farmer so as to create a causal nexus. As counsel for Waikato Regional Council (WRC) stated in submissions at the Variation 5 hearing :

<sup>8</sup> District Court, Napier, 14 November 2007 CRI-2007-041-1348, paragraph 2.

<sup>9</sup> *Carter Holt Harvey Limited v Waikato Regional Council* unreported, EnvC Auckland, A 123/2008, 6 November 2008, Whiting J, para 50.

<sup>10</sup> CA 526/03 at page 14.

*“applying the “but for” test, the stock would not exist on the property unless they had been brought on to the land for the purpose of farming operations and there are means which farmers can employ to limit or avoid such discharges occurring, e.g., herd homes.”<sup>11</sup>*

35. The Court in that case accepted evidence that pastoral farming accounts for 92% of the estimated manageable load of nitrogen to Lake Taupo.<sup>12</sup> The reference to ‘manageable’ suggests that there is an accepted causal link between farmers and the discharge of nitrogen into Lake Taupo.

*Discharge expressly allowed for*

36. Whether a discharge is expressly provided for will depend on the rules of the relevant regional plan.
37. In Variation 5, counsel for WRC contended that the Variation should make it clear that any consent issued for nitrogen leaching activities should not only authorise the activities themselves, but also expressly authorise the discharges of contaminants onto the ground in circumstances where they may enter waterways. The Court held that subject to certainty and completeness, there is no legal reason why a “catch all” discharge rule could not be promulgated.<sup>13</sup>

*Summary*

38. The above analysis of the four questions posed indicates that dung and urine discharges are caught by section 15(1)(b) and therefore, contrary to the RMA.
39. EDS and Ecologic submit that if non point source discharges are not adequately dealt with by the NPS, the health of New Zealand’s freshwater will never fully recover. EDS and Ecologic’s proposed Objective 3(b) attempts to manage the effects of non point source discharges so that the objectives of the NPS are achieved.
40. EDS and Ecologic submit that the NPS should recognise the importance of non point source discharges in the recovery of New Zealand’s freshwater resources and provide clear direction for how to manage them.

**Land-use Development and discharge of contaminants**

41. The NPS defines Land-use Development as *“includes land-use intensification, land-use change, and subdivision of land.”* This definition does not capture

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<sup>11</sup> Waikato Regional Council Legal Submissions at Variation 5 Hearing, at para 15.31.

<sup>12</sup> *Carter Holt Harvey Limited v Waikato Regional Council* unreported, EnvC Auckland, A 123/2008, 6 November 2008, Whiting J, para 97

<sup>13</sup> *Carter Holt Harvey Limited v Waikato Regional Council* unreported, EnvC Auckland, A 123/2008, 6 November 2008, Whiting J, para 204.

existing land uses, such as farming. However, the term is coupled in the objectives of the NPS with the phrase, "*and discharges of contaminants*".

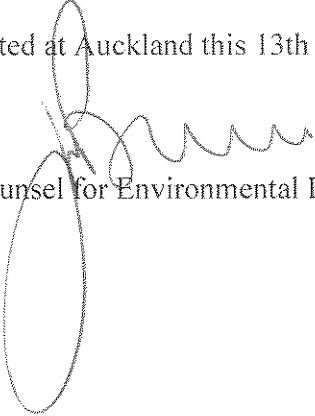
42. In our submission, the phrase "*discharges of contaminants*" captures point source discharges and, following the interpretation of section 15 detailed above, also captures non point source discharges.

43. EDS and Ecologic support this approach to managing discharges. They do not want to see any weakening of the NPS so that it only applies to discharges associated with Land-use Development. Such an approach would be akin to grandparenting existing discharges, and would not be conducive to achieving full recovery of New Zealand's freshwater quality or with the intent of section 15 of the RMA which is a restrictive rather than a permission<sup>ve</sup> provision.

### Conclusion

44. In conclusion, EDS and Ecologic submit that the Board should adopt provisions in line with their re-worded version of the NPS. EDS and Ecologic's version of the NPS will result in effective and efficient management of New Zealand's freshwater resources and will ensure that freshwater resources are sustainably managed for future generations.

Dated at Auckland this 13th day of August 2009.

   
Counsel for Environmental Defence Society Inc and Ecologic Foundation.