

Adjudicating Sustainability: New Zealand's Environment Court

*By Bret C. Birdsong**

| | |
|--|----|
| Introduction | 2 |
| I. An overview of environmental governance in New Zealand | 6 |
| A. Environmental Management in New Zealand Before the RMA | 6 |
| B. The Emergent Concept of Sustainability..... | 9 |
| C. The RMA Policy Framework: Some Themes of Sustainability | 11 |
| 1. Sustainable Management..... | 11 |
| 2. Effects-Based Management | 14 |
| 3. Promoting Public Participation | 16 |
| D. The Institutions and Instruments of Environmental Decisionmaking under the RMA..... | 18 |
| 1. National Institutions and Instruments | 19 |
| 2. Regional and Territorial Authorities and Instruments..... | 20 |
| 3. Resource Consents | 22 |
| 4. Summary..... | 25 |
| II. The Role of the Environment Court Under the RMA | 26 |
| A. A Brief History of the Environment Court..... | 26 |
| B. The Powers and Functions of the Environment Court Under the RMA | 28 |
| 1. The Power to Make Declarations | 28 |

Copyright © 2002 by the Regents of the University of California

* Assistant Professor, William S. Boyd School of Law, University of Nevada, Las Vegas. A.B., Princeton University (1987); J.D., University of California, Hastings College of the Law (1993). The author wishes to thank Anne Traum, Carl Tobias, Doug Grant, Morgan Williams, Gill James, and Phil Hughes and the participants of a faculty symposium at the UNLV, Boyd School of Law for valuable comments, and to gratefully acknowledge the financial support of the Ian Axford (New Zealand) Fellowship in Public Policy and the James Rogers research fund. All errors that remain are mine.

| | | |
|------------------|---|----|
| 2. | The Power to Decide References and Appeals | 30 |
| 3. | The Power to Issue Enforcement Orders | 31 |
| C. | The Nature of Environment Court Adjudication..... | 32 |
| 1. | Structure of the Environment Court..... | 32 |
| 2. | <i>De novo</i> Standard of Review | 33 |
| 3. | The Role of the Public Interest in Environment Court Proceedings..... | 36 |
| 4. | Appeal from Environment Court Decisions..... | 37 |
| D. | Summary and Conclusion | 38 |
| III. | The Substance of Sustainability: Environment Court Treatment of Fundamental RMA Themes | 38 |
| A. | Interpreting Sustainability: Defining Sustainable Management..... | 39 |
| 1. | The Sustainable Management Priority of the RMA | 39 |
| 2. | The Meaning of Sustainable Management | 43 |
| a. | The “Environmental Bottom Lines” Approach .. | 43 |
| b. | The Overall Judgment Approach | 45 |
| B. | Effects-Based Management..... | 47 |
| 1. | Resource Consents and Environmental Impact Assessment by Councils..... | 48 |
| 2. | The Duty to Avoid, Remedy, or Mitigate Adverse Effects | 49 |
| 3. | Regional and District Plans as Effects-Based Instruments..... | 50 |
| C. | Promoting Public Participation..... | 54 |
| 1. | Standing..... | 55 |
| 2. | Notification..... | 56 |
| 3. | Awarding of Costs against Unsuccessful Litigants | 58 |
| 4. | Summary..... | 61 |
| IV. | Some Implications of New Zealand’s Environment Court Model..... | 61 |
| Conclusion | | 69 |

INTRODUCTION

New Zealand’s Resource Management Act of 1991 (“RMA”)¹ placed the island nation on the world’s cutting edge of environmental management by making sustainability the law of

1. 32 REPRINTED STATUTES OF NEW ZEALAND 131(1). Citations to the RMA herein are in the format “RMA § ___.”

the land. Amidst a climate of deregulation, increasing reliance on market mechanisms, and devolution of central government powers to local authorities – policy initiatives that made it the destination of choice for travelling politicians and academics advocating market-based policy reform – New Zealand took the contrarian step of embracing sustainability as the core principle of its environmental and natural resources law and policy. Observers have heralded the RMA as a radical departure from traditional methods of environmental decisionmaking and as a comprehensive new framework for environmental management, one for the world to watch and possibly to follow.² New Zealand's bold embrace of the sustainability concept, which had long been emerging on the world stage,³ warrants recognition.

However, the RMA also presents an opportunity to examine a less heralded New Zealand innovation in environmental governance: a specialized, expert court that is focused exclusively on resolving environmental disputes. The

2. HUEY D. JOHNSON, GREEN PLANS: GREENPRINT FOR SUSTAINABILITY 76 (1995) (asserting that the RMA is a “truly radical break from traditional approaches to environmental planning”); TON BÜHRS & ROBERT V. BARTLETT, ENVIRONMENTAL POLICY IN NEW ZEALAND: THE POLITICS OF CLEAN AND GREEN? 113 (1993) (calling the RMA a “comprehensive new framework”); Martin Phillipson, *Implementing Sustainable Development in New Zealand: The Resource Management Act 1991*, 4 J. ENVTL. L. & PRAC. 222 (1994); Rhoanna Stanhope, *A Vision for the Future? The Concept of Sustainable Development in the Netherlands and New Zealand*, 4 N.Z. J. OF ENVTL. L. 147 (2000). *But see* BÜHRS & BARTLETT, *supra*, at 125 (“In most respects, however, [the RMA] is not a revolutionary departure from previous law, as it builds on the Water and Soil Conservation Act of 1967 and particularly the management planning approach developed in the Town and Country Planning Act.”); GEOFFREY PALMER, ENVIRONMENT: THE INTERNATIONAL CHALLENGE 145 (1995); B.H. Davis, *New Planning and Environment Law in New Zealand; Preliminary Assessment of the Resource Management Act 1991*, 5 ASIA PACIFIC L. REV. 102 (1996); Gordon Smith, *The Role of Assessment of Environmental Effects under the Resource Management Act 1991*, ENV. & PLANNING L.J. 82 (April 1996). For commentary on the RMA from the United States, see Lloyd Burton & Chris Cocklin, *Water Resource Management and Environmental Policy Reform in New Zealand: Regionalism, Allocation, and Indigenous Relations*, 7 COLO. J. INT'L ENVTL. L. & POLY 75, 81 (1996); Owen Furuseth & Chris Cocklin, *An Institutional Framework for Sustainable Resource Management: The New Zealand Model*, 35 NAT. RESOURCES J. 243, 260 (1995); Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U.L. REV. 21, 158-160 (2001); Robert V. Bartlett, *Integrated Impact Assessment: The New Zealand Assessment*, in ENVIRONMENTAL POLICY: TRANSNATIONAL ISSUES AND NATIONAL TRENDS 157, 160-161 (Lynton K. Caldwell et al., eds.) (1997).

3. *See, e.g.*, WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987) [hereinafter OUR COMMON FUTURE]; INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE AND NATURAL RESOURCES, WORLD CONSERVATION STRATEGY: LIVING RESOURCE CONSERVATION FOR SUSTAINABLE DEVELOPMENT (1980) (hereinafter “WORLD CONSERVATION STRATEGY”).

Environment Court⁴ is a critical institution in New Zealand's effort to move toward sustainable management of the environment. Exercising broad powers to review most of the fundamental issues arising under the RMA, the Court is the primary arbiter of whether activities and policies affecting the environment meet New Zealand's standard of sustainability. It is a rare institution,⁵ a specialized court of law composed of judges and technically-trained laypersons vested with the power of *de novo* review of government policy and both governmental and private actions affecting the environment.⁶ The court issues decisions of binding effect on particular disputes and potentially far-reaching precedential effect on crucial legal, factual and policy issues arising under New Zealand's law of sustainability.

New Zealand's experience with its Environment Court is instructive both for nations that have mature traditions of environmental governance and adjudication and for countries that have nascent systems of environmental law. For the United States, this experience represents a road not taken. At the advent of America's era of modern federal environmental statutes, Congress directed the President to analyze "the feasibility of establishing a separate court, or court system, having jurisdiction over environmental matters."⁷ Upon the

4. Before 1996 the Environment Court was called the Planning Tribunal. The Resource Management Amendment Act of 1996 renamed the Planning Tribunal the Environment Court. As used in the text of this article, "Environment Court" refers to both the Planning Tribunal and the Environment Court.

5. The state of New South Wales, Australia, also has a specialized court with exclusive jurisdiction over planning and environmental issues. See generally Justice Paul Stein, *The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Environmental Law*, 13 ENVTL. & PLAN. L.J. 179 (1996); T.F.M. Naughton, *The Limits of Jurisdiction and Locus Standi in the Land and Environment Court of New South Wales*, 65 AUSTRALIAN L. J. 149 (1991).

6. E.g. *Housing New Zealand Ltd. v Waitekere City Council* [2000] N.Z.R.M.A. LEXIS 21, *12 (appeals of resource consents); *Canterbury Reg'l Council v. Christchurch City Council* [2000] N.Z.R.M.A. LEXIS 7, *34 (appeals of plans). Further, when ruling upon challenges to plans, the Environment Court has construed its power to "confirm, or direct the local authority to modify, delete or insert, any provision which is referred to it" under § 15 of the First Schedule to the RMA as providing for no presumption that the policy, plan or rule under review is correct. *Leith v. Auckland City Council* [1995] N.Z.R.M.A. LEXIS 15, *29 (citing K. A. PALMER, *LOCAL GOVERNMENT LAW IN NEW ZEALAND* 646 (2d ed. 1993)). The instruments by which government entities promulgate policies, rules and decisions regarding specific activities are discussed *infra* at notes 55-81 and accompanying text.

7. Federal Water Pollution Control Act, ("Clean Water Act of 1972"), Pub. L. 92-500, 86 STAT. 816, 899 (1972).

Justice Department's negative recommendation,⁸ no federal environmental court system was established. Rather, environmental disputes continue to be decided by courts of general jurisdiction applying principles of general and administrative law. For other jurisdictions less bound by settled traditions, New Zealand's example might provide a blueprint for environmental governance.⁹

In either case, understanding the role of New Zealand's Environment Court within that country's system of environmental governance brings into focus some important policy choices inherent in granting a court of law such sweeping powers under a legal regime based on sustainability. This Article examines the New Zealand model and reflects on the policy choices that it encompasses. Part I provides an overview of New Zealand's framework for sustainability under the RMA. Part II describes the functions and role of the Environment Court under the RMA regime. Part III examines the Environment Court's contribution to the development of the law and practice of sustainability under the RMA. Part III focuses on three cornerstone themes: (1) the meaning of the RMA's objective – the sustainable management of natural and physical resources; (2) effects-based management of the environment; and (3) public participation in environmental decisionmaking. It shows that the Environment Court's jurisprudence reflects a reluctance to accept as broad a policymaking role as some of its founders had intended.¹⁰

Part IV concludes that New Zealand's experience raises some possible limitations of a specialized environmental court. Although New Zealand has demonstrated that technical and jurisdictional problems that attend the formation of such a court in countries with democratic political and common law judicial traditions can be overcome, its experience also reveals several

8. U.S. ATTORNEY GENERAL, REPORT OF THE PRESIDENT, ACTING THROUGH THE ATTORNEY GENERAL, ON THE FEASIBILITY OF ESTABLISHING AN ENVIRONMENTAL COURT SYSTEM, at I, VII-1 (1973) (hereinafter "REPORT OF THE PRESIDENT").

9. Despite the federal government's rejection of a specialized environmental court system, several counties and municipalities in the United States recently have begun to experiment with specialized environmental courts. These counties typically assign a particular judge or existing division of the court to handle all cases raising environmental issues. See Larry E. Potter, *The Environmental Court of Memphis, Shelby County, Tennessee: The Past, Present, and the Future*, 29 GEORGIA L.R. 313, 316 (1995); David Rohn, *Environmental Court Gains Stature*, INDIANAPOLIS STAR, Sept. 10, 2001; *Westchester Starts Environmental Court*, N.Y. L.J., March 16, 2001, at 4, col. 4.

10. Several of the RMA's framers have openly criticized the Court's performance in this respect. See PALMER, *supra* note 2, at 146, 170.

reasons for caution. First, it remains unclear whether the model produces overall better environmental outcomes than more limited and deferential judicial review, an empirical question that is beyond the scope of this article.¹¹ Second, New Zealand's experience suggests that judicial reluctance to take on the essential functions of governance can frustrate the intentions of lawmakers who wish courts to adjudicate questions of sustainability. Finally, New Zealand's model of *de novo* judicial decisionmaking on issues of sustainability raises questions about the role of courts in encouraging institutions and building their capacity to make more sustainable decisions. The RMA places great confidence in legal-technocratic decisionmaking by committing fundamental questions regarding sustainability to the discretion of a non-democratic court. Because that court focuses on correcting the substance of local government decisions that do not meet the sustainability standard, rather than the processes for environmental decisionmaking, there remains an open question whether it promotes the overall capacity of those local government entities – the first-instance environmental decisionmakers – to make “sustainable” decisions.

I

AN OVERVIEW OF ENVIRONMENTAL GOVERNANCE IN NEW ZEALAND

A. Environmental Management in New Zealand Before the RMA

New Zealand was the first country in the world to adopt a scheme of environmental management explicitly based on sustainability. This development was neither effortless nor foretold by New Zealand's earlier systems of environmental governance. The RMA was the culmination of a long process of

11. Determining whether New Zealand's model produces “better” environmental outcomes is problematic for two reasons. First, although enacted in 1991, the RMA still has not been fully implemented. As of May 2001, fewer than half of the resource management plans mandated by the RMA had become fully operative. Many remained in litigation before the Environment Court or at earlier stages of formulation. New Zealand Ministry for the Environment, *Resource Management Act: Annual Survey of Local Authorities 1999/2000* 37, Table 30, available at <http://www.mfe.govt.nz/new/rma2001final.pdf>. Second, the very principle of sustainability that is at the core of the RMA is one that focuses on a *process* of decisionmaking rather than particular on-the-ground outcomes. See, e.g., OUR COMMON FUTURE, *supra* note 3, at 46 (describing sustainability as a “process” rather than a static condition).

reform that is best understood in the context of New Zealand's earlier systems of environmental management and the radical governmental and economic reforms that swept the country during the 1980s. Before the onset of the reforms that led to the passage of the RMA, New Zealand's system of environmental management and policy, such as it was, reflected the dominant themes of its political and economic history – active promotion of economic growth by central government and emphasis on private property rights.¹²

Driven as much by pragmatism as ideology, New Zealand's central government historically engaged both directly and indirectly in developing a wide array of economic sectors. Direct central government intervention and entrepreneurship extended to the development of infrastructure such as roads, railways and electricity generation facilities, the delivery of services such as healthcare, education and income support, and, most importantly, the creation and support of industries for the exploitation of natural resources, such as mining, forestry, hydroelectricity, and fisheries.¹³ By the early 1970s, an extensive bureaucracy of government departments evolved that focused heavily on resource development. These included departments or ministries of Agriculture and Fisheries, Energy, Tourism, Mining, Housing, Forestry, Lands and Survey, and Works and Development.¹⁴ Not only were these departments development-oriented, but they also operated compartmentally, with little, if any, coordinated planning or analysis of the environmental impacts of their activities.

When not directly involved in entrepreneurship to promote natural resource development and utilization through government owned or funded projects, New Zealand adopted policies designed to encourage private sector development. Much like the laws that governed the use of natural resources on federal lands in the United States,¹⁵ New Zealand's policies before the reforms that led to the RMA promoted the private exploitation of natural resources, primarily through the

12. P. ALI MEMON, KEEPING NEW ZEALAND GREEN 26-27 (1993); *see also* PALMER, *supra*, note 2, at 150-53. .

13. MEMON, *supra* note 12, at 26-27.

14. *Id.* at 31.

15. *See e.g.*, General Mining Law of 1872, as amended, 30 U.S.C. §§ 21-42 (1994) (offering valuable hardrock mineral deposits on federal lands for exploration and purchase); Mineral Leasing Act of 1920, as amended, 30 U.S.C. §§ 181-287 (1994) (establishing a leasing system for private development of oil, gas, coal and other minerals on federal lands); Taylor Grazing Act of 1934, as amended, 43 U.S.C. §§ 315-315r (1994) (providing for private grazing on federal lands by permit).

protection of agriculture and manufacturing sectors by a combination of direct subsidies and import tariffs.¹⁶ Notwithstanding the central government's historical support for economic development and resource utilization, by the early 1980s New Zealand had enacted a smorgasbord of statutes to address environmental and natural resource issues. As did the United States, New Zealand typically enacted these statutes on an ad hoc basis in response to disparate concerns and crises.¹⁷ As described by Sir Geoffrey Palmer, former Minister for the Environment, Prime Minister, and a chief architect of the RMA, the "uncoordinated, unintegrated hotch-potch" of laws

bore the marks of the country's history - gold mining, soil erosion owing to clearing of too much land for pastoral farming, harbour development, zoning laws for urban development, and a whole host of one-off regimes for regulating particular problems such as noise, air pollution, petroleum exploration and geothermal energy. . . . They contained no unifying principle or approach. Permission to do things was usually required but there was no golden thread running through the statutes of the standards to be applied or the outcomes to be achieved. The mechanisms for settling disputes contained no uniformity. The institutional structures for dealing with the issues were almost infinitely various.¹⁸

Among this hotch-potch, two laws in particular provide the essential institutional backdrop for the RMA. First, the Soil Conservation and Rivers Control Act of 1941 pioneered watershed management.¹⁹ It established elected catchment, or watershed, control boards to conduct limited resource management and planning.²⁰ Each board was given responsibility for planning for soil conservation and flood control within its entire watershed area, providing regional oversight that spanned several towns, boroughs and counties.²¹ Although environmental

16. After the Government ended its price support for sheep, the number of sheep grazing New Zealand farmland dropped from nearly 70 million to approximately 50 million. The implication is that the policy had led to the environmentally damaging maintenance of far more sheep than the market and the land could sustainably support. *THE STATE OF NEW ZEALAND'S ENVIRONMENT* § 8.33 (Ian Smith ed., 1997).

17. Between 1925 and 1965, at least sixty separate pieces of legislation were enacted to regulate pollution. During the same period, pollution problems continued to spread. *MEMON*, *supra* note 12, at 38.

18. *PALMER*, *supra* note 2, at 150 (citation omitted).

19. *THE STATE OF NEW ZEALAND'S ENVIRONMENT*, *supra* note 16, § 4.3.

20. *Id.* The words "catchment" and "watershed" are synonymous. Each refers to the land area that is drained by a particular river system, including its tributaries.

21. *Id.*

advocates in other countries, including the United States,²² have promoted the establishment of political boundaries along watershed lines, New Zealand was the first to do so.²³ The RMA continued this use of natural boundaries to define jurisdiction over environmental management.

Second, the Town and Country Planning Act ("TCPA") of 1977 and its predecessors established processes for making land management decisions that the RMA adopted in modified form and extended to other physical and natural resources. The TCPA established a zoning scheme that relied on land use planning at both the regional and local level. The TCPA employed a strategy of segregating incompatible land uses by designating zones in which specified predominant uses were permitted as of right, and conditional uses permitted only if the local council granted special planning consent.²⁴ As detailed below, the RMA retained the basic planning and consent structure of the TCPA, but jettisoned its activities-based orientation in favor of a focus on the environmental effects of particular natural resource uses.

B. The Emergent Concept of Sustainability

New Zealand's decision to forge a new, integrated system of environmental management reflected an emerging global discussion about shortcomings in the world's management of the global environment. Beginning in the 1980s, the global nature of environmental problems garnered increasing international attention. First the World Conservation Strategy²⁵ in 1980 and later the World Commission on Environment and Development²⁶ in 1987 (known as the Brundtland Commission) advocated the concept of sustainability as a linchpin of environmental policy. The work of these groups substantially informed New Zealand's

22. Recognizing that the scarcity of water in the American West would inevitably lead to difficult resource conflicts, the visionary explorer John Wesley Powell, who was the first European American to explore the Colorado River through the Grand Canyon, advocated in the late 1800s that political boundaries be established by watersheds. *See, e.g.*, MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* (1993); WALLACE EARLE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST* (1954).

23. THE STATE OF NEW ZEALAND'S ENVIRONMENT, *supra* note 16, § 4.3.

24. B.H. Davis, *New Planning and Environment Law in New Zealand; Preliminary Assessment of the Resource Management Act 1991*, 5 ASIA PACIFIC L. REV. 102, 104-05 (1996).

25. WORLD CONSERVATION STRATEGY, *supra* note 3. The strategy was endorsed by the New Zealand government. MEMON, *supra* note 12.

26. OUR COMMON FUTURE, *supra* note 3.

reliance on sustainability in the RMA.²⁷ The Brundtland Commission's report, *Our Common Future*, was particularly influential.²⁸ It illuminated the concept of sustainable development just as New Zealand began studying its reform options and spurred New Zealand reformers to consider sustainability as a core, guiding principle for their effort.²⁹ *Our Common Future* established an important benchmark definition of sustainable development, defining it as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."³⁰ Under this formulation, sustainable development fundamentally concerns issues of equity – both between current and future generations and between societies (or sectors of societies) that are developmentally privileged and those that are not. The formulation also recognizes that development which affords intergenerational and distributive equity is subject to social, technological, and environmental limitations. Sustainable development, then, fundamentally involves an integration of social, economic, and environmental decisionmaking. It is a "process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations."³¹

Our Common Future proposed a number of institutional predicates to guide national governments to develop and implement national sustainable development strategies. These include a political system capable of securing "effective citizen participation in decisionmaking," a flexible administrative system

27. PALMER, *supra* note 2, at 153-55. As Palmer explains, New Zealand's resource management law reform project, headed by a core group of advisers, studied various reform options and reported to a committee of the New Zealand cabinet. Among the primary objectives of the study group was "to ensure good environmental management (as specified in the World Conservation Strategy), which includes considering issues related to the needs of future generations, the intrinsic value of ecosystems, and sustainability." *Id.* at 155. At least three working papers and one published study addressing sustainability formed the basis of the core group's decision to adopt its own modified notion of "sustainable management" as the central principle of the RMA. *Id.* at 166 & n.36.

28. D.A.R. WILLIAMS, ENVIRONMENTAL & RESOURCE MANAGEMENT LAW 57 (2nd ed. 1997) (calling OUR COMMON FUTURE "[p]erhaps the most important source of the central RMA concepts").

29. *Id.* at 149; see also Gordon Smith, *The Resource Management Act 1991, "A Biophysical Bottom Line" vs. "A More Liberal Regime": A Dichotomy?*, 6 CANTERBURY L. REV. 499, 502 (1997).

30. OUR COMMON FUTURE, *supra* note 3, at 43.

31. *Id.* at 46.

capable of self-correction, and a social system that “provides for solutions for the tensions arising from disharmonious development.”³² As discussed below, New Zealand’s Environment Court, to some degree, serves each of these functions.

C. *The RMA Policy Framework: Some Themes of Sustainability*

The RMA represents New Zealand’s attempt to implement the kind of national strategy for sustainability prescribed by *Our Common Future*. The enactment of the RMA in 1991 resulted from the most extensive law reform project in New Zealand history, a multi-phased process involving self-study and substantial public input.³³ The 400-page law replaced some sixty discrete environmental laws with a complex scheme designed to promote the sustainable management of physical and natural resources. The comprehensive framework is best described by reference to three essential policy themes – sustainable management, effects-based management, and public participation – and the policy instruments that implement these themes.

1. *Sustainable Management*

The fundamental, overarching substantive principle of the RMA is the “sustainable management of physical and natural resources,” and the single express purpose of the RMA is to “promote” sustainable management.³⁴ Although the concept of “sustainable management” emerged from the global discussion of “sustainable development” discussed above,³⁵ sustainable management is not sustainable development per se. In essence, the framers of the RMA substantially narrowed the concept to incorporate certain notions of sustainability, particularly a concern for future generations, while eschewing the issues of

32. *Id.* at 65. Other institutional predicates to sustainable development were: an economic system that is able to generate surpluses and technical knowledge on a self-reliant and sustained basis; . . . a production system that respects the obligation to preserve the ecological base for development; a technological system that can search continuously for new solutions; [and] an international system that fosters sustainable patterns of trade and finance. *Id.*

33. See generally Furusest & Cocklin, *supra* note 2; PALMER, *supra* note 2. Further amendments to the RMA were enacted in 1993, 1994, 1996 and 1997.

34. RMA § 5(1) (“The purpose of this Act is to promote the sustainable management of natural and physical resources.”).

35. See *supra* notes 25-32 and accompanying text.

distributive equity (particularly cross-national distributive equity) heralded by the Brundtland report.³⁶

As defined in section 5(2) of the RMA:

"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.³⁷

Thus, sustainability, as embodied in the RMA's definition of "sustainable management," involves considerations of human-centered values, notably social, economic, and cultural well-being, as well as ecological values, including ecosystem services. It plainly seeks to limit the impact of the present generation's human activities on both the environment and the ability of future generations to meet their needs. But the bare statutory definition is murky. As discussed below in Part III of this Article, the meaning of "sustainable management" in practice turns upon the exact relationship between the social, economic, and cultural values expressed in the first part of the definition and the ecological values expressed in the latter part.³⁸

36. The narrowing of the concept was largely the result of the National Party's full-fledged reassessment of the original legislative proposal after it unseated the Labour government in the 1990 election. The National government's review of the resource management legislation specifically noted that it viewed the Brundtland Commission's concept of "sustainable development" as being broader than "sustainable management." Simon D. Upton, *Purpose and Principle in the Resource Management Act*, 3 WAIKATO L. REV. 17, 33 (1995) (citing Review Group, Wellington, Ministry for the Environment, *Discussion Paper on the Resource Management Bill*, December 1990, at 7); PALMER, *supra* note 2, at 167 (discussing the review group report). The National Government's review group chose to emphasize "the need to safeguard the ability of future generations to meet their needs, and the need to avoid, remedy or mitigate any adverse effects on the environment." *Id.* At the same time, the review group suggested that "sustainable management," as contrasted with Brundtland's "sustainable development," does not explicitly include considerations of global redistribution of wealth and social inequities. *Id.*; see also Phillipson, *supra* note 2, at 223 n.5.

37. RMA § 5(2).

38. See *infra* notes 201-217 and accompanying text.

The purpose of promoting sustainable management is set forth in Part II of the RMA with other principles that govern environmental management under the RMA regime. Sections 6 through 8 enumerate a number of matters that decisionmakers must consider when discharging their responsibility to promote sustainable management. Under Section 6, for example, decisionmakers must specifically “recognize and provide for” matters of “national importance,” such as the natural character of the coastal environment, wetlands, lakes and rivers, and the protection of significant indigenous vegetation and habitat for indigenous fauna.³⁹ Section 7 requires decisionmakers to “have particular regard to” other factors, including intrinsic values of ecosystems and the efficient use and development of natural and physical resources.⁴⁰ Under Section 8, decisionmakers must also

39. RMA § 6. Section 6 provides in full:

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 recognize 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. The words “waahi tapu” and “taonga” are Maori terms meaning sacred places and treasures, respectively. See Furuseth & Cocklin, *supra* note 2, at glossary of Maori terms.

40. RMA § 7. Section 7 provides in full:

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;
- (aa) The ethic of stewardship;
- (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;

“take into account the principles of the Treaty of Waitangi” governing the New Zealand government’s relationship with indigenous Maori.⁴¹

2. *Effects-Based Management*

A second hallmark of the RMA is the concept of effects-based management,⁴² the notion that environmental regulation should focus on the environmental effects of activities rather than the activities themselves. New Zealand’s earlier laws – notably the Town and Country Planning Act – typically aimed to achieve their objectives by directly addressing particular activities or resource uses. For example, like land use zoning schemes common in the United States, land use plans under the TCPA specified geographic zones in which particular activities were permitted as of right, others were categorically prohibited, and still others were prohibited absent “consent” by the relevant government authority.⁴³ Typically those activities would be listed by name. A person who wished to carry on a particular activity could consult the appropriate schedules of a land use plan and easily determine whether the activity was permitted in a particular place and whether some kind of “consent” was required.

The RMA shifts away from such blunt, prescriptive regulatory mechanisms toward a performance-based approach. The RMA focuses not on controlling activities or resource uses *per se* but on avoiding, mitigating and remedying the effects activities and resource uses have on the environment.⁴⁴ The RMA generally seeks to be permissive, theoretically allowing nearly any activity in any place if rigorous analysis shows that the effects can be adequately avoided, remedied, or mitigated, and

(h) The protection of the habitat of trout and salmon.

41. RMA § 8. Section 8 provides in full:

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).

42. Although the RMA does not use the term “effects-based management,” the Environment Court and New Zealand practitioners and scholars have often described the general approach of the RMA as “effects-based.” See, e.g., Nugent Consultants Ltd. v. Auckland City Council [1996] N.Z.R.M.A. 481; St. Lukes Group Ltd v. North Shore City Council [2001] N.Z.R.M.A. 412.

43. See B.H. Davis, *supra* note 2, at 104-05.

44. Furuseth & Cocklin, *supra* note 2, at 259; see RMA § 5(2)(c).

are otherwise consistent with the statute's goal of promoting sustainable management.⁴⁵

The RMA emphasizes effects-based management in several ways. First, the definition of sustainable management incorporates the notion that adverse effects on the environment should be avoided, remedied, or mitigated.⁴⁶ The RMA then separately imposes a specific duty on all persons to avoid, remedy, and mitigate adverse effects of activities on the environment.⁴⁷ Further, when adopting environmental and resource management plans,⁴⁸ governmental authorities must consider the environmental effects and alternatives to specific plan provisions.⁴⁹ Finally, to facilitate effects-based management, the RMA adopts an environmental impact assessment scheme in which proponents of individual projects requiring permits, whether public or private, must submit to the permitting authority an assessment of environmental effects.⁵⁰ The actual and potential effects of the proposed activity are essential considerations for government authorities determining whether to subject a development application to public review and ultimately whether to grant the requested resource consent (permit).⁵¹

The broad scope of effects-based management under the RMA is exemplified by the expansive construction of the terms "environment" and "effect." Without actually defining "environment" in any limiting respect, the RMA provides:

[u]nless the context otherwise requires, "Environment" includes—(a) ecosystems and their constituent parts, including people and communities; and (b) All natural and physical resources; and (c) Amenity values; and (d) The social,

45. Simon Upton, the Minister for the Environment for the National Party-led government when the RMA was enacted, emphasized the permissive, liberal aspects of the RMA in his speech to the New Zealand Parliament upon the third reading of the Resource Management Bill, calling the new approach a "more liberal regime for developers," because it limited government intervention in economic activities. Upton, *supra* note 36, at 26. Under the RMA, he argued, "[b]enefits will flow from there being fewer but more targeted interventions. Better environmental quality will be achieved with fewer restrictions on the use and development of resources, but higher standards in relation to their use." *Id.* at 24

46. RMA § 5(2)(c).

47. RMA § 17.

48. See *infra* notes 79-93 and accompanying text.

49. RMA § 32.

50. RMA § 88(4).

51. RMA § 94 (public notification), §§ 104 and 105 (considerations for granting consents).

economic, aesthetic, and cultural conditions which affect . . .
or which are affected by those matters.⁵²

Indeed, the RMA provides that “natural and physical resources” include “land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures.”⁵³ The definition of “effect” is similarly expansive.⁵⁴ Thus, effects-based management must take into consideration an activity’s or policy’s effects on the “environment” whether positive or adverse; temporary or permanent; past, present or future; singular or cumulative; highly probable to occur; or improbable to occur but potentially of high impact.⁵⁵

3. *Promoting Public Participation*

The goal of broad public participation in environmental decisionmaking is the third cornerstone theme of the RMA. The RMA embraces the notion that public participation is, for both instrumental and intrinsic reasons, an essential element of sustainability. Instrumentally, the reformers accepted that better environmental decisions would likely result from a greater flow of information, including information held or developed by the members of local communities.⁵⁶ Intrinsically, the reformers believed that open public participation promotes both fairness

52. RMA § 2. That the term “environment” is meant to be broad and inclusive is underscored by the use of the word “includes” rather than “means,” which is employed in nearly every other definition in the RMA. *See id.*

53. RMA § 2.

54. RMA § 3 states in full:

In this Act, unless the context requires otherwise, the term “effect” . . . includes—

Any positive or adverse effect; and

Any temporary or permanent effect; and

Any past, present or future effect; and

Any cumulative effect which arises over time or in combination with other effects—regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

Any potential effect of high probability; and

Any potential effect of low probability which has a high potential impact.

55. RMA § 3.

56. *See e.g.*, MINISTRY FOR THE ENVIRONMENT, PEOPLE, ENVIRONMENT, AND DECISION MAKING: THE GOVERNMENT’S PROPOSALS FOR RESOURCE MANAGEMENT LAW REFORM 55-57 (1988); David Sheppard, *Doing Justice in Environmental Decision-Making*, presented to University of Auckland conference on Environmental Justice and Market Mechanisms, 5-7 (March 1998), at 1-2; Explanatory Note to the Resource Management Bill at p. iii.

and societal acceptance of environmental policies that impact communities.⁵⁷

Eliminating barriers to standing is the RMA's primary strategy for promoting public participation in environmental decisionmaking. The concept of open standing is applied at all levels of decisionmaking under the RMA. The RMA provides that "any person" may make a submission to government entities engaged in environmental and resource management planning⁵⁸ at the national level,⁵⁹ the regional level,⁶⁰ or the local level.⁶¹ Similarly, any person may make a submission to a government entity considering an application for a resource consent if that application is "publicly" processed.⁶²

In addition to providing for open standing at local government proceedings, the RMA aims to eliminate standing as

57. See *id.*; David Grinlinton, *Access to Environmental Justice in New Zealand*, 1999 ACTUS JURIDICA 80, 88. It is worth noting here that the scholarly literature on public participation in the United States demonstrates that merely providing for public participation opportunities does not always bear out these predictions, notwithstanding the good intentions of public participation proponents. The impact of citizens groups on environmental decisions is often limited by factors such as lack of expertise, scant financial resources, and limited political clout. See, e.g., Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L.REV. 263, 273-75 (1999) (reviewing problems with public participation mechanisms); Ann Bray, Comment, *Scientific Decision Making: A Barrier to Citizen Participation in Environmental Decision Making*, 17 WM. MITCHELL L. REV. 1111 (1991); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1714-15 (1975); Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3 (1998); Symposium on Public Participation, 25 ECOLOGY. L.Q. (1999).

58. See *infra* notes 79-93 and accompanying text.

59. RMA § 49.

60. RMA § 65.

61. *Id.*

62. RMA § 96. The RMA establishes a presumption in favor of "notification," or public processing, of applications for resource consents. RMA § 92. In processing a "notified" resource consent application, a consent authority must specifically notify persons likely to be affected by a proposed project and provide public notice. RMA § 93(1). The RMA requires the notice to describe the proposal, invite submissions, and disclose a location where the application file may be viewed. RMA § 93(2). To some extent, local government practice indicates this presumption is illusory. First, according to the Ministry for the Environment's survey of local authorities, 95 percent of all resource consent applications in 1996 through 1999 were processed on a non-notified process. Ministry for the Environment, *Annual Survey of Local Authorities 1998/99* (July 2000), at 10, at www.mfe.govt.nz/new/RMA2000.pdf. Public notification is the gateway to broader participation in the processing of resource consents, since it is a prerequisite for interested parties to make submissions and thereby to secure a right of appeal to the Environment Court. Second, the awarding of costs in the Environment Court has the potential to discourage public participation by increasing its risks. See *infra* notes 204-218 and accompanying text.

a barrier to the Environment Court. Any person who has participated in a government proceeding regarding a planning instrument or a resource consent, by making a submission, generally has a right of appeal to the Environment Court irrespective of any showing of particularized injury.⁶³ Even when he or she has failed or was unable⁶⁴ to make a submission, "any person" may participate in any Environment Court action initiated by another person if he or she has "an interest in the proceedings greater than the public generally."⁶⁵ Further, "any person" may generally apply for a declaration⁶⁶ or an enforcement order⁶⁷ and participate in the Court's proceedings on the application. Finally, any person may request the Court to initiate proceedings regarding an alleged criminal offense under the RMA.⁶⁸

D. The Institutions and Instruments of Environmental Decisionmaking under the RMA

Like all policies, the three fundamental themes of the RMA are chiefly implemented through the institutions and instruments through which the RMA is administered. The RMA employs a tiered planning and review approach to environmental management. It mandates national, regional, and local environmental and resource management planning for the purpose of prescribing policies and rules for achieving sustainable and integrated resource management.⁶⁹

The inter-relationship of planning documents prepared by different government entities is governed by a rule of hierarchical consistency.⁷⁰ In general, each planning document must be consistent with the policies, methods and objectives of a higher-level or same-level planning document. For example, a regional

63. RMA § 120 (resource consents); First Schedule, § 14(1) (policy statements and plans).

64. In non-notified consent application determinations, the RMA provides no opportunity for public submissions. See *infra* notes 104-107 and accompanying text.

65. RMA § 274.

66. RMA § 311 (declarations).

67. RMA § 316 (enforcement orders). One notable exception is that only a local authority may apply when seeking the enforcement of certain rules or resource consent conditions relating to discharges. *Id.* § 316(2).

68. RMA § 338(4).

69. At the national level, both the Ministry for the Environment and the Ministry of Conservation have planning responsibility under the RMA. At the regional and local levels, planning is conducted by regional and district (sometimes called "local") councils. See *infra* notes 79-93 and accompanying text.

70. *E.g.* RMA § 55 (requiring local government entities to ensure that local plans do not conflict with a national policy statement).

authority's planning documents must be consistent with statements of national policy,⁷¹ and a district council's plans must be consistent with both regional plans or policy statements and with national policy statements.⁷² In addition to establishing a system of resource planning, the RMA establishes a permitting (or resource consent) system applicable to certain individual projects that are otherwise not permitted as of right.⁷³

1. *National Institutions and Instruments*

The RMA provides for two ways of developing national environmental policy. First, the Minister for the Environment may issue national policy statements for the purpose of setting national policy on "matters of national significance that are relevant in achieving the purpose of [the RMA]."⁷⁴ The RMA intends national policy statements to address environmental matters of broad national, rather than mere local or regional, importance.⁷⁵ Although national policy statements do not set specific rules and are not specifically enforceable, they have potentially wide impact by operation of the rule of consistency. When a national policy statement becomes effective, each district and regional council is required to ensure that its own policies and plans are consistent with the national policy statement and, with public input, to rectify any inconsistencies.⁷⁶ Second, the

71. RMA § 62(2) ("A regional policy statement shall not be inconsistent with any national policy statement, New Zealand coastal policy statement, or water conservation order."); RMA § 67(2) ("A regional plan shall not be inconsistent with (a) Any national policy statement or New Zealand coastal policy statement; or (b) Any water conservation order; or (c) The regional policy statement or any other regional plan of the region concerned.").

72. RMA § 75(2) ("A district plan shall not be inconsistent with (a) Any national policy statement or New Zealand coastal policy statement; or (b) Any water conservation order; or (c) The regional policy statement or any regional plan of its region in regard to any matter of regional significance or for which the regional council has primary responsibility under Part IV.").

73. *See generally* RMA Part VI, §§ 87-150.

74. RMA § 45.

75. The New Zealand coastal policy statement is an example of one particular kind of national policy statement. The RMA mandated the preparation of the New Zealand coastal policy statement by the Minister of Conservation. The purpose of the coastal policy statement is to set national priorities for the management of the coastal marine area in accordance with the purpose of the RMA. The first New Zealand coastal policy statement was issued in May 1994. Website of the Ministry for the Environment, at <http://www.mfe.govt.nz/management/rma/subms.htm#nzpolicy> (last visited July 18, 2001).

76. RMA § 55. *See also* WILLIAMS, *supra* note 28, at 106 (citing Report of the Review Group on Resource Management Bill, Feb. 11, 1991, at 35-36). Commentators have suggested that national policy statements be prepared for a

RMA empowers the Governor-General, upon the recommendation of the Ministry for the Environment, to set binding regulations, in the form of “national environmental standards” relating to the use or development of natural resources, such as air quality, soil contamination, noise, and water quality and quantity.⁷⁷ To date, however, the national government has not issued any discretionary national policy statements or any national environmental standards.⁷⁸ The paucity of national policy statements and standards that would bind local government authorities in environmental policymaking enhances the Environment Court’s policymaking influence under the RMA.

2. *Regional and Territorial Authorities and Instruments*

The most important institutions in the RMA framework are regional and territorial authorities. Regional authorities bear primary responsibility for ensuring the integrated management of the natural and physical resources within each region.⁷⁹ They also bear primary responsibility for managing the region’s water and air resources, as well as land uses which particularly affect water or air quality.⁸⁰ Regional councils may act by adopting a regional policy statement and regional plans. The RMA requires each regional authority to prepare a regional policy statement “to achieve the purpose of the Act by providing an overview of the resource management issues of the region and the policies and methods to achieve the integrated management of the natural

number of environmental issues, such as carbon dioxide emissions and the irradiation of food. See WILLIAMS, *supra* note 28, at 105

77. RMA § 43. New Zealand’s Governor-General is the representative of New Zealand’s head of state, the English monarch. The Governor-General nominally exercises executive power, but only upon the advice and counsel of parliamentary ministers. See New Zealand Constitution Act of 1986, §§ 2-3.

78. Submissions on Proposed District and Regional Plans and Policy Statements, at <http://www.mfe.govt.nz/management/rma/subms.htm> (last visited April 4, 2002). The failure to issue any discretionary national policy statements reflects the national government’s preference for environmental policy to be set at the regional and district levels, with the Ministry for the Environment acting primarily through the issuance of nonbinding policy guidances describing what it believes to be good practice. See, e.g., MINISTRY FOR THE ENVIRONMENT, GOOD-PRACTICE GUIDE FOR AIR QUALITY MONITORING AND DATA MANAGEMENT (2000), at www.mfe.govt.nz/new/monitoringforweb2.pdf, (recommending to regional councils a process for developing regional air quality monitoring programs and evaluating air quality monitoring methods); KEEPING IT FAIR: A GUIDE TO CONDUCT OF HEARINGS UNDER THE RESOURCE MANAGEMENT ACT 1991 (2001), at http://www.mfe.govt.nz/new/Keeping_it_fair_overview.pdf (recommending good practice for hearings)

79. RMA § 30(1)(a).

80. RMA § 30(1)(c), (f).

and physical resources within the whole region.”⁸¹ The Environment Court has called regional policy statements the “heart of resource management” for each region.⁸²

Unlike the regional policy statement, which merely sets forth broad issues and objectives for integrated environmental management, a regional plan may include specific rules regarding resource use. Rules in regional plans may prohibit, regulate or allow specific activities.⁸³ Under the rule of consistency, a regional plan may not be inconsistent with any higher level planning document, including national policy statements and the regional policy statement.⁸⁴ Each regional plan must also be consistent with other regional plans in effect for the same region.

In addition to regional policy statements, regional councils have discretion to address particular environmental issues through more detailed regional plans.⁸⁵ The purpose of regional plans is “to assist the regional council to carry out any of its functions in order to achieve the purpose of the Act.”⁸⁶ Although regional plans may be prepared to address any function of a regional council,⁸⁷ the RMA lists a number of circumstances or considerations which would appropriately be addressed in regional plans. These include significant conflicts between development and protection of natural resources, significant need or demand for protection of particular resources with regional importance, and land uses that have actual or potential adverse effects on soil conservation or the quality of water or air.⁸⁸

Territorial, or district, councils have narrower jurisdiction both geographically and environmentally. Their limited, primary function is to control the effects of land use, subdivision of land and noise.⁸⁹ The RMA mandates the preparation of district plans,

81. RMA § 59.

82. *North Shore City Council v. Auckland Reg'l Council* [1994] N.Z.R.M.A. 521, 526.

83. RMA § 68(1).

84. RMA § 67(2).

85. RMA §§ 63-70.

86. RMA § 63(1).

87. RMA § 65(2)(a).

88. RMA § 65(3)(a) to (h).

89. RMA § 31. The High Court summarized the authority of regional councils as follows:

[R]egional councils have the task of establishing and implementing policies and methods to achieve the integrated management of the resources of the region, and of preparing policies as to any effects of the use of land which are of regional significance. They also have the responsibility for controlling

which are the fundamental instruments to carry out this function.⁹⁰ A district plan may promulgate rules providing for permitted, regulated, and prohibited uses of land,⁹¹ as well as subdivision and esplanade reserves.⁹² Before adopting any particular rule, a territorial authority must "have regard" to the actual or potential effects of the subject activity on the environment, and any rules in a district plan must be consistent with regional plans, regional policy statements, and national policy statements.⁹³

3. *Resource Consents*

In addition to national, regional and territorial planning and policy instruments, the RMA requires proponents of certain resource uses to obtain specific permission, or resource consent, from the appropriate local or regional government authority. The resource consent process enables environmental managers to scrutinize environmental issues associated with particular proposals for resource use.⁹⁴ To obtain a resource consent, an

the use of land for the purpose of soil conservation and the maintenance of quantity and quality of water, for the control of other activities relating to water and for the control of discharges of contaminants. Territorial authorities have the functions of establishing and implementing policies to achieve the integrated management of the effects of the use of land and resources in their district, and the control of the actual or potential effects of use, including the avoidance or mitigation of adverse effects. Their responsibilities also include the control of subdivision, and of matters relating to noise and to activities in relation to the surface of rivers and lakes.

Application by Canterbury Regional Council [1995] N.Z.R.M.A. LEXIS 18, *8-*9.

90. RMA § 72-73.

91. RMA § 76(3).

92. RMA § 77.

93. RMA §§ 82, 376(3), 368(3).

94. *Royal Forest and Bird Protection Soc'y of New Zealand, Inc. v. Manawatu-Wanganui Reg'l Council* [1996] N.Z.R.M.A. 241, is a good example. An applicable regional plan required a resource consent for activities, including cutting trees and disturbances of land surfaces that would expose land or soil to erosion. The applicant sought a resource consent for a proposal to log about 300 hectares of native forest on private land. In deciding whether to uphold the regional council's grant of consent, the Environment Court considered the effects of proposed roads, felling trees, the proposed removal procedures, and the overall effects on the forest ecosystem, including removal of seed sources, canopy die-back, and damage to habitat of native fauna and flora. *Id.* at 264-65. The court then assessed these effects in the context of the requirements of "sustainable management" and other factors that the RMA requires to be considered, including consistency with relevant planning documents. *Id.* at 265-70. The resource consent process is similar to the application for a permit under many American environmental laws, and most particularly resembles the wetlands program of the Clean Water Act, 42 U.S.C. § 1344 (1994), in which the

applicant must prepare a project-specific analysis of the proposal's environmental effects.⁹⁵ After considering a number of different factors,⁹⁶ the consent authority, usually a regional or district council, must decide whether to consent to the activity or impose conditions to address environmental effects. The particular considerations for determining whether to grant a resource consent depend on how the particular proposed activity is characterized by the rules in a plan.⁹⁷

There are five types of resource consents: land use consents, subdivision consents, coastal permits, water permits, and discharge permits.⁹⁸ A land use consent is required if a land use would contravene a rule in a district plan.⁹⁹ Resource consent is required for subdivision unless the subdivision is expressly permitted by a rule in a district plan.¹⁰⁰ Similarly, no person may take, use, dam or divert water (or heat or energy from geothermal water),¹⁰¹ and no person may discharge contaminants to air, land or water,¹⁰² without obtaining resource consent unless expressly permitted by a rule or regulation.¹⁰³

Army Corps of Engineers may grant a permit for filling wetlands after considering certain factors, including the "public interest."

95. RMA § 88.

96. Section 104 of the RMA sets forth factors councils must "have regard to" when considering resource consent applications. These factors include: actual or potential effects on the environment of allowing the activity; national policy statements; regional and district plans; water conservation and heritage orders; and any other factor the consent authority considers relevant and reasonably necessary to consider. Significantly, consideration of all such factors (and presumably the resource consent itself) is explicitly made "[s]ubject to Part II."

97. A plan may designate an activity in one of five ways. A "permitted activity" is one that is allowed without any requirement for a resource consent. A "controlled activity" is one for which the applicant is entitled to resource consent, subject to council consideration of particular factors specified in the plan and possible imposition of conditions related to those factors. A "discretionary activity" is one for which a consent authority retains discretion to grant or deny, or to impose conditions on resource consent. The degree of discretion retained by the consent authority may be complete or limited and must be specified in the plan. A "non-complying activity" is one that contravenes a rule in a plan but is not listed as a "prohibited activity;" resource consent may be granted or denied. A "prohibited activity" is one which is expressly disallowed by a plan; as such, it may not be pursued even with resource consent. WILLIAMS, *supra* note 28, at 106.

98. RMA § 87.

99. RMA § 9; *see* RMA § 87(a).

100. RMA § 11.

101. RMA § 14.

102. RMA § 15.

103. A resource consent for land use or subdivision is for an unlimited duration unless otherwise specified. Other resource consents may be issued for a period of up to thirty-five years, but run for a term of five years if no period is specified. RMA § 123. Resource consents regarding land uses and subdivision attach to the land and may be transferred with the land. Water permits may be transferred in some cases.

The public's opportunity to participate or provide comment in resource consent determinations depends whether the applications are processed on a notified or a non-notified basis. "Notified" resource consent applications are open for public input. "Any person" may make a submission before a decision is made on the merits of the application.¹⁰⁴ "Non-notified" applications are not subject to public submissions and are decided by the consent authority without formal public participation.¹⁰⁵ With limited exceptions, the RMA requires applications to be notified unless the proposal will have only minor effects and written approval has been obtained from all persons likely to be adversely affected by the proposed activity.¹⁰⁶ Despite this statutory preference for notification of resource consent applications, however, the Ministry for the Environment has estimated that, in practice, district and regional councils process approximately 95 percent of applications on a non-notified basis.¹⁰⁷

All water permits may be transferred to the new owner or occupier of the site to which they apply. Permits to divert, obstruct, or use water may be transferred to another site in some circumstances.

104. RMA § 96(1).

105. See RMA § 94 (providing for exceptions to the notification requirement).

106. RMA § 94(2)(a)(b).

107. Ministry for the Environment, *Annual Survey of Local Authorities 1998/99* (July 2000), at 10, at <http://www.mfe.govt.nz/new/RMA2000.pdf>. The fact that such a huge percentage of resource consent applications are processed with no possibility of public comment and review by the Environment Court reveals that the RMA's promotion of public participation by allowing open standing is substantially limited in practice.

A comparison with the opportunity for public participation in the context of a proposal for major federal action under the National Environmental Policy Act "NEPA", 42 U.S.C. §§ 4321 - 4370 (1994), is instructive. NEPA requires extensive public participation whenever a project requires the preparation of an environmental impact statement, i.e., when the proposal constitutes "major Federal action[] significantly affecting the quality of the human environment," 42 U.S.C. § 4332(C) (1994). An agency must publish a notice of intent in the Federal Register soliciting public input in the development of the EIS, 40 C.F.R. § 1501.7 (2001), invite public comment on the draft EIS, 40 C.F.R. § 1503.1(a)(3) (2001), respond to public comments received, 40 C.F.R. § 1503.4(a) (2001), and prepare a public record of its decision regarding the proposal, 40 C.F.R. § 1505.2 (2001). Although NEPA does not impose agency-level public participation requirements for proposals that warrant only an environmental assessment, see 40 C.F.R. § 1508.9 (2001), aggrieved citizens may seek judicial review of any governmental decision that implicates NEPA under the Administrative Procedure Act, 5 U.S.C. § 702 (1994), as long as they can satisfy the traditional requirements of standing, exhaustion, and ripeness. Importantly, the doctrine of exhaustion does not limit the availability of judicial review to those that participate in the administrative process where there is no opportunity for public participation at the agency level. See *Darby v. Cisneros*, 509 U.S. 137 (1993) (holding that 5 U.S.C. § 704 (1994) requires exhaustion only where a statute or agency rule requires an administrative appeal). By contrast, under the RMA, in spite of its textual

4. Summary

The RMA established a tiered resource management system in which local government institutions establish environmental policies and rules of general applicability through policy statements and plans and make site and project specific permitting decisions subject to review by the Environment Court. The basic structure resembles the land use planning system for national forests in the United States. The National Forest Management Act mandates each national forest to prepare a land and resources management plan¹⁰⁸ based on “integrated consideration of physical, biological, economic, and other sciences.”¹⁰⁹ Those plans establish desired resource conditions,¹¹⁰ policy objectives, including the “desired levels of uses [and] values,”¹¹¹ and standards, in the form of requirements and limitations, for achieving those conditions.¹¹² Many activities that actually impact the environment, however, may be authorized only through individual site-specific decisions involving forest service projects, permits for private activities, or timber contracts.¹¹³ As with resource consent decisions under the RMA, those site-specific decisions must be consistent with the applicable plan and be taken only after specific consideration of environmental effects.¹¹⁴

However, there are some significant points of departure. Unlike decisions under NFMA, which apply only to public lands within the national forest system and private activities on those lands, the RMA applies to public and private activities whether located on public or private land. Further, as described more fully below, both planning and site-specific decisions under the RMA are subject to *de novo* review by the Environment Court. This stands in sharp contrast to the deferential review of decisions relating to activities on national forests.¹¹⁵ As discussed

commitment to open standing, the decision by a regional or district council not to “notify” a resource consent application effectively bars the possibility of judicial oversight, unless sought by the project applicant.

108. 16 U.S.C. § 1604(a) (1994).

109. *Id.* § 1604(b).

110. 36 C.F.R. § 219.7(a) (2001).

111. *Id.* § 219.7(b).

112. *Id.* § 219.7(c).

113. See 16 U.S.C. § 1604(i) (1994); 36 C.F.R. § 219.10 (2001).

114. *Id.*; see *Ohio Forestry Ass’n, Inc., v. Sierra Club*, 523 U.S. 726, 729-30 (1998) (discussing the relationship between forest plans and site-specific decisions to permit logging).

115. Federal courts review decisions under the National Forest Management Act under a deferential standard and may overturn the agency’s decision only if it is

below, formal adjudication in the Environment Court represents an essential arm of the RMA framework. The Environment Court's role in overseeing the planning and the resource consent processes is sweeping.

II

THE ROLE OF THE ENVIRONMENT COURT UNDER THE RMA

A. *A Brief History of the Environment Court*

The Environment Court was not a creation of the RMA. It has existed in some form since the earliest days of land use planning in New Zealand. Its first progenitor, the Planning Appeal Board, was established in 1953 for the purpose of adjudicating land use disputes under town planning schemes.¹¹⁶ The New Zealand Parliament sought to create a specialist tribunal, "more or less judicial" in nature, that would ensure "justice as between the people and the [planning] authority."¹¹⁷ Chaired by a barrister, the Board operated as a professional, full-time, multi-disciplinary body, that would resolve individual land use disputes on the basis of evidence received at hearings held around the country.¹¹⁸ By the middle 1960s, the Planning Appeal Board had developed a substantial body of case law establishing land use planning principles applicable to rural, residential, commercial and industrial zones and to nature reserves.¹¹⁹

Commentators recognized that the unique position of these specialist planning appeal boards derived from the nature of the issues they addressed, their probing scope of review, and the expertise that they brought to the task. R.J. Bollard (now a

"arbitrary or capricious, an abuse of discretion." 5 U.S.C. § 706 (1994). Further, the scope of their review of the agency's decision is generally limited to the administrative record before the agency when it made its first-instance decision. *E.g.*, *Southwest Ctr. for Biological Diversity v. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996); *Preserve Endangered Areas of Cobb's History, Inc. v. Army Corps of Eng'rs*, 87 F.3d 1242, 1246 (11th Cir. 1996). The ripeness doctrine, which aims to prevent courts from "entangling themselves in abstract disagreements over administrative policies," further limits the role of United States courts in forest management by foreclosing review of policy decisions incorporated in the plan until after some site specific decision has implemented the policy. *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 732-33 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967)).

116. Town and Country Planning Act of 1953.

117. David Sheppard, *Forty Years of Planning Appeals*, RESOURCE MGMT. NEWS, May/June 1995, at 20 (citing 299 Parliamentary Debates at 809-10 (1935)).

118. *Id.* (citing 299 Parliamentary Debates at 689 (1953)).

119. *Id.* Due to increasing caseloads in the 1960s, the Planning Appeal Board was twice supplemented by additional appeal boards. *Id.*

retired Environment Court Judge), for example, suggested that the Boards' decisions were often "of far greater import" than ordinary court decisions because they involved issues of widespread public interest, precedential value, and large sums of money.¹²⁰ He further observed that the nature of appeal board hearings differed from ordinary judicial proceedings in at least one important respect: the boards exercised the power of *de novo* review on questions that inevitably involved conflicts between public interests and private rights.¹²¹ As Bollard summarized:

The outcome of an Appeal Board hearing reflects the planning and administrative experience of Board members, enabling them properly to assess the evidence adduced (the extent and quality of which varies from case to case), and to foresee the overall effect of a planning decision beyond the bounds that the individual may conceive as owner of the land under consideration. What may seem illogical to the individual appellant, may be quite logical in terms of wider planning concepts and experience.¹²²

Thus, the New Zealand Parliament bestowed upon the Appeal Boards the responsibility of protecting the public interest by applying expert knowledge and "enlightened opinion" to an essentially judicial function of determining individual rights regarding land use.¹²³

In the late 1970s, the New Zealand Parliament validated and expanded the Planning Appeal Board model by consolidating the boards into a single Planning Tribunal and elevating the tribunal's status to a court of record. Except for a period in the early 1980s when the power of the Planning Tribunal to review certain large-scale projects was curtailed,¹²⁴ no major changes

120. R.J. Bollard, *The Important Role of Town and Country Planning Boards*, N.Z. L.J. 233 (June 5, 1973).

121. *Id.* at 234.

122. *Id.*

123. *Id.* (citing *Turner and Others v. Allison and Others*, N.Z.L.R. 833, 843 (1971)).

124. The expanding role of the Planning Tribunal was briefly checked by the National Development Act of 1979. Sheppard, *supra* note 117, at 22-23. In order to streamline environmental review, Parliament relegated the Planning Tribunal to an advisory role on certain development projects, called "Think Big" projects, that were deemed vital to the nation's strategic interest. After an inquiry into the merits of granting consents for such projects, the Planning Tribunal could merely recommend to the Minister of National Development whether the project should proceed and, if so, under what conditions. Ultimate authority, however, rested with the executive Government, which had no obligation to follow the Planning Tribunal's recommendations. The Parliamentary debates regarding the proper role of the Planning Tribunal (as opposed to the democratically-accountable elected officials) in deciding the fate of the Think Big projects reflected a growing wariness of the

were made to the Planning Tribunal until the RMA was enacted in 1991.

*B. The Powers and Functions of the Environment Court Under the RMA*¹²⁵

The RMA expanded the powers of the Planning Tribunal yet again by vesting it with a wider range of functions respecting policy planning, resource consents, and environmental enforcement. Under the RMA, virtually every important mechanism for environmental management is subject to review by the Environment Court, including regional policy statements, regional and district plans, resource consents, and water conservation orders. The Environment Court exercises its authority under the RMA in three areas. First, it has the power to make certain declarations of law.¹²⁶ Second, it has the power to review on a *de novo* basis¹²⁷ the decisions of local and regional government authorities.¹²⁸ Finally, it has the power to enforce the duties of the RMA through civil or criminal proceedings.¹²⁹ In exercising its jurisdiction, the Environment Court has the status and powers of an ordinary trial court,¹³⁰ but is not bound by the usual procedural and evidentiary formalities of other courts of law in New Zealand.¹³¹

1. The Power to Make Declarations

The RMA significantly expanded the Environment Court's power to make declarations regarding "the existence or extent of

Planning Tribunal's expanding authority. The National Development Act was repealed in 1986.

125. See *supra* note 4 on nomenclature.

126. See generally RMA § 310-313.

127. See *infra* notes 166-176 and accompanying text.

128. RMA § 120 (providing for appeal of decisions on resource consents); RMA First Schedule, § 14.

129. See generally RMA §§ 314-321.

130. RMA §§ 278 (Environment Court has the powers of a District Court), 247 (Environment Court has the powers inherent in a court of law).

131. The Environment Court has the authority to set its own rules of procedure, and the RMA expressly states that it may conduct proceedings "without procedural formality where this is consistent with fairness and efficiency." RMA § 269(1)-(2). Further, the Environment Court is "not bound by the rules of law about evidence that apply to judicial proceedings", RMA § 276(2) and "may receive anything in evidence that it considers appropriate to receive." RMA § 276(1)(a). The Environment Court has issued a "Practice Note" indicating the procedures it usually follows. See Environmental Court-Practice Notes, http://www.courts.govt.nz/environment_court/pnote.html (last visited April 4, 2002).

any function, power, right, or duty” under the RMA.¹³² This power has been invoked by litigants for a variety of purposes, including to obtain guidance on the division of authority between regional and territorial authorities,¹³³ and to determine whether certain acts by government entities violate the general duty to avoid, remedy or mitigate adverse environmental effects.¹³⁴ Moreover, the Environment Court is empowered to declare whether or not there are inconsistencies between provisions in various policy statements and plans and whether or not any act or omission contravenes or is likely to contravene any rule in a plan or proposed plan.¹³⁵ Any person may seek declarations on such issues.¹³⁶

The decision to issue a declaration is a matter of discretion for the Environment Court. Although the Court seems reluctant to make declarations about abstract issues or issues not adequately framed by specific facts and argument, it occasionally has been willing to rule on uncontested issues when it believed that the public interest warranted judicial interpretation.¹³⁷

The Environment Court’s broad power to make declarations offers several substantial opportunities for environmental litigants. First, it enables the Environment Court to make pronouncements on issues that otherwise might be beyond its reach in appeals and references. One example involves the public notification of resource consent applications. The failure of local governments to notify applications does not give rise to a right of appeal to the Environment Court and is usually challenged in

132. RMA § 310(a).

133. *E.g.* Application by Auckland City Council [1992] 2 N.Z.R.M.A. 9; Application by Christchurch City Council [1995] N.Z.R.M.A. 129.

134. *Sayers v. Western Bay of Plenty Dist. Council* [1992] 2 N.Z.R.M.A. 143; *Kaimanawa Preservation Soc’y, Inc. v. Attorney-General* [1997] N.Z.R.M.A. 356, 360.

135. RMA § 310(b) and (c).

136. *See* RMA § 311(1) and (2).

137. *See* Applications by Canterbury Frozen Meat Co. Ltd. [1993] 2 N.Z.R.M.A. 282 (deciding, after consideration, to make a declaration even though the application was unopposed); Application by Christchurch City Council [1995] N.Z.R.M.A. 129 (appointing an *amicus curiae* to present opposing arguments); *North Shore City Council v. Auckland Reg’l Council* [1994] N.Z.R.M.A. 521, 526 (“If there are differences . . . among responsible public authorities [as to the scope of the Regional Council’s authority], it is desirable that the differences should be resolved promptly.”); Application by Project Adventures, Ltd. and Stevens [1994] N.Z.R.M.A. 27 (holding that where there are interested or affected parties who have been served, the fact that no parties appeared at the hearing in opposition to the requested declaration does not deprive the court of power to make “an effective and binding declaration”).

judicial review proceedings in the High Court.¹³⁸ However, on occasion, the Environment Court has entertained applications for declarations that consent authorities had the duty to notify the public about particular resource consent applications.¹³⁹ Second, litigants may seek declarations regarding the Crown's duties under the RMA. This is the only enforcement mechanism (although indirect) that can be used to enforce the Crown's compliance with the RMA.¹⁴⁰ Third, the declaration procedure allows litigants to resolve disputes at an early stage and possibly prevent the unnecessary expenditure of resources.

2. *The Power to Decide References and Appeals*

The Environment Court is empowered to review decisions by regional and territorial authorities. This power provides for Environment Court review of the basic planning instruments – regional policy statements and regional and district plans – as well as resource consents. Of the major policy instruments, only national policy statements are not reviewable in the Environment Court.¹⁴¹

Although any person who makes a submission to a council regarding a plan or policy statement has the right to Environment Court review of any decision respecting that submission, such “references” to the Court must be narrow. They are limited in scope to the specific provisions of a plan or policy statement that a litigant challenged in a submission to the council.¹⁴² When deciding the merits of such a reference, the Environment Court, after a public hearing, may either confirm or “direct the local authority to modify, delete, or insert” any provision referred to it.¹⁴³ Local authorities must make any amendments necessary to effectuate the Environment Court's

138. *E.g.*, *Quarantine Waste NZ, Ltd. v. Waste Resources Ltd* [1994] N.Z.R.M.A. LEXIS 25; *Ports of Auckland Ltd. v. Auckland Reg'l Council*, [1995] N.Z.R.M.A. 233; *Elderslie Park, Ltd. v. Timaru District Council* [1995] N.Z.R.M.A. 433 [1995] N.Z.R.M.A. LEXIS 17.

139. *E.g.*, *Foodstuffs (S. Otago) v. Christchurch City Council* [1992] 2 N.Z.R.M.A. 154.

140. *See WILLIAMS, supra note 28, at 625.*

141. RMA §§ 46-52 (requiring the appointment of a Board of Inquiry to consider public comment on any proposed National Policy Statement, but providing, in § 52, that the Minister for the Environment “may (but need not) change the proposed national policy statement as he or she thinks fit”).

142. RMA, First Schedule, § 14.

143. RMA, First Schedule, § 15(2).

decisions.¹⁴⁴ Accordingly, the Environment Court is the final arbiter of whether particular provisions are included in plans and regional policy statements.

The Environment Court is similarly empowered to review decisions on applications for resource consents. Any person who makes a submission to a local authority regarding a resource consent application, as well as the consent applicant, may appeal the local authority's decision to the Environment Court,¹⁴⁵ which may "confirm, amend, or cancel" the decision.¹⁴⁶ The power to amend or cancel resource consent decisions, including any conditions to the consent imposed by a local government authority,¹⁴⁷ makes the Environment Court ultimately responsible for deciding any resource consent application,¹⁴⁸ subject to review by higher courts only on issues of law.

3. *The Power to Issue Enforcement Orders*

The Environment Court has wide powers to issue enforcement orders under the RMA. "Any person" may apply to the Court for an enforcement order to: (1) enjoin a person from taking actions that contravene provisions of the RMA, regulations, rules in regional or district plans, or resource consents; (2) enjoin a person from action that "is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment";¹⁴⁹ (3) require a person affirmatively to act to ensure compliance with the RMA's provisions and instruments or to avoid, remedy, or mitigate adverse effects on the environment caused by or on behalf of that person; and (4) compensate others for reasonable costs associated with avoiding, remedying or mitigating effects caused by a person's failure to comply with one of several instruments, including rules in plans or resource

144. RMA, First Schedule, § 16. The Minister of Conservation, however, must approve any changes to regional coastal plans that are directed by the Environment Court. RMA, First Schedule, § 18.

145. RMA § 120.

146. RMA § 290(2).

147. See RMA § 108.

148. The same is true for resource consent applications that have been "called in" by the Minister for the Environment. The RMA gives the Minister for the Environment the power to "call-in" a resource consent that raises issues of national significance and to decide the application himself. RMA §§ 140-50. The Minister's decision is subject to public comment and ultimately to review by the Environment Court on the same basis as any other resource consent application. RMA § 149(3).

149. RMA §314(1)(a)(ii).

consents.¹⁵⁰ A local authority may apply for enforcement orders under some additional circumstances.¹⁵¹

This far-reaching authority to issue enforcement orders is a potentially powerful mechanism for enforcing duties that arise under the RMA, particularly the general duty to avoid, remedy or mitigate any adverse environmental effects of applicable plans.¹⁵² Issuance of an enforcement order is a matter of discretion for the Environment Court. The burden rests upon an applicant to make the case for an enforcement order, and the Court will give the benefit of the doubt to the person against whom the order is sought.¹⁵³

C. *The Nature of Environment Court Adjudication*

1. *Structure of the Environment Court*

As constituted under the RMA, the Environment Court is a court of record¹⁵⁴ including both Environment Judges and Environment Commissioners.¹⁵⁵ Environment Judges are judges of law who hold joint appointments as District Court Judges or Maori Land Court Judges, though they serve full time on the Environment Court.¹⁵⁶ Appointed by the Governor-General, they hold life tenure.¹⁵⁷ To ensure that the Environment Court “possesses a mix of knowledge and expertise” in matters coming before it, the RMA also provides for non-judicial Environment

150. RMA §§ 314, 316.

151. RMA § 316.

152. See RMA § 17. The Environment Court has issued enforcement orders against such activities as the construction of an illegal jetty, *Kawarau Jet Services Ltd. v Pro Jet Adventures Ltd* [1991] 1 N.Z.R.M.A. 1, the construction a bungee jumping platform inconsistent with the terms of a resource consent, *Queenstown Bungy Centre Ltd. v Hensman* [1994] N.Z.R.M.A. 360, and the operation of a malodorous carryout fish and chips shop in violation of a district plan, *Smith v. Dick* [1998] N.Z.R.M.A. LEXIS 40.

153. See *Marlborough Dist. Council v. New Zealand Rail Ltd.* [1995] N.Z.R.M.A. 357 (denying an application for an enforcement order against the operation of “fast ferries”).

154. RMA § 247.

155. RMA § 250(1).

156. The Maori Land Court is a specialized court of law that adjudicates disputes over title to land owned by indigenous Maori. Originally constituted as the Native Land Court in 1865, the Court today operates under the 1993 *Te Ture Whenua Maori Act*, which aims to “promote and assist the return of Maori-owned land in continued Maori ownership; and [to promote] . . . the effective use and management of Maori-owned land.”

157. RMA § 250(1).

Commissioners.¹⁵⁸ Qualifications of Environment Commissioners include knowledge and expertise in areas relevant to environmental disputes, including business, economics and local government affairs, planning and resource management, environmental science, architecture and engineering, Maori and Treaty of Waitangi issues, and alternative dispute resolution.¹⁵⁹ Environment Commissioners are appointed by the Governor-General for a term of five years.¹⁶⁰

In most instances, one Environment Judge and one Environment Commissioner constitute a quorum of the Environment Court.¹⁶¹ It is the Court's practice, however, to empanel two Environment Commissioners and an Environment Judge to preside over cases involving plan references and appeals of resource consent applications.¹⁶² In such instances, the Environment Judge presides over the panel and the proceedings, but a decision of the majority represents the decision of the Court.¹⁶³ Applications for declarations or enforcement orders are presided over and decided by an Environment Judge sitting alone.¹⁶⁴ Environment Commissioners also mediate Environment Court cases.¹⁶⁵

2. *De novo Standard of Review*

When deciding references and appeals of decisions made by district or regional councils under the RMA, the Environment Court exercises *de novo* review. Not only does it decide the ultimate merits of the decisions it reviews, but it does so based on evidence that is adduced anew before the court, rather than on the evidence that was before the council.¹⁶⁶ The Environment

158. RMA § 253.

159. RMA § 253. Training or qualification in the law is not required for Environment Commissioners.

160. RMA § 254.

161. RMA § 265.

162. See WILLIAMS, *supra* note 28, at 168.

163. RMA § 265(3). The author is aware of no cases in which an Environment Judge was the dissenting member.

164. RMA § 265.

165. See RMA § 268. An Environment Commissioner who mediates a dispute usually will not sit on the panel that decides the case if the mediation fails to resolve all issues.

166. As the Environment Court's Practice Note explains:

The Court usually conducts an appeal against a decision on an application for a consent, approval or permit as a complete rehearing afresh. When hearing such an appeal the Court will normally call first upon the person who applied for the consent, approval or permit to state his or her case and then to adduce the evidence in support of it, followed by the cases of those

Court may receive in evidence anything it considers appropriate and may subpoena any witnesses whose testimony it thinks will be helpful.¹⁶⁷ Environment Court review typically focuses on the merits and substance of the particular decision at issue rather than the deliberative process of the government entity that made the initial decision. In exercising its appeal powers, the Environment Court “has the same power, duty, and discretion . . . as the person against whose decision an appeal or inquiry is brought.”¹⁶⁸ In addition to any specific duties applicable to any particular planning decision, the Environment Court’s duties include the general duty to avoid, remedy, or mitigate adverse effects¹⁶⁹ on the environment and the overarching duty to promote sustainable management.¹⁷⁰

More than any other of its attributes, the power of *de novo* review elevates the Environment Court’s role above that of mere adjudicator and vests it with the authority to set and implement environmental policy in New Zealand. The power of *de novo* review places the Court in the position to perform the fundamental tasks of environmental management.¹⁷¹ In doing so, “the Court hears the evidence itself and decides what the facts are, based on that evidence, before coming to its own conclusion as to the proper way in which the statutory discretions should be exercised.”¹⁷² The Court is free to exercise this discretion in the way that it sees fit within the overall framework of the RMA, even

who support the grant. Next it will call upon the body whose decision is appealed against to present its case. Then it will call upon those parties who oppose the grant of the consent, approval or right to present their cases, followed by the cases of parties who oppose the grant.

Practice Note, *supra* note 131, at para. 24.

167. RMA §§ 276 and 278.

168. RMA § 290.

169. See RMA § 17.

170. See RMA § 5.

171. As one commentator has noted, “legislative” rules under the RMA, such as those in plans and policy statements, can be unmade in various ways. Janet McLean, *New Zealand’s Resource Management Act 1991: Process with Purpose?*, 7 OTAGO L. REV. 538, 542 (1992). The unmaking, or remaking, of these rules is often accomplished on a case by case basis when resource consents or plan changes are being considered by a council in its quasi-judicial capacity or by the Environment Court in its full judicial capacity, resulting in “policy making by adjudication.” *Id.* The importance of the Environment Court is thus elevated by the likely predominance under the RMA of judicial rulemaking.

172. Waitakere Forestry Park, Ltd., v. Waitakere City Council [1997] N.Z.R.M.A. 231, 234-35 (citing Countdown Properties et ors v. Dunedin City Council [1994] N.Z.R.M.A. 145); A. J. Burr, Ltd. v. Blenheim Borough Council [1980] N.Z.L.R. 1; Love v. Porirua City Council [1994] 2 N.Z.L.R. 308.

when there are potentially inconsistent decisions by local authorities on similar facts.¹⁷³

The Court of Appeal has described the Environment Court's duties in exercising *de novo* review as follows:

[Its] duty necessarily includes the duty to decide the application. Unlike more general jurisdiction appellate Courts, the Environment Court has no power to remit a [matter] to a council for the latter's reconsideration and decision. For the Environment Court to do so would be contrary to its "duty." So where . . . it cancels a decision, the application to the council to which that decision related ceases to have effect. It does not remain extant for fresh or further consideration by the council. And consistently with that role and responsibility any rehearing in the light of new evidence or a change in circumstances subsequent to its decision is by the Environment Court itself.¹⁷⁴

In essence, then, when the Environment Court exercises its function of *de novo* review on the issues brought before it, it becomes the primary decisionmaker and bears full responsibility for exercising discretion and for achieving the purpose of the RMA, subject to appeal only on issues of law.¹⁷⁵

In two important respects, despite this power of *de novo* review, the Environment Court's potential policy-setting role is limited. First, it does not inevitably review every policy or implementation decision made under the RMA. Rather, it exercises its powers of *de novo* review only on those particular issues that properly are brought to it by disputants. When reviewing a disputed regional or district plan, for example, its power of *de novo* review extends only to the provisions in dispute, not the plan as a whole. Second, the Environment Court is not empowered to review national policy statements,¹⁷⁶ a

173. *McLuskie v. Waikato Dist. Council* [1994] N.Z.R.M.A. LEXIS 30, *45 (addressing the function of appeals with regard to inconsistent council decisions on applications with similar facts: "[b]y bringing this appeal, [plaintiffs] have obtained a second consideration of their proposal by independent and experienced decision-makers, and a reasoned decision addressing the main evidence and issues presented on their behalf by counsel experienced in resource management cases").

174. *Fleetwing Farms, Ltd. v. Marlborough DC* [1997] N.Z.R.M.A. 385, 391.

175. Some critics of the RMA in New Zealand have sought to limit the Environment Court's power to decide issues of policy. A government review of the RMA in 1998 led to a proposal to limit the Environment Court's scope of review of policy statements and plans to issues of law. See N. Wheen, *A Response to the Minister's Proposals for RMA Reforms*, 20 ENVIRONMENTAL PERSPECTIVES 4-7 (1998), at www.commerce.otago.ac.nz:800/epmrc/4-20.html. The policy was not adopted.

176. See WILLIAMS, *supra* note 28, at 107. Professor Williams suggests that the Minister for the Environment's recommendation to the Governor General to adopt a national policy statement would be subject to judicial review under the Judicature

limitation that is largely theoretical in light of the national government's failure to issue more than a single national policy statement.

3. *The Role of the Public Interest in Environment Court Proceedings*

As with all environmental disputes, Environment Court cases fundamentally concern more than private rights. They concern the ways in which public rights to environmental quality constrain the exercise of private rights or other public authority. In addressing such cases, the court seems acutely conscious of its duty to ascertain and promote the public interest. Although it has articulated no clear definition of the "public interest," other than to say that serving the public interest means promoting sustainable management,¹⁷⁷ the court has attempted to establish flexible procedures that aim to ensure that the court serves the public interest in its exercise of discretion. For example, the Court has allowed the late submission of evidence, despite unfairness to the opposing party, on the basis that the public law nature of RMA appeals was an overriding factor.¹⁷⁸ The court stated:

These are public law proceedings in which a general public interest may transcend the private interests of the parties. That public interest may even transcend the important aspect of fairness to the parties.

The [Environment Court's] need [to consider additional evidence] is [that] a decision to grant a resource consent may affect interests of the public and of other private parties than the appellants and for a long time. It also relates to the confidence that the public is entitled to have in the quality of the [Environment Court's] decision-making.¹⁷⁹

Similarly, the Environment Court has rejected any formal burden of proof in plan references and appeals of resource consent decisions. There is no presumption that the local

Amendment Act of 1972 and under usual standards applicable to judicial review in New Zealand, including the unreasonable exercise of discretion. *Id.*

177. See *Canterbury Reg'l Council v. Christchurch City Council* [2000] N.Z.R.M.A. LEXIS 7, *32 ("On the principle that the best decision in the public interest (defined as the promotion of sustainable management) should be the proper outcome, rather than the best decision for one of the parties, then the Court should have all the relevant evidence of any weight, even if, perhaps especially if, it does not support the Council's position.")

178. *Te Aroha Air Quality Protection Appeal Group v. Waikato Reg'l Council* (No. 1) [1993] 2 N.Z.R.M.A. 572.

179. *Id.* at 574.

authority's decision is correct, and, therefore, no onus on the party taking the appeal to dislodge the presumption.¹⁸⁰ Each party simply provides the Court evidence and argument as to why its position should prevail and has the opportunity to test other parties' evidence and arguments through cross examination and counterargument. The court has further noted that the adversarial element, though present, is somewhat muted in comparison with litigation involving solely private rights.¹⁸¹ The Environment Court views the primary purpose of the adversarial process in its proceedings as developing high quality information to assist the Court in discharging its responsibilities to the "public interest."¹⁸²

4. *Appeal from Environment Court Decisions*

Unsuccessful litigants may appeal Environment Court decisions as of right to New Zealand's intermediate appellate court, the High Court. The appeal is limited to points of law.¹⁸³ In RMA litigation to date, the High Court has been reluctant to assert itself with respect to the kinds of policy judgments and discretionary decisions that are the daily diet of the Environment Court.¹⁸⁴ Rather, the High Court strictly constrains its review to matters of law, adhering to the view that its function is:

to see that the statute, the district plan and the regional plan have been correctly interpreted . . . , to ensure that all relevant, and no irrelevant, matters have been considered, that the decision of the [Environment Court] is properly based upon the evidence before it and that the decision reached is 'reasonable' in the sense that it was one that could be arrived at by a rational process in accordance with a proper interpretation of the law and upon the evidence.¹⁸⁵

By contrast, the High Court construed the Environment Court's function quite differently:

180. *Leith v. Auckland City Council* [1995] N.Z.R.M.A. LEXIS 15, *29 (citing K. A. PALMER, *LOCAL GOVERNMENT LAW IN NEW ZEALAND*, at 646 (2d ed. 1993)).

181. *New Zealand Rail Ltd. v. Nelson Marlborough Reg'l Council* [1992] 2 N.Z.R.M.A. 70, 76 (holding that the court is empowered to make orders for particular discovery, noting that, while the adversarial element is not as important in public law proceedings where there is no formal onus of proof, "it is highly desirable that the [court] has before it all the information necessary to enable it to make a fully informed decision.").

182. *Id.*

183. RMA § 299.

184. See R. Somerville, *The Resource Management Act 1991: An Introductory Review*, in 1 BROOKERS RESOURCE MANAGEMENT RM-7, RM-9 (July 23, 1998).

185. *Stark v. Auckland Reg'l Council* [1994] N.Z.R.M.A.337, 340.

[T]he role of this Court is not to delve into questions of planning and resource management. That is for the expert [Environment Court] to determine based on its knowledge gained from its day-to-day experience and its consideration of district and regional plans and submissions made to it.¹⁸⁶

By its own assessment, then, the High Court lacks the expertise and background to treat matters of policy that drive environmental decisionmaking in the Environment Court.

D. Summary and Conclusion

The Environment Court has extraordinarily broad power as the adjudicator of sustainability. As one of the framers of the RMA, Sir Geoffrey Palmer, has written: "It might be argued that questions of this sort cannot be made justiciable; that the [environment] judges and their [commissioners] are being handed a task with such sweeping social and political consequences that it is impossible."¹⁸⁷ Despite the great burden Palmer and others placed upon the Environment Court, they believed that the Court would succeed because of its experience and expertise, political guidance in the exercise of its discretion through national policy statements, and flexibility in the RMA that would permit the Court to achieve beneficial outcomes in fact-specific situations.¹⁸⁸

III

THE SUBSTANCE OF SUSTAINABILITY: ENVIRONMENT COURT TREATMENT OF FUNDAMENTAL RMA THEMES

New Zealand is a small country whose citizens seem, to this observer, to be determinedly shy of litigation,¹⁸⁹ and the

186. *Id.* at 340.

187. Sir Geoffrey Palmer, *Sustainability - New Zealand's Resource Management Legislation* (unpublished manuscript) (1992). Judge R.J. Bollard has similarly observed:

On occasion, the [Environment Court] encounters the type of case requiring judgments to be made on present and future aspects, bearing not just on likely physical effects but on other criteria related to public well-being (including cultural needs and concerns). Looked at in vacuo, one might be forgiven for thinking that an element of crystal-ball gazing is involved. Yet, in practice, the "wider considerations" tend to manifest themselves sufficiently straightforwardly for sensible rationalisation to occur.

R.J. Bollard, *Some Thoughts on the Planning Tribunal's Role in Resource Management*, N.Z. L. J. 38 (Feb. 1995).

188. *Id.* at 20.

189. I make this assertion based on personal observation and many discussions with New Zealand resource management professionals and lawyers during my lengthy visit to New Zealand as an Ian Axford Fellow in 1998.

Environment Court's jurisprudence arising under the RMA's complex regime is still developing. Nonetheless, existing jurisprudence can support a qualitative analysis of the Court's decisionmaking relevant to the RMA's fundamental themes. The court's decisions respecting the RMA's three central policy themes – sustainable management, effects-based environmental management, and public participation – indicate that the Environment Court has been reluctant to embrace the full breadth of responsibility that the New Zealand Parliament has given it. Although Parliament structurally and functionally empowered the Environment Court to engage in more sweeping and intensive environmental policymaking than traditional deferential judicial review permits, the Environment Court's early decisions under the RMA suggest its tendency to view its own role in environmental law narrowly and to behave much like a traditional court.

A. Interpreting Sustainability: Defining Sustainable Management

The initial reluctance of the Environment Court to assume the broad role intended by the RMA is clearest in cases addressing the most fundamental principles of the RMA, especially the meaning of “sustainable management” and its significance for resource management decisions. The Environment Court's early treatment of those issues betrayed a reluctance to depart from traditionally deferential judicial treatment of statutory issues.

1. The Sustainable Management Priority of the RMA

The most important issue the Environment Court has addressed is the role the broad governing principles of the RMA, particularly the principle of sustainable management, play in the law's complex environmental management scheme. It is now well settled that the broad principles of Part II of the RMA, particularly “sustainable management,” guide and constrain the exercise of discretionary decisionmaking under the RMA.¹⁹⁰ As a matter of statutory certainty and case law authority, all plans, policy statements and resource consents must conform with the

190. See, e.g., *New Zealand Suncern Constr. v. Auckland City Council* [1996] N.Z.R.M.A. 411, 425.

principles of sustainable management.¹⁹¹ The Environment Court now accepts that all discretion under the RMA is to be directed toward achieving the RMA's goal of promoting the sustainable management of physical and natural resources.¹⁹²

The Environment Court, however, reached this determination only after explicit correction by the New Zealand Parliament. In an important early case, the Environment Court held that Part II principles, including "sustainable management," were not overriding considerations in the evaluation of resource consent applications.¹⁹³ Weighing the relative importance of the RMA's essential principles in the consideration of resource consent applications, the Environment Court took a limited view of the importance of promoting "sustainable management," as enunciated in Section 5. In its view, Section 5

may be valuable to inform an exercise of discretion (particularly in the absence of express statutory guidance for the particular discretion); and to inform the interpretation of a provision, the meaning of which may be ambiguous or otherwise unclear. However, Parliament has provided detailed resources in the rest of the Act to serve that general purpose. Where the intent of those measures is clear from their terms, there may be no need to refer to that broad purpose of the whole Act. Further, there may not be any advantage in doing so, given the breadth of the meaning to be given to the term "sustainable management."¹⁹⁴

The Environment Court's view is remarkable for two reasons. First, it reflects a traditionally conservative philosophy of statutory interpretation, giving greatest weight to the statute's most specific terms while relying on general statements of purpose only when necessary to resolve an ambiguity. Second, and perhaps more telling, it betrays a deep skepticism of the RMA's expression of "sustainable management," criticizing the New Zealand Parliament for articulating the concept so generally that it affords insufficient direction to a reviewing court. The

191. RMA §§ 51, 61, 66 and 74. RMA § 104(1) (requiring all considerations in processing resource consents to be "[s]ubject to Part II").

192. See *Royal Forest and Bird Protection Soc'y v. Manawatu-Wanganui Reg'l Council* [1996] N.Z.R.M.A. 241 (partial reporting); *Te Runanga o Taumarere v. Northland Regional Council* [1995] N.Z.R.M.A. LEXIS 37, *36-*37 ("The discretionary judgment whether resource consent is to be granted or refused has to be exercised for the purpose of . . . the promotion of the sustainable management of natural and physical resources, giving the term 'sustainable management' the meaning provided by § 5(2) of the Act.").

193. *Batchelor v. Tauranga Dist. Council* [1992] N.Z.R.M.A. LEXIS 22, *aff'd* [1992] N.Z.R.M.A. Lexis 43.

194. *Id.* at 268-69.

passage suggests that the Court was reluctant to provide helpful interpretation of the term "sustainable management," as was likely expected by the RMA's framers,¹⁹⁵ and was at best ambivalent about the prospect that judicial policymaking under the RMA would displace the traditional judicial function of narrowly determining facts and applying statutory law.

The High Court upheld the Environment Court's decision, based as it was on traditional, if strict, rules of statutory interpretation.¹⁹⁶ However, the New Zealand Parliament quickly corrected the courts. The Resource Management Amendment Act of 1993 clearly stated Parliament's intent that decisionmakers, including the Environment Court, accord primacy to all Part II considerations when evaluating the merits of resource consent applications.¹⁹⁷

Part II considerations now clearly merit primacy in all aspects of decisionmaking under the RMA. The High Court has stated:

. . . Part II of the RMA is critical to the new statute. It requires courts and practitioners to approach the new machinery provisions, and the resolution of cases, with the hortatory statutory objectives firmly in view. The fact that there are some difficult issues of interpretation of Part II itself, and its relationship with the rest of the RMA, does not absolve the consent authorities and courts from wrestling with these problems; or justify the side-tracking of Part II.¹⁹⁸

The Environment Court has increasingly recognized the primary importance of the statutory goal of promoting sustainable management to all decisionmaking under the RMA. On a procedural level, the Environment Court specifically addresses "sustainable management" and Part II issues in many of its decisions, often in a discrete portion of the decision.¹⁹⁹ On

195. See PALMER, *supra* note 2, at 169-70.

196. [1992] N.Z.R.M.A. 137; accord *New Zealand Rail, Ltd., v. Marlborough Dist. Council* [1994] N.Z.R.M.A. 70 (holding that the provisions of Part II do not warrant primacy in the consideration of resource consents under section 104).

197. At least one commentator has regarded the Environment Court's treatment of the primacy of Part II in *Batchelor* as a prime example of "quality litigation," or litigation that effectively promotes the helpful development of the law. Martin Phillipson, *Judicial Decision Making Under the Resource Management Act 1991*, 24 VICTORIA U. WELLINGTON L. REV. 163, 168 (1994). By making a determination that Part II considerations did not warrant primacy in resource consent decisions, the Environment Court pressed Parliament into action to clarify its intent. *Id.*

198. *TV3 Network Services, Ltd. v. Waikato Dist. Council*, Case No. AP55/97 (Sept. 12, 1997) (J. Hammond) [1997] N.Z.R.M.A. LEXIS 22.

199. In *Te Runanga o Taumarere v. Northland Regional Council* [1995] N.Z.R.M.A. LEXIS 37, for example, the Environment Court considered an application for a

occasion, in contrast to its earlier reticence, the Environment Court has treated Part II considerations as determinative of resource consent applications, overriding and rendering unnecessary the specific consideration of the matters set forth in Section 104 of the RMA.²⁰⁰ On a substantive level, the Court has recognized that sustainable management takes priority over common law rights in private property.²⁰¹ Thus, with clarification by the Parliament and guidance from the High Court, the Environment Court has overcome its early reluctance, and now views Section 5 and the other Part II principles as paramount.

resource consent to discharge treated sewage effluent into a wetland near Te Uruti Bay. A local Maori group and shellfish businesses had appealed the regional council's grant of consent. The Environment Court specifically analyzed the proposal in relation to the definition of "sustainable management" in § 5, including whether the proposal: (1) enabled local communities and Maori people to provide for their health and safety and social, cultural and economic wellbeing; (2) sustained the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; (3) safeguarded the life-supporting capacity of the affected ecosystem; and (4) avoided, remedied, or mitigated adverse effects on the environment. *Id.* at *36-*41. The Court also analyzed matters specified for consideration by sections 6-8 of the RMA, including the character of the coastal environment, habitat of indigenous fauna, efficient use of resources, and various Maori issues. *Id.* at *41-*47. The Court found that the proposal, while generally supporting "sustainable management" in some respects, did not promote sustainable management because it failed to "provide for the attitudes [of Maori people] in respect of their customary taking of shellfish from the beds of Te Uruti Bay," and because "the feasibility of another option for effluent disposal which would avoid these adverse cultural effects has not been adequately investigated." *Id.* at *47. *See also* Marlborough Seafoods, Ltd. v. Marlborough [1998] N.Z.R.M.A. 241.

200. In *Minister of Conservation v. Kapiti Coast Dist. Council* [1994] N.Z.R.M.A. 385, 393, the Environment Court held that it was unnecessary to consider the particular prongs of § 105(b)(2) because it had determined that the consent at issue should not be granted due to Part II considerations. *Cf.* *Titterton v. Dunedin City Council* [1994] N.Z.R.M.A. 395, 404 (remarking on the difficulties of interpreting the 1993 amendment, the Court stated, "[i]t might be suggested for example, that § 104 is not the appropriate section to place the words '[s]ubject to Part II' and that perhaps they would be more appropriate in § 105, which provides the means by which a consent authority is to make decisions on applications for resource consents.").

201. *New Zealand Suncern Constr. v. Auckland City Council* [1996] N.Z.R.M.A. 411, 425 (The RMA "sets in place a scheme in which the concept of sustainable management takes priority over private property rights. . . . It is inherent in the nature of district plans that they impose some restraint, without compensation, on the freedom to use and develop land as the owners and occupiers might prefer."), *aff'd* 3 ELRNZ 230 (1997); *see also* *Falkner v. Gisborne Dist. Council* [1995] N.Z.R.M.A. 462, 478; *Hall v. McDrury* [1996] N.Z.R.M.A. 1, 9 (holding that the RMA's purpose of sustainable management and its goal of avoiding, mitigating, or remedying adverse environmental effects override common law rights to drive livestock on a public road.).

2. *The Meaning of Sustainable Management*

As the Environment Court's views on the priority of "sustainable management" in environmental decisionmaking have evolved, so has its interpretation of the substantive meaning of that term. The lengthy definition of "sustainable management" embodies several different concepts – enabling communities to provide for their welfare, maintaining intergenerational equity, safeguarding ecosystems, and avoiding, remedying, or mitigating adverse environmental impacts—in an unclear statutory relationship. The focus of most debate among New Zealand's legal commentators has been the relationship between the economically enabling and the ecologically limiting functions of the definition.²⁰² By its terms, "sustainable management" is meant both to "enable people and their communities to provide for their wellbeing" *and* to limit the use and development of resources within certain ecological parameters.²⁰³ The Environment Court gradually has departed from a restrictive, mechanistic construction of "sustainable management" in favor of one that requires decisionmakers – including the Environment Court – to exercise broad discretionary balancing of social, economic, and ecological factors.

a. *The "Environmental Bottom Lines" Approach*

One possible reading of "sustainable management," as defined in Section 5 of the RMA, is that it establishes certain environmental thresholds, or bottom lines, which cannot legally be breached. According to this view, the RMA was designed, on the one hand, to enable people and communities – rather than the Government – to provide for their economic wellbeing by making choices about their uses of resources free from government control. On the other hand, their choices would be constrained by ecological bottom lines enumerated in Section 5, as determined by public authorities exercising powers under the RMA.²⁰⁴ So formulated, the establishment of environmental

202. See, e.g., B.V. Harris, *Sustainable Management as an Express Purpose of Environmental Legislation: The New Zealand Attempt*, 8 OTAGO L. REV. 51 (1993); Upton, *supra* note 36, at 26.

203. RMA § 5(2).

204. This view was first espoused by then-Minister for the Environment Simon Upton in a speech to Parliament on the third reading of the Resource Management Bill in 1990. The Minister argued:

bottom lines allows private resource development to occur somewhat free from direction and control by governmental regulators and by the Environment Court itself. At the same time, by prohibiting any balancing between the enabling and the limiting functions, the bottom lines formulation ostensibly ensures that minimum ecological safeguards will not be breached.²⁰⁵

Shortly after the RMA's enactment, the Environment Court developed a line of cases adopting a "bottom lines" approach. In *Plastic and Leathersgoods Company, Ltd., v. Horowhenua District Council*,²⁰⁶ for example, the Environment Court held that clauses (a), (b), and (c) of Section 5(2) established "cumulative safeguards" and stated that "[i]f we find that any one of these safeguards is unlikely to be achieved, then the purpose of the Act is not fulfilled."²⁰⁷ In that case, the Court cancelled a resource consent for a recycling center and waste transfer station adjacent to a commercial and light industrial area on the basis that the adverse effects of noise, odor, and traffic probably could not be adequately avoided, remedied or mitigated.²⁰⁸ In the Court's view, "sustainable management" prohibited the granting of a resource consent, irrespective of the value of the project for

[Section 5] enables people and communities to provide for their social, economic, and cultural wellbeing. Significantly, it is not for those exercising powers under the Bill to promote, to control, or to direct. With respect to human activities it is a much more passive formulation. People are assumed to know best about what it is that they are after in pursuing their wellbeing. Rather those who exercise powers under the legislation are referred to a purpose clause that is about sustaining, safeguarding, avoiding, remedying, and mitigating the effects of activities on the environment. It is not a question of trading off those responsibilities against the pursuit of wellbeing. ... The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. As such, the Bill provides a much more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards, and society will set those standards. [Section 5] sets out the biophysical bottom line.

Upton, *supra* note 36, at 26.

205. D.E. Fisher, *The Resource Management Legislation of 1991: A Juridical Analysis of its Objectives*, in 1 BROOKERS RESOURCE MANAGEMENT Intro-1 (Nov. 15, 1991) (explaining that the precise issue of statutory interpretation is whether the word "while" denotes a coordinating or a subordinating relationship between the section's social and economic objectives on the one hand and environmental objectives on the other); see also J.R. Milligan, *Pondering the 'While,'* TERRA NOVA, May 1992; Decision of the Board of Inquiry regarding the New Zealand Coastal Policy Statement, as cited in 1 BROOKERS RESOURCE MANAGEMENT A2-8 § A5.09 (March 10, 1998).

206. Dec. No. W 26/94 (April 19, 1994) (slip op.).

207. *Id.* at 8.

208. *Id.* at 15.

the community's well-being, because the cumulative bottom lines could not be satisfied.²⁰⁹ Several Environment Court panels repeated this approach.²¹⁰

A significant aspect of the cumulative "bottom lines" approach, as interpreted by the Environment Court, is that it limits the role of the court to narrow discretionary or even quasi-factual determinations. By focusing only on the limiting functions of "sustainable management," to the exclusion of the enabling functions, the Court established a statutory standard that permitted it to remain in traditional and comfortable judicial territory - deciding facts, albeit scientifically complex facts, rather than establishing policies regarding social and economic values.

b. The Overall Judgment Approach

Almost as soon as formulated by the Environment Court, the environmental bottom lines approach began to erode. First, the "bottom lines" interpretation sat somewhat uncomfortably with the textual definition of "sustainable management." As the Environment Court admitted in *Trio Holdings v. Marlborough District Council*, the concept of mitigation in Section 5(2)(c) is not necessarily consistent with a rigid "bottom lines" approach:

The idea of "mitigation" is to lessen the rigor or the severity of effects. We have concluded that the inclusion of the word in s 5(2)(c) of the Act, contemplates that some adverse effects from developments . . . may be acceptable, no matter what attributes the site might have. To what extent the adverse effects are acceptable, is, however, a question of fact and degree.²¹¹

Second, many cases do not permit a clear determination of whether bottom lines are met. Most cases present an array of

209. *See id.*

210. *E.g.*, *Foxley Eng'g, Ltd. v. Wellington City Council*, Dec. No. W 12/94 (March 16, 1994) (slip op. at 40-41) (holding that sections 5(2)(a), (b), and (c) are "cumulative safeguards" which "must be met before the purpose is fulfilled."); *Shell Oil N.Z., Ltd. v. Auckland City Council*, Dec. No. W 8/94 (Feb. 2, 1994) (slip op. at 10) ("Section 5(2)(a), (b), (c) provisions may be considered cumulative safeguards which ensure (or exist at the same time) whilst the resource . . . is managed in such a way or rate which enables the people of the community to provide for various aspects of their wellbeing and for their health and safety."); *Campbell v. Southland Dist. Council*, Dec. No. W 114/94 (Dec. 14, 1994) (slip op. at 66) ("Section 5 is not about achieving a balance between benefits occurring from an activity and its adverse effects. . . . [T]he definition in § 5(2) requires adverse effects to be avoided, remedied or mitigated, irrespective of the benefits which may accrue. . . .").

211. [1997] N.Z.R.M.A. 97, 116.

facts and issues, only some of which are relevant to the themes in Section 5(2)(a) to (c). The issues resist mechanistic, even if well considered, determination, fundamentally requiring the exercise of discretion. In *Royal Forest and Bird Protection Society v. Manawatu-Wanganui Regional Council*, the Environment Court expressed reservations about the rigidity of the phrase “environmental bottom” and suggested that the more proper consideration is “whether allowing the activity represents managing the use, development and protection of natural and physical resources for a purpose within the first part of [the definition] while having the effects described in paras (a), (b) and (c).”²¹² Further, in its first interpretation of “sustainable management,” the High Court emphasized the broad generality of the concept, emphasizing that it

should [not] be subjected to strict rules and principles of statutory construction which aim to extract a precise meaning from the words used. There is a deliberate openness about the language, its meanings, and its connotations which . . . is intended to allow the application of policy in a general and broad way.²¹³

In light of these views, Principal Environment Court Judge Sheppard articulated a modified interpretation of “sustainable management.”²¹⁴ Judge Sheppard recognized the difficulty of harmonizing the enabling aspects of sustainable management embodied in the first part of the statutory definition with the ecological aspects in the latter part. He reasoned that “[t]o conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject section 5(2) to the strict rules . . . of statutory construction” that the High Court had rejected.²¹⁵ Rather, Judge Sheppard concluded that decisionmakers under the RMA must exercise overall, broad judgment in considering the various factors included in the definition of sustainable management.²¹⁶ The proper approach to determining whether a proposal meets the statutory goal of promoting sustainable management

212. [1996] N.Z.R.M.A. LEXIS 43, *80.

213. *New Zealand Rail Ltd., v. Marlborough Dist. Council* [1994] N.Z.R.M.A. 70; see *Marlborough Dist. Council v. Southern Ocean Seafoods, Ltd.* [1995] N.Z.R.M.A. LEXIS 4, *18-19.

214. *North Shore City Council v. Auckland Reg'l Council* [1997] N.Z.R.M.A. 59, 96-108.

215. *Id.* at 93.

216. *Id.* at 94.

calls for consideration of the aspects in which a proposal would represent management 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 wellbeing, health and safety. It also requires consideration of the respects in which it would or would not meet the goals described in paragraphs (a), (b) and (c)... Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.²¹⁷

The “overall judgment” interpretation of sustainable management represents a substantial step in the Environment Court’s acceptance of a broader role in environmental decisionmaking. It requires the Court to engage in the kinds of primary balancing of social, economic and environmental concerns that the political branches of government have traditionally undertaken.²¹⁸

B. *Effects-Based Management*

The RMA’s reliance on “effects-based management,” in place of the prescriptive management of particular activities or resource uses, arguably represents the RMA’s sharpest departure from New Zealand’s past. This requires all decisionmakers, including the Environment Court, to employ a significantly new approach to environmental regulation. Although not statutorily defined, effects-based management, as embraced in the RMA, requires decisionmakers – whether adjudicating the merits of individual projects, choosing remedial rules, or enacting prospective rules – to focus on environmental outcomes and performance by considering environmental impacts as a primary factor in their decisions.²¹⁹ The Environment Court’s treatment of effects-based management,

217. *Id.* at 94.

218. The extent to which the framers of the RMA foresaw this approach is debatable. As noted earlier, Simon Upton, the Minister for the Environment at the time the RMA was finally enacted, favored a restrictive, “bottom lines” interpretation of sustainable management. Upton, *supra* note 36. Upton’s Labour Party predecessor, Sir Geoffrey Palmer, however, appears to have accepted that the RMA’s definition of sustainable management incorporated social, economic and cultural values within the contours of ecological bottom lines. See PALMER, *supra* note 2, at 171-173 (criticizing commentators who viewed the RMA’s definition of sustainable management as indeterminately weighing different values and agreeing with commentators’ suggestions that the definition establishes environmental bottom lines).

219. See *supra* notes 42-55 and accompanying text.

like its jurisprudence on the meaning and importance of the sustainability principle, reflects a reluctance to accept the new regime.

1. Resource Consents and Environmental Impact Assessment by Councils

An early case regarding the scope of environmental impact analysis in the resource consent process trenchantly illustrates the Environment Court's reluctance to embrace the new paradigm of effects-based management. In its resource consent application, a project proponent must provide a statement of the "actual or potential effects that the activity may have on the environment, and the ways in which any adverse effects may be mitigated."²²⁰ In *McFarland v. Napier City Council*, the Environment Court held that the provision requires only "reasonable compliance" and stated that "an applicant is under no obligation to become a devil's advocate in order to destroy its own application before it has even started."²²¹ The Court rejected the argument that the applicant's failure to indicate how adverse effects can be mitigated deprived a consent authority of jurisdiction to process an application.²²² Notwithstanding the statutory language requiring project proponents to submit analysis of mitigation options, the Court held that councils, not the applicant, are responsible for framing appropriate measures to control adverse effects of projects.²²³ Read narrowly, *McFarland* establishes a rule that a project proponent must only be in reasonable compliance with the RMA's requirement to provide an adequate assessment of environmental effects and that a consent authority should reject an application or seek more information if the submission is inadequate. However, the Court's refusal to require strict compliance with the statutory requirement of mitigation analysis suggests a reluctance to ensure that first instance decisionmakers - regional and district councils - have access to information necessary for determining whether adverse environmental effects are avoided, remedied, or mitigated.

220. RMA § 88(4)(b).

221. *McFarland v. Napier City Council* [1993] 2 N.Z.R.M.A. 440, 442.

222. *Id.*

223. *Id.*

2. *The Duty to Avoid, Remedy, or Mitigate Adverse Effects*

The Environment Court's cases addressing the RMA's statutory duty to avoid, remedy, or mitigate adverse effects²²⁴ similarly evince some reluctance to implement the RMA's effects-based management scheme. To be sure, the Environment Court has recognized this duty as a significant remedial tool, acknowledging its importance as a backstop when other RMA mechanisms do not adequately protect against environmental degradation.²²⁵ Despite that recognition, the Environment Court has been cautious in enforcing the duty. In *Kaimanawa Preservation Society, Inc. v. Attorney-General*²²⁶ the Court refused to issue an enforcement order that would prohibit the national government from mustering and culling a storied herd of wild horses in the central North Island. Although the Environment Court accepted that wild horses were part of the "environment" as broadly defined by the RMA and that the horses themselves would be adversely affected, it held as a matter of law that the herd was not within the reach of the RMA's general duty to avoid adverse environmental consequences.²²⁷

224. RMA § 17 ("[e]very person has a duty to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of a person. . . .").

225. *Sayers v. Western Bay of Plenty Dist. Council* [1992] N.Z.R.M.A. 143, 152 ("Although, as we have said, the Act embraces a permissive land use approach, applicable unless the particular activity is prevented or controlled in some way, § 17 is critical for ensuring that, at the end of the day, particularly in cases where no District Plan rule is apt for calling in aid to avoid, remedy, or mitigate an adverse effect on the environment . . . a person is not able to claim that no public law duty is owed to take such rectifying steps as the case may warrant."). The Court required a landowner to remove fill placed on his property which the Court found was having adverse effects on the environment, both by creating silt laden runoff and by detracting from "amenity values of the neighbourhood, as well as the economic and aesthetic conditions which affect or are affected by those values." *Id.*

226. [1997] N.Z.R.M.A. 356.

227. Principal Environment Judge Sheppard reasoned: "I understand the Society to be claiming that as their case alleges that the proposed acts would have adverse effects on the environment, it is a case for the Environment Court. That claim is too broad. Parliament has not conferred on the Environment Court general authority over all acts which would or might have adverse effects on the environment. The law does not provide for appeals to the Environment Court about the contents or implementation of management plans under the Wildlife Act. The jurisdiction given to the Court has been carefully defined." *Id.* at 371. Construing narrowly the reach of the duty imposed by § 17, he concluded: "I do not consider that I should impute to Parliament an intention that the general duty imposed by § 17(1) extends to restrain activities that are not subject to control elsewhere in the Act and which are authorised under other legislation, even though they give rise to an adverse effect on the environment." *Id.* at 369.

The Environment Court's treatment of the general duty to avoid, remedy or mitigate adverse environmental effects in a celebrated case involving high speed ferries further demonstrates the Court's limited view of the duty as a remedial tool. In *Marlborough District Council v. New Zealand Rail, Ltd.*, the Court considered applications for declarations and enforcement orders to require avoidance, mitigation or remediation of environmental effects caused by the wash of a new "fast ferry" service between the North and South Islands.²²⁸ The Court refused to impose the requested enforcement orders.²²⁹ Reviewing the discretion of the Environment Court to impose enforcement orders in general, Planning Judge Treadwell concluded that orders to halt or cease otherwise lawful activities altogether – as opposed to orders to mitigate adverse effects – require evidence of serious, or "top level" effects.²³⁰ Although the Court acknowledged that the wash from the high speed ferries had altered the shorelines, it found that the shorelines were adjusting to the wash and reaching a new "dynamic equilibrium" and that any ecological disturbance was therefore temporary. Further, because the adjustment was nearly complete and a new equilibrium established, an enforcement order could not provide the mitigation, remediation or avoidance that the applicants sought.²³¹

3. *Regional and District Plans as Effects-Based Instruments*

The Environment Court has most extensively analyzed and accepted the RMA's thrust toward effects-based management in its review of the quasi-legislative rules included in regional and district plans. The focus of much of the debate has been whether

228. [1995] N.Z.R.M.A. LEXIS 13.

229. *Id.* at *75.

230. *Id.* at *34 (reasoning that "[t]he cessation order is one which remedies a defect in previous law and enables termination of the activities of those who previously chose to hide behind shields of lawfulness whilst inflicting upon the community environmental effects which were unacceptable").

231. The Environment Court's decision in the "fast ferries" case spawned considerable controversy in New Zealand. The court's determination that the establishment of a new equilibrium precluded any finding of an adverse effect on the environment was roundly criticized as violating the notion of ecological sustainability by permitting human activities to permanently alter the ecosystem without legal consequence. See Bruce Parady, *Fast Ferries: New equilibrium versus ecological sustainability*, N.Z. L. J., June 1995, at 204. Other commentators defended the decision as consistent with sustainable management under the RMA. Stephen Kos and Steve Bielby, *Fast ferries decision: Seeing sense in its wake*, N.Z. L. J., Nov. 1995, at 363 (The authors of this piece represented Tranz Rail Limited, the ferry operator, in the primary case.).

traditional Euclidean-style comprehensive zoning²³² remains an acceptable tool for environmental and land use planning under the RMA. When reviewing the issue, the Environment Court has read the RMA as requiring local and regional councils and the Environment Court itself to approach environmental rulemaking from a new perspective.

The Environment Court's most comprehensive and fundamental treatment of effects-based planning is its decision in *Application by Christchurch City Council*.²³³ In that case, the Court held that rules under the RMA may be formulated by reference solely to environmental performance standards rather than to particular resource uses or activities. Before Christchurch City Council began what promised to be a lengthy and expensive process of developing its city plan under the RMA, it sought a declaration from the Environment Court that the council's intended approach to effects-based planning was permissible under the RMA.²³⁴ The council proposed not to follow a traditional activity-oriented approach to planning and zoning in which particular areas or zones are designated for particular permissible activities, such as residence, commerce, or industry. Instead, it proposed to write a plan in which any activity or land use would be permissible provided that it complied with certain standards of environmental performance, a method it likened to a sieve that would filter out any activities that would not meet the performance standards in the plan.²³⁵ Under that approach, different areas would be subject to different environmental performance standards based on the desired environmental result to be achieved within that zone – for example, suitability for residential use.²³⁶ Specifically, Christchurch City Council sought a declaration that “it is lawful for a district plan to contain a rule in respect of permitted activities having the following form: Any activity which complies with the standards specified for the zone where the standards specified go to the

232. Euclidean zoning refers to the land use control strategy of segregating land uses geographically based on the intensity and types of different uses, such as agricultural, residential, industrial, and open space. See, e.g., Nicolas M. Kublicki, *Innovative Solutions to Euclidean Sprawl*, 31 ENVTL. L. REP. 11001 (2001). The United States Supreme Court ruled the technique constitutionally permissible in the landmark case *Village of Euclid et al. v. Ambler Realty Co.*, 272 U.S. 365 (1926).

233. [1995] N.Z.R.M.A. 129.

234. *Id.* at 132.

235. *Id.* at 131.

236. *Id.*

effects which activities have on the environment rather than their purpose.”²³⁷

After a court-appointed advocate presented arguments against Christchurch City’s otherwise unopposed request,²³⁸ the Environment Court rejected the advocate’s argument, stating “the sieve process can be demonstrated to work” and “can be used to provide for the different classes of activity” specifically identified in the RMA.²³⁹

The Environment Court to date has not addressed the validity of traditional zoning in the RMA’s effects-based scheme. However, the court has disallowed zoning-type rules that it determined were not appropriately supported by the need to control adverse environmental effects.²⁴⁰ For example, the Environment Court rejected a land use rule that prohibited the use of more than one-third of the gross floor area of a home for business purposes.²⁴¹ The Environment Court rebuffed the

237. *Id.* at 132.

238. The case is a procedural oddity which exemplifies the far-reaching authority of the Environment Court relative to that of United States courts reviewing environmental decisions. Christchurch City’s application for a declaration was supported by several territorial and regional councils and the Ministry for the Environment. The Environment Court was not able to find any organization that opposed the application. In order to ensure that the arguments before it were well developed and focused, the Court took the “unusual step” of appointing an *amicus curiae* to oppose the application. *Id.* at 134. In two important respects this differs from the availability of declaratory relief in the United States. First, the Environment Court’s jurisdiction did not rest on the existence of an actual case or controversy, as required by Article III of the U.S. Constitution. Second, the generality of the declaration sought, coming as it did at the beginning rather than the end of a governmental process, did not preclude review, as it likely would in an analogous instance in the United States, where actions for declaratory judgment generally must be raised in a well developed factual context after the decisionmaking process is completed (or at least substantially underway).

239. *Id.* at 142.

240. Several statutory provisions underlie the Court’s analysis. The RMA requires each territorial or regional authority to “have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect” of its proposed rules. RMA §§ 68(3) (regional councils), 76(3) (territorial councils). Further, the Court has held that Section 32 of the RMA requires that each rule:

has to be necessary in achieving the purpose of the Act, being the sustainable management of natural and physical resources (as those terms are defined); it has to assist the territorial authority to carry out its function of control of actual or potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most appropriate means of exercising that function; and it has to have the purpose of achieving the objectives and policies of the plan.

Nugent Consultants, Ltd. v. Auckland City Council [1996] N.Z.R.M.A. 481, 484.

241. The rule also provided, for example, that “[n]o objectionable noise, smoke, smell, effluent, vibration, dust or other noxiousness or danger, or significant increase

argument that the floor space limitation was proper because it could be “anticipated” that “the effects or cumulative effects of [the one-third] floor area limitation being exceeded *could be expected* to have an adverse effect on the environmental amenity” and that the rule was necessary as a “rule of thumb” to provide administrative convenience and certainty to the community.²⁴² The Court reasoned that the “effects on the environment of a home [business] are not necessarily related to the proportion of the gross floor area of all buildings on a site that are occupied by the activity.”²⁴³ Accordingly, the Court rejected the floor space limitation as not sufficiently effects-based.

The Environment Court also has rejected an attempt to create a special zone for future industrial development, including a potential, but not yet planned, wood products processing plant.²⁴⁴ Wishing to promote local forestry operations, the Marlborough District Council created a zone that favored industrial uses requiring large sites and prohibited potentially inconsistent new uses that might preclude the economically desirable “dirty” uses in the future.²⁴⁵ Within the zone, certain activities, such as processing and storage of forestry, agricultural and horticultural produce, as well as the manufacture and storage of wood products, would be permitted as of right (subject to conditions) as long as they met certain performance standards and *could* be permitted, as a matter of discretion, even if some performance standards were not satisfied.²⁴⁶ Residents of the rezoned rural area appealed to the Environment Court, arguing that the council had not properly considered all environmental effects of the zone change and that the change was not “necessary” to provide for the needs of industry.²⁴⁷ The Court concluded that the potential environmental effects of industry – including bulky and high buildings, high traffic volume, noise, air and water emissions, and glare – combined with their expected, negative impact on the value of residents’ property,

in traffic, shall result from the operation of the home occupation activity.” *Id.* at 483. Only the floor space limitation was challenged.

242. *Id.* at 484 (emphasis added).

243. *Id.*

244. *In Re: Boon and Marlborough Dist. Council* [1998] N.Z.R.M.A. 305.

245. *Id.* at 8 (“It was the council’s view that such facilities must be sited in appropriate locations. Currently these are considered to be limited and will become scarcer if no provision is made to ensure suitable sites are not compromised by incompatible development.”).

246. *Id.* at 3.

247. *Id.* at 9. The residents also feared that they would be precluded from participating in resource consent proceedings respecting future industrial sites.

demonstrated that the area was not suitable for industrial activities.²⁴⁸ Further, the Court expressed doubt that the new zone would ultimately achieve its purpose of promoting industrial uses because it permitted continued, interim development of some incompatible uses that would create the potential for conflict when industrial operations eventually tried to locate there.²⁴⁹ Thus, after consideration of both policy and factual considerations, the Environment Court overruled the policy-based zoning decision on the basis that it was not consistent with effects-based decisionmaking.

The Environment Court's cases addressing effects-based planning thus suggest that the Court is willing to scrutinize quasi-legislative rules to ensure that they are based on proper consideration of the environmental effects of the activities to be permitted. When evidence and analysis suggest that the proposed zoning plan is not strictly necessary to control the effects of particular resource uses, the Court will probably reject the zone.²⁵⁰

C. Promoting Public Participation

The Environment Court's jurisprudence addressing the RMA's other keystone, public participation, has been similarly mixed. Its cases that treat standing, public processing of resource consent applications and the award of costs against unsuccessful litigants reflect an initial ambivalence toward, followed by increasing acceptance of, the RMA's goal of promoting public participation at all levels of environmental decisionmaking.

248. *Id.* at 15 ("given the potential for mishaps which could occur from timber plants, the Court is concerned about the lack of comprehensive performance standards in the proposed plan change. ... And like the appellants we consider the potential for adverse effects from these intended plants to be major unless both the plan change and resource consents process require clear and strict requirements").

249. *Id.* at 17 ("We find the potential for adverse effects from the timber industries impacting on sensitive industries is high, in particular food processing and the food storage industries. . . .").

250. This view is in accord with High Court's decision in *Countdown Properties (Northlands), Ltd., v. Dunedin City Council* [1994] N.Z.R.M.A. 145, 171 (citing *J. Thorp, in K B Furniture, Ltd., v. Tauranga Dist. Council* [1993] N.Z.R.M.A. 291 (stating that zoning is a blunt instrument in the context of the RMA). The High Court has also stated that "the aims and objects of the RMA represent a major change in policy in that the RMA moved away from the concept of protection and control of development towards a more permissive system of management of resource focused on control [of] the adverse effects of activities on the environment." *Id.* at 171.

1. *Standing*

As discussed above, one of the fundamental ways that the RMA framers hoped to promote public participation in environmental decisionmaking was by eliminating restrictive rules of standing in both the administrative and judicial fora. The RMA permits any member of the public to make submissions to local, regional or national entities regarding policy statements, plans, and notified resource consents.²⁵¹ In the Environment Court, any person having an interest greater than the public generally and representing some relevant aspect of the public interest may participate in a court proceeding, although the right to initiate an appeal is limited to those having made a submission to the first-instance decisionmaker.²⁵²

The Environment Court has not always recognized the right of public interest litigants to participate fully in its proceedings. Before the RMA was clarified in response to a restrictive interpretation by the Environment Court, the RMA provided a right of participation to "any person having an interest greater than the public generally," without expressly including those who represent the public interest. In *Purification Technologies Ltd. v. Taupo District Council*, the Environment Court held that community groups did not have standing to participate in proceedings regarding a commercial gamma irradiation facility.²⁵³ The Environment Court based its refusal to grant standing upon a narrow interpretation of the RMA²⁵⁴ as well as legal authority from other commonwealth countries on standing and legally cognizable "interests."²⁵⁵ The Court held that groups could participate in Environment Court proceedings initiated by a separate party only upon a showing of "advantage or

251. RMA § 49 (national policy statements); § 96 (resource consents); First Schedule § 6 (regional policy statements and regional and district plans).

252. The rule for initiating proceedings is different for declarations and enforcement orders. Generally, any person may seek a declaration or enforcement order. RMA § 316 ("Any person may at any time apply to the Environment Court for an enforcement order . . .").

253. *Purification Technologies Ltd v. Taupo District Council* [1995] N.Z.R.M.A. 197.

254. The Court emphasized that the RMA omitted words contained in the earlier Town and Country Planning Act specifically conferring standing to persons "representing some relevant aspect of the public interest." *Id.* at *11-12 (citing § 157 of the Town and Country Planning Act of 1977).

255. *Id.* at *12-19 (discussing *Australian Conservation Foundation, Inc., v. Commonwealth of Australia* (1980) 146 CLR 493 (High Ct. of Australia)); *Re McHatton and Collector of Customs* (1977) 18 AUS. L.R. 154; *Re Crippenden and City of Vancouver* (1984) 14 DLR (4th) 599 (British Columbia Sup. Ct)).

disadvantage, such as that arising from a right in property directly affected, and which is not remote."²⁵⁶ The Court rejected almost all participation in the absence of economic or other concrete injury, reasoning that

an interest in proceedings in seeking to enforce the public law as a matter of principle, a belief that activity of a particular kind ought to be prevented, or as part of an endeavor to achieve the objects of an association, or uphold the values which it was formed to promote, would not be an interest in the proceedings greater than the public generally. Nor would an interest in the preservation of a particular environment, or an intellectual or emotional concern, the satisfaction or righting a wrong, an interest in upholding a principle, a sense of grievance or the risk of being ordered to pay costs.²⁵⁷

New Zealand commentators criticized the Environment Court's limitation on public interest group participation in court proceedings.²⁵⁸ One commentator even suggested that the Court's narrow reading of the RMA was "a self-defense mechanism against inundation of the adjudication process."²⁵⁹ The New Zealand Parliament quickly acted to extend standing to "any person representing some relevant aspect of the public interest."²⁶⁰ As it had done in response to the Court's restrictive interpretation of the importance of "sustainable management," the Parliament re-emphasized its intent that the Environment Court play a broad role in environmental management.

2. Notification

The lack of public notification of resource consent applications presents a significant barrier to public participation in Environment Court proceedings, although this might not have been clear to the RMA's drafters. As noted earlier, despite an apparent statutory presumption in favor of notification, an astounding 95 percent of all resource consent applications are processed by councils without public participation. Public participation at the judicial level depends upon participation in local government proceedings because the right to appeal

256. *Id.* at *19.

257. *Id.* at *19-20.

258. *E.g.*, K.A. Palmer, "Standing before the Planning Tribunal," 1 BROOKER'S RESOURCE MANAGEMENT BULLETIN 143 (1995).

259. D.A.R. Williams & Nicholas Williams, *Environmental Litigation and Dispute Resolution*, in WILLIAMS, ENVIRONMENTAL & RESOURCE MANAGEMENT LAW 581 (2d. ed. 1997).

260. RMA § 274.

resource consent decisions to the Environment Court is limited to applicants, consent holders, and persons who make submissions to the consent authority.²⁶¹ Although the Environment Court has had relatively few opportunities to address the issue of public processing of resource consents,²⁶² it has consistently used those opportunities to promote the availability of public participation at the local government level.

The Environment Court has strongly emphasized that public participation in resource consent proceedings before local government authorities strengthens the quality of decisionmaking. It has rejected the suggestion that exceptional circumstances must exist to support a local government's decision to notify the public of a resource consent where all of the persons directly affected have granted their approval to a project.²⁶³ The Court stated:

It has to be remembered that in its decision-making role council is required to act impartially or as is sometimes said quasi-judicially. There may well be occasions when it will want to have the benefit of submissions from a wider section of its community . . . to assist it in coming to the decision that it is required to make . . .²⁶⁴

The Court acknowledged the public's role "as the guardian of the policies and objectives" of a local government's environmental plans.²⁶⁵ Moreover, the Environment Court has held that statutory deadlines for action on resource consent applications must sometimes yield to the need for full public participation, stating that "[e]xpedition should not prevail over quality of decisionmaking."²⁶⁶ The Court further stated:

Submissions are calculated to assist the consent authority to view an application in its true perspective and give a decision which promotes the purpose of the Act. The issue on a contested application for resource consent is not only a question between conflicting private interests; there can often

261. RMA § 120(a) and (b).

262. The primary vehicle for challenging a local authority's decision not to notify the public of a resource consent application is judicial review to the High Court. More rarely, issues regarding notification are brought before the Environment Court in applications for declarations under the RMA.

263. *Foodstuffs (S. Island), Ltd. v. Christchurch City Council* [1992] 2 N.Z.R.M.A. 154, 160.

264. *Id.* at 160.

265. *Id.*

266. *Australasian Conference Ass'n v. Auckland City Council* [1992] 2 N.Z.R.M.A. 104, 105.

also be a public interest in achieving the purpose of the Act which transcends the private interests.²⁶⁷

Notwithstanding the Environment Court's strong language favoring the public notification of resource consent applications to enhance public participation, local and regional councils continue to process the overwhelming majority of resource consents without public participation – a fact that raises questions about the power of the Environment Court to address this crucial aspect of the RMA's vision of sustainability.

3. *Awarding of Costs against Unsuccessful Litigants*

Another area in which the Environment Court has a mixed record with respect to promoting public participation is the award of costs against unsuccessful public interest litigants. The RMA gives the Environment Court broad discretion to order an unsuccessful litigant to pay the "reasonable" litigation costs of another party.²⁶⁸ The costs awarded can include attorneys' fees, expert witness fees, and travel expenses for witnesses and attorneys, and can be substantial. In one celebrated case, a mining company sought costs of more than NZ\$85,000 against a community environmental group that had unsuccessfully challenged its plans to conduct exploratory mining activities.²⁶⁹

By charting a moderate approach to awarding costs, the Environment Court has demonstrated an awareness of, though not an overriding concern for, the chilling effect that the potential for costs awards has on public interest group participation in litigation. On the one hand, the Environment Court has expressly disavowed the rule – generally applicable in New Zealand – that the losing party pay some portion of the successful party's litigation costs as compensation for costs unnecessarily incurred. The Court has said that

[c]osts are not awarded as a penalty, nor to discourage resort to the [Environment Court] in different classes of case; but as compensation where that is just. Decisions on claims for

267. *Id.* at 111.

268. RMA § 285.

269. *Peninsula Watchdog Group, Inc. v. Waikato Reg'l Council* [1996] N.Z.R.M.A. 218, *aff'd Peninsula Watchdog Group, Inc. v. Coeur Gold N.Z., Ltd.* [1997] N.Z.R.M.A. 501. The amount the applicant sought in its petition for an award of costs was only a fraction of the more than NZ\$400,000 (approximately US \$200,000) in costs it claimed to have actually incurred. The Court ultimately awarded about NZ\$20,000 (approximately US \$10,000).

costs are made in exercise of judicial discretion, having regard to the circumstances of the individual case.²⁷⁰

On the other hand, it has also rejected a general rule against awarding costs in all cases where environmental groups pursue public interest goals, reasoning that “[t]he possibility of an award of costs is an important discipline to encourage participants in proceedings – even those with public interest motives – to limit responsibly the exercise of their appeal rights.”²⁷¹

Although the Environment Court determines whether to award costs based on the circumstances of each case, the Court has signaled several principles that guide the exercise of discretion. First, the Court has said that it will not normally award costs to any party in cases involving the provisions of plans or policy statements.²⁷² This policy reflects the Court’s belief in the importance of public participation in the formulation of the fundamental environmental plans and policies under the RMA. Second, the Environment Court’s decisions also reflect a philosophy that costs should not be awarded when the public interest is served by a judicial determination of issues.²⁷³ For example, the Court declined to award costs when it found that the case primarily raised a novel question of law and counsel for both parties argued the case fully.²⁷⁴ The Court has further recognized that public interest groups play a valuable role in RMA decisionmaking by “testing the acceptability of claims by industry and developers about the extent to which their projects serve the promotion of sustainable management of natural and physical resources.”²⁷⁵ In several instances when the Environment Court has declined to award costs, it has noted the public interest issues raised by the case.²⁷⁶

The Court has nonetheless awarded costs against public interest groups when their claims “lack substance,”²⁷⁷ when

270. *Foodstuffs (Otago Southland) Properties, Ltd., v. Dunedin City Council* [1996] N.Z.R.M.A. 385, 393.

271. *Peninsula Watchdog Group, Inc. v. Waikato Reg’l Council* [1996] N.Z.R.M.A. 218, 221.

272. Environment Court Practice Note 34, *supra* note 131.

273. See *Goldfinch v. Auckland City Council* 1997 N.Z.R.M.A. LEXIS 31, *7-*8 (citing *Rowell v. Tasman District Council*, (High Court, Nelson, M 14/96, 7 August 1996)).

274. *Foodstuffs (S. Island), Ltd., v. Christchurch City Council* [1992] 2 N.Z.R.M.A. 154, 160.

275. *Peninsula Watchdog Group, Inc. v. Waikato Reg’l Council* [1996] N.Z.R.M.A. 218.

276. *Grinlinton*, *supra* note 57, at 93 n. 67 (citing unreported cases).

277. *Peninsula Watchdog*, [1996] N.Z.R.M.A. at 221; see also *Darroch v. Northland Reg’l Council* [1993] 2 N.Z.R.M.A. 637, 639. The court stated:

litigation is not conducted in an efficient and fair manner,²⁷⁸ or when the case raises generalized issues of policy rather than specific issues in dispute.²⁷⁹ At least one commentator has argued that, while claiming to award costs to compensate parties unreasonably subjected to litigation, the Environment Court actually uses costs to regulate proceedings and to punish unreasonable litigation behavior.²⁸⁰ New Zealand's High Court, while upholding the Environment Court's award of costs in the *Peninsula Watchdog* case, suggested that the Court should refine its criteria for costs awards to reflect the relative importance of issues for promoting sustainable management under the RMA.²⁸¹

The objectors, having failed in their opposition to the proposal at the first hearing, exercised their right to obtain the judgment of the Tribunal after a full rehearing *de novo*. They are not criticised for having done so, but we recognize that by exercising that right they put the applicant to the expense of presenting its case a second time. . . The outcome in this case does not indicate that the objectors' appeal was necessary to avoid harm to the environment.

278. *Auckland Heritage Trust v. Auckland City Council* [1992] 1 N.Z.R.M.A. 174 (awarding costs upon cancellation of interim enforcement order which had been sought *ex parte* without warning to council; rejecting argument that costs should not be awarded because action was a "test case" under the new law); *Med. Officer of Health v. Canterbury Reg'l Council* [1995] N.Z.R.M.A. LEXIS 31 (discussing principles governing awarding of costs). In the latter case, discussing the duty of litigants before the Court, the panel said:

[I]t is important that litigants before this Tribunal exercise a degree of discipline over their case. That is the purpose of the pretrial procedures such as were undertaken in this case. They were intended to narrow the issues, and ensure that all parties knew in advance the case they had to prepare, or meet. It is simply not good enough for a party to lead all others to the litigation to believe that an objection will be fought in one way, and then materially alter that stance at the opening of the case without any prior notice to the other parties. We have expressed on a number of occasions how expensive litigation under the RMA is becoming. This case illustrates the point. It behooves all parties to ensure that only the matters truly in issue are litigated. A party who does not exercise that minimal degree of discipline can hardly complain if they are called upon to contribute to costs thereby thrown away by other parties, particularly when offered the opportunity to participate fully in a number of pretrial conferences to avoid that outcome.

Id. at *42-*43.

279. *Wilbrow Corp. v. North Shore City Council and Auckland Reg'l Council*, 4 NZPTD 624.

280. See generally Justin von Tunzelman, *Costs Awards in the Planning Tribunal—Should the Environmental Court Change its Approach?*, 1 N.Z.J. ENVTL. L. 237 (1997).

281. [1997] N.Z.R.M.A. 501, 508-09.

4. Summary

Under New Zealand's scheme of sustainable management, the Environment Court has created what is probably the largest body of judicial authority interpreting and applying a legal standard explicitly based on modern principles of sustainability. Early stumbles, such as failing to recognize the full breadth and overriding importance of the "sustainable management" concept, seem to be giving way to a holistic approach to sustainability more consistent with what the architects of the RMA envisioned. Nonetheless, those missteps led the chief proponent of the RMA, Sir Geoffrey Palmer, to temper the optimism he once had that the Environment Court could effectively discharge the admittedly nontraditional and seemingly non-judicial responsibility of "adjudicating sustainability."²⁸² Indeed, in 1995, before the evolution of the Court's jurisprudence on sustainability, Palmer expressed regret that the Environment Court had not been abolished by the RMA. Palmer's concern arose from the court's narrow interpretation of "sustainable management," several extra-judicial comments by Environment Judges that he believed showed hostility to the RMA's scheme, and the difficulty of changing "judicial culture."²⁸³ Such criticisms might have contributed to a shift in the Environment Court's jurisprudence toward a more open acceptance of the RMA and its role under its scheme of sustainability. The Court now interprets sustainability as a multi-faceted integration of environmental, social, and economic factors, has begun to flesh out principles of effects-based planning – especially in the context of regional and district plans – and has increasingly demonstrated openness to public participation in environmental decisionmaking.

IV

SOME IMPLICATIONS OF NEW ZEALAND'S ENVIRONMENT COURT MODEL

New Zealand's innovative experiment with a specialized Environment Court with ostensibly wide powers under the RMA offers a fundamentally different view of environmental adjudication than the prevailing system in the United States. Through the RMA, New Zealand has embraced the judiciary's *de novo* review of environmental decisions and overt, active role in

282. See Palmer, *supra* note 187, at 20.

283. PALMER, *supra* note 2, at 146, 170. Another of the leading architects of RMA, Philip Woollaston, echoed Palmer's criticism of the Environment Court's early decisions. *Id.* (citing Philip Woollaston, Use it Don't Lose it, Speech to the ECO Forum (August 19, 1994)).

environmental policymaking. In contrast, the United States has carefully limited the courts' role in environmental decisions based upon separation of powers and other concerns, including skepticism about judicial capacity to handle difficult scientific and technical questions. As mentioned in the Introduction, American proposals to establish an environmental court system once gathered enough momentum to convince Congress to mandate a study of the feasibility of establishing one.²⁸⁴ Although the idea was rejected by the United States in the early 1970s and seems to have faded from serious debate, New Zealand's experience offers an opportunity for Americans to peer down the road not taken and allows other countries that have not settled on systems of environmental adjudication to consider New Zealand's experience.

It is beyond the scope of this Article to offer a comprehensive comparison of the two systems. However, this review of New Zealand's system suggests some important lessons and punctuates several thematic tensions that have long pervaded discussions about the role of judges in environmental decisionmaking. First, as a practical matter, New Zealand has demonstrated that the establishment of a specialized Environment Court with sweeping powers can be achieved, at least in some situations. Second, and more significantly, New Zealand's experience shows that several disadvantages may attend the creation and operation of such a court. These include self-imposed constraints on the judicial role, tensions between the democratic and technocratic values at play in many environmental decisions, and a loss of judicial oversight of the deliberative process of first-instance environmental decisionmakers that could result in an loss of overall capacity for environmental governance.

The first lesson is a practical one. It is possible to create a specialized environmental court, even when the tradition of generalist adjudication predominates. Although the proposition might seem self evident, it is not. Indeed, apprehension about the difficulty of defining the appropriate jurisdiction for an environmental court substantially motivated the United States to

284. See Clean Water Act of 1972, § 9, Pub. L. 92-500, 86 STAT. 816 (1972); REPORT OF THE PRESIDENT, *supra* note 8; Scott W. Whitney, *The Case for Creating a Special Environmental Court System - A Further Comment*, 15 WM. & MARY L. REV. 33 (1973); Comment, *The Environmental Court Proposal: Requiem, Analysis, and Counterproposal*, 123 U. PENN. L. REV. 676 (1975).

reject proposals for a specialized environmental court system.²⁸⁵ Critical to the perceived problem was the perfectly correct understanding that many controversies, even disputes in private law, have some environmental dimension or impact.²⁸⁶ Some opponents of establishing an environmental court system in the United States argued that granting an environmental court broad, nonexclusive jurisdiction could result in a specialized environmental court deciding legal controversies that were only secondarily “environmental.”²⁸⁷ If such a court’s jurisdiction over “environmental” cases were exclusive, these opponents feared that litigants would artfully characterize essentially non-environmental claims as environmental ones to invoke the jurisdiction of the environmental court system (presumably to their favor).²⁸⁸ On the other hand, restricting an environmental court’s jurisdiction – for example, by granting it exclusive jurisdiction to decide appeals of certain government decisions – would undermine an important justification for such a court, as some technically demanding cases with “environmental” issues or implications would be decided by generalist courts perceived to lack equal competence.²⁸⁹

New Zealand’s enactment of the RMA after a lengthy reform process indicates that such difficulties, whether political, structural, technical, or merely semantic, are not necessarily intractable. New Zealand’s unique traditions, such as the Planning Appeals Boards and watershed-based local government, certainly provided institutional roots for a full-blown environment court,²⁹⁰ but a number of other factors also contributed to its establishment. Most important, New Zealand’s wholesale restructuring of its framework for environmental and resource management law in the RMA minimized the difficulties of carving out an appropriate jurisdiction for the Environment Court. By unifying its substantive and institutional framework for resource management and providing for Environment Court review of nearly all decisions arising under the RMA, New Zealand avoided the difficulties of deciding which decisions made under myriad statutes were sufficiently “environmental” in

285. Comment, *The Environmental Court Proposal: Requiem, Analysis, and Counterproposal*, *supra* note 284, at 683-85; REPORT OF THE PRESIDENT, *supra* note 8, at V-5, V-6.

286. REPORT OF THE PRESIDENT, *supra* note 8, at V-6.

287. *Id.* at V-6; *Requiem*, *supra* note 284, at 684-85.

288. REPORT OF THE PRESIDENT, *supra* note 8, at V-5.

289. *Id.* at V-5, VII-1.

290. *See supra* at notes 116-124 and accompanying text.

character to qualify for Environment Court jurisdiction. Of course, as described above, passage of the RMA was a monumental undertaking that might be more difficult for countries with less nimble democracies than New Zealand's.²⁹¹

Moreover, New Zealand's incorporation of sustainability as its guiding substantive principle reduces the perceived tension between "environmental" issues that are appropriate for environmental courts to decide and "non-environmental" issues that are more appropriate for generalist courts. The very notion of sustainability rests on the explicit recognition that environmental decisions inescapably involve economic and social issues.²⁹² Under New Zealand's scheme of sustainability, particularly under the "overall judgment" approach of the Environment Court, concern that an environmental court would decide non-environmental issues is unfounded because under the RMA social and economic issues are made part and parcel of environmental decisions. Of course, while this broad notion of sustainability may ease the jurisdictional tensions between the specialized environmental court and traditional, general jurisdiction courts, it begs the question whether any court ought to be deciding questions that might be characterized as essentially political.

The issue of political decisionmaking by unelected judges with life tenure raises the question of the proper balance between expertise and accountability in a system of environmental governance. New Zealand's approach to environmental adjudication shifts substantial power from politically accountable government entities to the judiciary. In the New Zealand eye, the perceived benefits of an Environment Court both technically expert and experienced in making decisions about sustainability subjectively outweigh any concerns about fundamentally political decisions being made by a court that is not politically accountable in any direct way. In

291. New Zealand's penchant for legislative reform combines with several structural factors to give that country "the fastest law in the West." GEOFFREY PALMER, UNBRIDLED POWER: AN INTERPRETATION OF NEW ZEALAND'S CONSTITUTION AND GOVERNMENT 139-161 (2d ed. 1987). Among the factors that enable New Zealand speedily to enact legislation include a unitary, rather than federal, system of government, a unicameral Parliament, and a significant overlap between the executive and the legislature (the Prime Minister and the cabinet are chosen by the majority party or coalition in Parliament). See *id.*; Luke Nottage, *New Zealand Law through the Internet: The Commonwealth Law Tradition and Socio-Legal Experimentation*, 6 MURDOCH UNIVERSITY ELECTRONIC J. OF L., No 1 (March 1999) at http://www.murdoch.edu.au/elaw/issues/v6n1/nottage61_text.html.

292. See *supra* notes 200-216 and accompanying text.

the United States, by contrast, most environmental decisions are made in the first instance by executive agencies and subject to judicial review under deferential standards that carefully limit the role of the judiciary. As explained above, the Environment Court is obligated to review quasi-legislative and quasi-judicial decisions and to render decisions based on its own factual determinations and its own exercise of discretion under the law.²⁹³ New Zealand's choice to vest broad powers of environmental policymaking in a court of law raises longstanding questions about whether unelected expert judges, rather than expert administrative agencies that are arguably more politically accountable, should bear ultimate responsibility for environmental decisions.²⁹⁴ A large body of American jurisprudence and scholarly literature examines the role of judges in environmental decisionmaking and charts familiar themes regarding both the competency of generalist judges to decide complex technical issues and the desirability of unelected judges making environmental decisions that so closely involve political, social and economic factors.²⁹⁵ One school favors limiting judicial attention to the procedures followed by environmental decisionmakers to ensure that all competing interests are adequately protected.²⁹⁶ This view essentially derives from doubts about the capacity of "technically illiterate judges" to render reliable decisions on matters of scientific

293. See *supra* notes 166-176 and accompanying text.

294. The expertise of the Environment Court's non-lawyer commissioners differs from the expertise of administrative agencies. For example, nothing in the RMA requires the Environment Court to assign to any particular case a commissioner with specifically relevant expertise. Instead, the RMA merely establishes as a qualification for Environment Commissioners that they have "knowledge and experience" in any of a wide range of subjects relevant to resource management generally, such as economics, environmental science, or Maori affairs. See RMA § 253.

295. E.g. James L. Oakes, *The Judicial Role in Environmental Law*, 52 N.Y.U. L. REV. 498 (1977); Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PENN. L. REV. 509 (1974); Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713 (1977); Clayton Gillette & James Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027 (1990); Cass Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522; Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 L. & CONTEMP. PROB. 249 (1991); Joel Yellin, *Science, Technology, and Administrative Government: Institutional Designs for Environmental Decisionmaking*, 92 YALE L.J. 1300 (1983).

296. Chief Judge Bazelon, of the United States Court of Appeals for the D.C. Circuit, was perhaps the leading judicial proponent of this view. See *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 66-68 (D.C. Cir. 1976) (Bazelon, C.J., concurring), cert. denied 426 U.S. 941 (1976); *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650-53 (D.C. Cir. 1973) (Bazelon, C.J., concurring).

complexity.²⁹⁷ Another school rejects these notions and argues that courts should engage in substantive review of environmental decisions to ensure that environmental decisionmakers act within the statutory limits of discretion.²⁹⁸ Judge Oakes, for example, argued both that generalist judges are capable of mastering scientific information to the extent necessary to determine “whether an agency has acted arbitrarily or capriciously”²⁹⁹ and that courts are not as insulated from political pressures as is often presumed.³⁰⁰

The power of New Zealand’s Environment Court to affect environmental policy, although limited by the Court’s inability to select the issues on which it acts, far exceeds even the substantive judicial review favored by D.C. Circuit Judges Harold Leventhal and James Oakes. In the exercise of *de novo* review, the Environment Court is required to exercise the full discretion of a first-instance decisionmaker, and is subject to review only on matters of law – all within a framework that requires it to consider social and economic as well as environmental factors. My personal experience living in New Zealand while observing the practice of sustainability there convinced me that what seems to make this acceptable, even desirable, to New Zealanders is a profound belief that environmental decisionmaking, at least on the project level, is essentially a technocratic exercise in which better decisions about environmental management will result from the practiced and expert development of environmental rules and application of those rules to factual circumstances. A government review of the RMA in 1998, for example, considered a proposal to allow resource consent applicants to bypass local and regional councils altogether by seeking direct review of resource consent applications by the Environment Court.³⁰¹ The same review also

297. *Ethyl Corp.*, 541 F.2d at 67 (Bazelon, C.J., concurring).

298. This view is perhaps best exemplified Judges Harold Leventhal and James Oakes. See *Ethyl Corp.*, 541 F.2d at 69 (Leventhal, J., concurring); Oakes, *supra* note 295, at 512 (“If it came to be accepted that neither of the two principal asserted limitations – that judges are inexpert generalists and that they lack responsibility to the public – is of much significance in this context, then more vigorous judicial scrutiny on a substantive level could provide a way for courts to respond to the unique problems posed in environmental cases.”).

299. *Id.* at 512.

300. *Id.* at 515-16 (arguing that even substantive judicial review is “inherently limited” and “is simply one part of an ongoing political process in which all sides can seek to influence ultimate outcomes through a multiplicity of channels,” including agencies and Congress.).

301. See N. Wheen, *A Response to the Minister’s Proposals for RMA Reforms*, 20 ENVIRONMENTAL PERSPECTIVES 4-7 (1998), available at

noted that regional and local councils exercise a "monopoly" on deciding resource consents and suggested that independent commissioners break the monopoly by processing consent applications.³⁰² These suggestions accompanied other proposals that would lessen, to a degree, the values-based policymaking functions of the Environment Court by limiting its review of plans and policy statements to issues of law.³⁰³ None of these proposals was enacted, but the fact they were debated demonstrates New Zealanders' belief that environmental decisionmaking is largely a technocratic function properly discharged by judicial officials insulated from political pressures, rather than by political administrative institutions. This judicial-technocratic view of environmental decisionmaking prevails even though, in the context of sustainable management under the RMA, decisions encompass a range of social, economic, cultural and ecological factors whose balancing might well be described as the essence of political governance.

A second issue raised by New Zealand's model is whether courts as institutions are well suited to establish broad environmental policy. The Environment Court also suggests that courts will not always perform as expected when given broad policymaking powers, at least not immediately. New Zealand's Environment Court jurisprudence suggests its reluctance to fulfill the policymaking roles that the architects of the RMA envisioned for it.³⁰⁴ In several areas, it has embraced the role intended for it only when corrected by Parliament and the High Court.³⁰⁵ The magnitude of the task entailed in developing a coherent legal doctrine interpreting a massive and complex new legal regime that is still in transition might explain some of the reluctance. However, the Environment Court's early tendency to interpret its authority under the RMA narrowly at least partly resulted from a traditional view of the judicial role in resolving disputes.³⁰⁶ A substantial question remains, then, whether

<http://www.commerce.otago.ac.nz:800/epmrc/4-20.html>.

302. *Id.* Simon Upton, then Minister for the Environment, suggested that the use of commissioners in place of councils was "an idea whose time has come thanks in part to the increasingly technical nature of resource management decision-making." *Id.*

303. *Id.*

304. *See supra* notes 282-283 and accompanying text.

305. *See supra* notes 191-218 and accompanying text (discussing cases interpreting the priority and meaning of "sustainable management"); *supra* notes 251-260 (discussing the Environment Court's view of standing).

306. It is difficult to say how inclusion of nonjudicial commissioners on Environment Court panels might have affected statutory interpretation. However,

judges trained and practiced in a legal tradition favoring a limited judicial role will adapt when required to play a broader policymaking role.

A final cautionary note arising from New Zealand's experience involves the impact of a specialized court of *de novo* review on the overall capacity of New Zealand to make environmental decisions. Gauging the costs and benefits of any particular system of judicial review is difficult.³⁰⁷ New Zealand's Environment Court is no exception. It is perhaps impossible to determine whether New Zealand's Environment Court ultimately improves or harms the environment. Irrespective of whether Environment Court decisions actually yield better environmental outcomes, there remains an important question as to how the Court might affect the nation's overall capacity to make sound environmental decisions on an ongoing basis without relying so heavily on its corrective function. In addition to providing for legally correct – if not environmentally beneficial – outcomes in specific cases, a system of judicial review should strengthen the overall capacity of a political or administrative system to make good decisions on an ongoing basis. Here, the New Zealand model potentially falls short.

The Environment Court's greatest power, *de novo* review, is also perhaps its greatest institutional weakness. Precisely because the RMA requires the Environment Court to focus on the substantive question of whether decisions promote sustainable management – exercising its overriding judgment and discretion on that ultimate issue – the court does not conduct searching review of the *deliberative process* of the first instance decisionmakers, local and regional councils. By design, the Environment Court corrects, but does not police, unlawful or inept environmental decisionmaking. In contrast, when a court overturns a decision as unlawful and remands it to the initial decisionmaker for correction, the inept decisionmaker must do it

several provisions of the RMA suggest that Environment Court judges would have primacy over commissioners on issues of law. The RMA specifically grants an Environment Judge, sitting alone, authority to hear cases "when the matter at issue is substantially a question of law only." RMA § 279(d). Further, an Environment Judge, sitting alone, may issue a "declaration relating to any inconsistency between a plan and a policy statement," which is a matter of legal interpretation. RMA § 279(j). Further, the RMA provides that an Environment Judge "preside" over any panel on which Environment Commissioners sit, and that the decision of the presiding Judge is the decision of the Court in the event there is no majority decision. RMA §§ 265(2),(3). As noted *supra* note 163, I am not aware of any decision in which two commissioners have constituted a majority of an Environment Court panel.

307. See, e.g., Sunstein, *supra* note 295.

again until the determination is proper under the law. The overall capacity of the system to make better decisions is arguably enhanced, in part because of the resources that the decisionmaking institution must develop or acquire to render decisions that pass judicial muster.

CONCLUSION

New Zealand has taken pioneering steps in embracing an integrated scheme of environmental and resource management based on sustainability and granting sweeping powers to a specialized court to review and establish environmental policies. Although ten years old, the RMA is still being implemented, and the Environment Court's views on fundamental legal issues will likely continue to evolve. Nonetheless, should others look to follow in New Zealand's wake, there still remain unanswered questions. Only time will reveal whether the Environment Court lives up to the grand expectations of its framers and helps New Zealand to achieve sustainable management of its environment.

