

## **Will the NZCPS adequately protect the coast?**

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There are provisions under the Resource Management Act 1991 (RMA) for national direction to be provided for the sustainable management of New Zealand's natural and physical resources through national policy statements (NPS). The only mandatory NPS is the New Zealand Coastal Policy Statement, required to be prepared by the Minister of Conservation.

There are now two processes for preparing such statements in the RMA the process used for the NZCPS involves the appointment of a Board of Inquiry by the Minister of Conservation which receives a Proposed NZCPS prepared by the staff in consultation with various individuals, organisations, and government bodies. The Board publicly releases the PNZCPS, and associated documents, calls for submissions and holds hearings. It then provides a report to the Minister, which is expected to include a recommended revised PNZCPS. The Minister, after some further interdepartmental discussion and refinements if appropriate, is then expected to take the PNZCPS to Cabinet. Subject to Cabinet agreement and amendments, the PNZCPS is finally approved by the Governor General-in-Council. The current NZCPS was approved in 1994, has been reviewed in 2004 (Jacobson 2004, Rosier 2004) and, in 2008, a replacement proposed NZCPS was released for public submission and hearings were held by a Board of Inquiry chaired by Shona Kenderdine. Kenderdine is an Alternate Environment Court Judge and her appointment to Chair the Board is an interesting departure from past-practice (where a retired Judge chaired) and raises questions about the appropriate separation of powers, but that is not the focus of this paper.

When the Environmental Defence Society (EDS) asked me to address the question "Will the NZCPS adequately protect the coast?" it was expected that the Board of Inquiry into the Proposed New Zealand Coastal Policy Statement 2008 (PNZCPS08) would have reported back to the Minister with its recommended policy statement in time for me analyse it. That the Board has been granted an extension is indicative of a saying I learnt on a stress management course many years ago – 'There is no such thing as a deadline'. I do not think the coast will die either because of the delay or in the absence of a new NZCPS. And of course, the delay does not mean that we do not have a NZCPS – the existing one, drafted in 1994, continues in place. There are many aspects of déjà vu in this situation, not least of which is that I was caught in a similar situation in the early 1990s! (see Warren and Rennie 1991, Rennie and Bagnall 1992, Rennie 1992)

### **Approach**

That the Board's recommended new NZCPS is not available means that I am unable to do more than speculate on its likely success – but then, that is largely what I would have had to do had the new NZCPS been published. A published NZCPS would have enabled me to approach the question in the form of a Strategic Environmental Assessment of its impact. That is obviously not possible.

In the absence of the new NZCPS some might think that I should analyse the proposed NZCPS, perhaps in light of the submissions that have been made on it. Past experience tells me that this would be a fruitless exercise. One needs only compare the draft 1990 NZCPS and the proposed 1992 NZCPS to the final 1994 NZCPS to realise that the final version may be substantially different from the version released to the public for consultation. There is also potential for the finally approved NZCPS to be challenged on points of law to the Courts which, if it is sufficiently prescriptive might be the case.

It is also worth noting that a strategy that may be adopted when putting a policy document out for public submissions is to present policies that are somewhat contrary to the preferred direction. The logic to this approach to policy-making is that those that are opposed to the policies are more likely to make more and/or more substantive submissions in opposition than are those who might support the proposed policies. I have no reason to expect that this was the case, but the logic still implies that unless the PNZCPS is very much in accord with a general consensus on the coast, the submissions are likely to be more reactive and oppositional than supportive. The weight of opposition arguments, may lead the Board to a different conclusion than the PNZCPS08. This then enables the policy-makers to justify significant changes to the proposed policy as part of responding to the public process. Thus the 1994 NZCPS was arguably closer to the views of the Department of Conservation officials than the proposed 1992 NZCPS.

I am not for a moment suggesting that the PNZCPS 2008 is a stalking horse, but I am not about to try to predict the thinking and analysis of the Board of Inquiry in considering the submissions made to it. There is, however, a sense of *deja vu* about the current situation and there are cautionary parallels with the preparation of the first NZCPS.

The 1990 Draft NZCPS was prepared under the Labour Government by Minister of Conservations' relatively newly formed Department of Conservation, a delegation that worried many for its perceived protection-orientation. The 1990 election of a National-led Government resulted in significant amendments to the Resource Management Bill, which in turn led to significant changes in the 1992 Proposed NZCPS. This occurred at a difficult time for the economy and resulted in significant budget cuts.

Similarly, the PNZCPS08 was prepared under a Labour-led Government, there has been a change in Government and National has indicated its intentions to significantly amend the RMA. Some would argue that it makes little sense to complete the NZCPS until the passage of the proposed amendments. There have also been significant cuts to the Government's budget, notably in the Department of Conservation. In contrast to 1990, however, there is a proposal to establish an Environmental Protection Agency (EPA). Although the need for an EPA has not been demonstrated, nor is its role clear, it may be a significant player in the implementation of the NZCPS and so is as much an unknown as was DoC in 1990.

If the new NZCPS is promulgated before the RMA amendments, then the extent of any amendments to the RMA will determine whether there will need to be an

amended or new proposed NZCPS released for consultation under either the existing or a new Board of Inquiry, or decided through some other process. It may even be that the requirement for an NZCPS is dropped altogether from the RMA, if someone convinces Parliament that we do not need it. I would not be surprised if there was some lobbying to do so under the aegis of reducing the constraints on development, but suspect there will be a NZCPS.

In summary, not much can be accomplished by attempting to predict the content of the new amended RMA or of the NZCPS. National may well find that many of its concerns with the existing RMA are groundless and it might be quite happy to live with whatever the Board of Inquiry reports back and may feel no need to restart the process. Or, it might do otherwise. There has been no public indication of the extent or nature of any changes that the Board might recommend.

So let us for the moment assume that there will be an NZCPS of some sort and that it will continue to have to be 'given effect to', then there is scope for considering the question put by EDS by considering the issue at conceptual and pragmatic levels.

### **Purpose of the NZCPS**

To the question "Will the new NZCPS adequately protect the coast?" the answer is clearly 'no'. The 'no' lies conceptually in the simple fact that protecting the coast is not the purpose of the NZCPS, nor can the NZCPS achieve it by itself. More pragmatically, there are considerable constraints to its implementation regardless of its content. I address each of these in turn.

The purpose of a NZCPS under the RMA is to state policies in order to achieve the purpose of the RMA – that purpose is to 'promote the sustainable management of the natural and physical resources of New Zealand'. The purpose is *not* to provide adequate protection of the coast. It can be argued, however, that the 'adequacy' of the protection is taken as being defined by the outcome of the processes that are set in place by the RMA.

A NZCPS may state objectives and policies about any matter relating to its purpose. A number of these matters are listed, but there is no hierarchy between these. Briefly these matters include the:

- preservation of the natural character of the coastal environment, including protection from inappropriate subdivision, use and development
- matters to be included in regional coastal plans in regard to preservation of the natural character of the coastal environment
- specification of the circumstances where the Minister of Conservation will decide resource consent applications – the so-called restricted coastal activities. (The current RMA reforms propose to remove the Minister's decision-making role while retaining the ability to appoint a representative to hearings of RCAs).
- maintenance of public access to and along the coast and the protection of recognised customary activities.
- protection of characteristics of special value to tangata whenua
- implementation of international obligations

- procedures and methods to be used to review the policies and monitor their effectiveness
- activities involving the subdivision, use, or development of areas of the coastal environment.

Protection can be achieved through a raft of mechanisms, each providing varying degrees of protection. What is 'adequate' will lie in the eye of the beholder and under the RMA is largely determined by the community through its plans and consent processes. In the absence of a genuine consensus at all levels on what is adequate protection, the processes of the RMA provide a situational determination. Logically, any decision that is taken on the coast under the RMA must be considered to be providing adequate protection at that particular place and time, otherwise it would not have been taken as it would have been *ultra vires*. Pragmatically, whether this is true or not is dependent on the same constraints that lead to the conclusion the PNZCPS will not adequately protect the coast.

Considering the potential adequacy of the NZCPS requires pragmatic consideration of the contextual within which it might be implemented and the associated constraints and threats. That context needs to consider:

- changes to the RMA since the first NZCPS was made,
- planning approaches and related case law
- changes in approaches and mandates of government departments
- changes in the situation of Maori
- experience gained since the first NZCPS.

### **Changes to the RMA regarding the NZCPS**

The new NZCPS is being prepared under the new 'give effect to' provisions of the RMA. The 1994 NZCPS was prepared under provisions that the plans and policies shall not be 'inconsistent with' the NZCPS. The RMA clearly now may state objectives as well as policies. Moreover, although individual policies within the statement are not rules, case law has clarified that regional policy statements may include 'methods'. That would appear appropriate for national policy statements too. Indeed, there are methods in the existing NZCPS for deciding what activities are RCAs.

The weight that the new NZCPS has is much greater than that of the old and it can be much more prescriptive and action-forcing. The PNZCPS08 individual policies have been vigorously opposed on grounds that they amount to central government interference in local planning decisions made by democratically elected local government and that they have significant cost implications, especially for local government.

In the straightened economic times that have become apparent since the release of the PNZCPS08 it may be that the outcome of the current process is a less prescriptive NZCPS than might have been expected in more affluent times. Whether this occurs depends in large part on the predilections of the new Government.

### **Changed planning ideologies**

The approach taken to planning in general has made a significant shift to the left since the early 1990s. The drafting of the national policy statement in the early days of the RMA had an underlying theme of a 'hands off' central government. This was a period at the height of implementing the neo-liberal, market-led approach to government. It was a period of devolving power from central government to the local level, the 'one-stop shop'. Quangos and various other governmental structures were 'streamlined'. The intention was to establish a permissive and enabling planning regime. Land owners were empowered to do what they wished with their land unless they had effects on the rights of others. Government would not 'pick winners', it would not favour one industry or activity with special treatment as this was effectively a 'hidden' subsidy distorting the market. Instead it would create consistent processes that would be implemented in a transparent and accountable way throughout the country. The RMA was about **sustainable management**, it deliberately was not about **sustainable development**.

Since the start of the new millennium there has been a significant shift in approach, away from 'integrated' sustainable **management**, towards sustainable **development**. This led to the rewrite of the Local Government Act, enabling local government to have a much more developmental approach to their operations, and the creation of an associated financial and asset management planning regime. Calls from local government and Maori for greater central direction on difficult issues such as water, energy and coastal occupation (e.g., for aquaculture) led Labour to increase its ability to provide prescriptive central direction and associated national policies or activity specific legislation.

The election of the National-led Government in late 2008 has signalled some significant ideological changes. The proposed changes to the RMA are indicative of the new approach. National clearly favours a greater level of central government interference in local government decision-making and in the rights of private land owners and justifies this as improving the efficiency of sustainable development. In many respects this is a centrally-oriented decision-making process that had its precursors under Labour. There are inherent tensions between National's approach of investing in key sectors (picking winners) and fast-tracking particular projects and that of its coalition partner, ACT's, belief in hands-off Government. It is unclear whether the current ACT-led approach to local government might significantly change the LGA in a direction back toward neo-liberal sustainable management as opposed to the sustainable development approach that National appears to prefer for the RMA.

Before considering the related planning approaches it is important to recall the distinct nature of the regime for the coastal environment.

### *The exceptional coastal environment*

The 1990s reforms were the outcome of the most extensive public consultation period of any in New Zealand's history. These apparently reinforced the importance the citizens of New Zealand placed on special management of the coastal

environment. Consequently, the coastal environment was always treated distinctively in the RMA.

In the coastal marine area there was a prohibitive approach. Under the RMA, to have an effect on the environment *within* the coastal marine area one had to either be allowed to do so by a rule in a coastal plan or by a coastal permit. This partly reflected the presumption (now fact) of Crown ownership of the foreshore and seabed. More broadly, for the coastal environment, there was recognition of the lack of knowledge of coastal and marine processes and their great dynamism.

Consequently, the only national policy statement which is statutorily required under the RMA is that for the coastal environment. This enables the Crown to indicate what its expectations are as landowner of the CMA and as the Treaty partner with Maori. It also addresses cross boundary issues to ensure that its concerns are addressed by local communities when preparing and implementing plans that might affect the Crown's responsibilities for the coastal environment generally.

#### *Effects-based planning reminder*

The planning approach chosen to implement the neo-liberal agenda of the 1990s was effects-based planning. The RMA, in theory, ushered in this new planning regime coupled with a participatory decision-making process that empowered the individual. This decentralised and devolved decision-making to the market, the individual, the community. It reflected a post-modern approach to planning, potentially reducing the role of planners to that of facilitators of processes, a move resisted by traditional planners more at home with the command and control approach inherent in the rational planning models of earlier times.

Under the RMA, communities set the limits to cumulative effects for their environment through their various planning documents. Within those constraints individual landowners could do what they wished, or seek resource consents to do things that the community indicated it wanted a decision-making role in. This placed considerable reliance on an informed, active community and a strong knowledge-base and ability to predict future cumulative environmental effects. In turn, this requires good environmental science.

Tight budgets at local and national levels in the early 1990s, focussed people on statutory planning – largely found only in the RMA and the Conservation Act. The nature of planning in these Acts is *environmental planning*, which is quite different from the preceding Town and Country Planning Act orientation.

For planners trained in traditional planning approaches, with its historical connection to the built environment and close connections to architecture, engineering and top down approaches, the RMA was almost anti-planning. Interestingly, the more affluent start to the new millennium facilitated the return of traditional planning through the LGA.

Judicial resistance to effects-based, environmental planning was led initially by the late Judge Treadwell, but is best exemplified by the flawed *Trio* decision of Judge Kenderdine (Upton et al. 2002).

### *Portfolio planning*

An alternative planning approach, the one overwhelmingly voted for in 2008 by the shareholders of New Zealand Inc, is of managing the country like a business. Under such a model, known as portfolio planning, the country's human and natural capital is managed to optimise the return on these assets. 'Optimise' can be read in many ways, but in a market-led economy is potentially reducible to the 'simple to quantify,' national GNP and national debt levels. Portfolio planning, however, inevitably interferes with the decisions made by individuals as to how they use their property and how they invest in the future. It therefore conceptually interferes with ACT's neo-liberal orientation.

Implementing a portfolio approach can be at a national or a local level, but initial indications are that National prefers the economies of scale offered by a centralised national approach with decentralisation only to the regional level. This fits well with ACT's desire to streamline local government – again. So for the present the tensions between the two approaches are not as evident as they will become. Whether devolution will be retained or there will be a shift to seeing local government as a branch of central government, or whether local government will be replaced in operational terms by an EPA with regional offices (reminiscent of the Ministry of Works and Development and potentially duplicating or replacing the Department of Conservation) is unclear.

A 'key' component of traditional portfolio approaches is rational planning – represented in the planning lexicon as 'master planning' and often implemented through reductionist 'structure plans'. In the marine environment it is being implemented in Europe through marine spatial planning. In New Zealand, the approach to aquaculture reflects the attempt to shoe-horn a portfolio approach, based on activity planning, into an effects-based planning regime. In passing, the non-integration of fisheries into the RMA represents an early failure of the government to completely avoid portfolio and activities based planning.

Arguably, successful, geographically constrained, sedentary corporations (such as NZ Inc) that adopt a head office, centralised decision-making model, need to also have a strategic planning capacity to ensure their biophysical capital is not stripped. Will National recognise this need? It is early days and the signs are mixed.

The new class of event-contracted, special advisors reporting to Ministers, but employed by departments does not appear likely to provide this capacity. Recent, national conferences on strategic issues have been notable for their lack of success. They are ephemeral, ill-informed and lack relevant institutional memory and capacity. They are not a New Zealand Planning Council or a National Development Conference such as those seen in the past under similar portfolio planning approaches. The proposed NZ version of an EPA seems likely to fall well-short of a 'Department of National Planning'. The Minister of Conservation is being removed

from the important landowner's decision-making role in relation to restricted coastal activities. At this stage the only mechanism available to the Government to provide direction to the use of the Crown's major biophysical asset is the NZCPS. It would make sense to expect it to take a strong directional approach in this policy, but the relinquishing of the RCA decision-making role suggests it may not appreciate this responsibility. Thanks to the foreseeable debacle of the aquaculture approach (Rennie 2006), I am hopeful that further disintegration of the RMA into individual portfolios will not occur, but aquaculture continues to be treated as a special case. There is little logic to this.

Under a national portfolio approach, a prescriptive NZCPS would be a critical component to providing central direction and integration across portfolios, but will the new NZCPS be that prescriptive? I will return to this shortly.

### **Changes in Government department operational mandates**

The third major change since the early 1990s is in government department mandates.

Government departments in the early 1990s were expected to have clear mandates and to provide policy advice that reflected their specific mandates. Policy decision-making was in the hands of the elected Government, not the bureaucracy of unelected officials. This too has changed, with Labour (re-)introducing 'whole-of-Government' approaches that seem to over-ride legislative mandates, most notably the Department of Conservation's responsibility to be an advocate for the environment. This limits the information presented to decision-makers and the public.

Where once Judge Treadwell complained of the frequency with which the Department of Conservation appeared before him in coastal resource consent appeals, I now miss the Department's input. This trend is likely to be exacerbated by the recent DoC budget cuts and it is probably time for the Conservation Act to be rewritten to legitimise the dropping of DoC's advocacy role. It is unlikely the new EPA will take up that role.

Interestingly, while DoC may be an endangered species at coastal permit hearings, the Ministry of Health officials have rediscovered Health Impact Assessment and the relevant provisions of the RMA, and they are making 'neutral' submissions. This may help protect the coast from water pollution, but assist the development of aquaculture. Is that adequately protecting the coast?

### **Experience from the 1994 NZCPS**

Fourth, the new NZCPS will have the advantage of the experience of the 1994 NZCPS and its implementation, and indeed the implementation of the RMA generally. There are two dimensions that I wish to address here- the policy construction aspects of the NZCPS and the human component.



The effectiveness of the 1994 NZCPS has been independently reviewed (Jacobson 2004, Rosier 2004). The key conclusion is that it had an effect, even when it was not required to be given effect to. However, it was much less effective at the district council than at the regional council level. Generally, as in many other areas of the RMA, there were calls from lower tiers of government for more national direction on difficult issues – this effectively translates as a need for greater clarity which in turn implies greater prescription to ensure that it is given effect to.

Such a prescriptive approach is in keeping with a nationally-centralised rational planning approach and should fit well with the National government. Will it prescribe greater protection? Unless the National government recognises the need to invest in green infrastructure, as well as grey, more prescriptive protection is less likely than prescriptions that favour economic development.

Ironically, many of the submissions to the proposed new NZCPS policies were from lower tiers of government protesting that the prescriptive nature of the policies would require considerable expenditure from local government or, more subtle, that it would alter the timetabling of expenditure in a way that would distort the local government's financial planning. It was argued, for instance, that specific policies to protect surfing breaks of national importance were not needed because these would be protected through the normal RMA decision-making processes. Alternatively, it was argued that it was inequitable to select some coastal features, such as surfing breaks, for protection and not to do the same for areas nationally important for, say, recreational fishing or boating. The cost imposition was not warranted and there was no need to pick winners.

I do not know what the Board's view of such submissions was, nor is it possible to say from their questions or comments which ways they were leaning as they may well have been playing devil's advocate at times. For instance, did members of the Board genuinely believe that it would be inappropriate for the NZCPS to direct that lower tiers of government be required to undertake regional assessments and protection of regionally important aspects of the coastal environment? How much was the board influenced by ideologies that central government should not dictate to regional government the national priorities for protection? Will it accept evidence presented to it as to the nationally important surfing breaks, or will it 'opt out', by arguing that yet another process (other than the Board's process) is required to identify areas to be protected and consequently not provide strong protection of such important features? I believe the evidence presented by organisations such as the Surfbreak Preservation Society (see Skellern et al. 2009) on the need to protect the diversity of surf breaks as well as the breaks recognised as nationally important, was compelling – the Board may not. The situation will be even more difficult on land in the coastal environment where the government is not the landowner.

It is clear, however, that the level of prescriptiveness adopted, including requiring particular methods to be implemented within particular time frames where information is currently insufficient to make a definitive decision, will determine the degree to which the new NZCPS provides the necessary direction to adequately protect the coast. The PNZCPS08 is certainly more prescriptive than its predecessor. Only time will tell if this is carried into the approved new NZCPS.

### *The human element*

If the NZCPS lacks prescriptiveness, then the adequacy of guidance, if any, given to protect the coast will be even more dependent on the way humans implement it.

Most experienced planners I have spoken with say that when they got involved in coastal planning they had to go back to first principals. It was totally different from their experience with terrestrial planning – which suggests that their coastal planning shoreward of mean high water springs was probably not true coastal planning. Are the human resources present to enable the implementation of the NZCPS?

Failure to implement the NZCPS may be less due to the adequacy of the policies than it is poor planning practice. I have been struck over the years by the selective nature of the planning evidence presented at some hearings. For instance, at times there has been no sign that relevant iwi planning documents are considered in planning officer reports. Similarly, district council planners have told me they never look at the NZCPS as they assume that anything relevant has been included in the relevant district plan. The policies chosen as relevant in section 42 reports also prove puzzling. I wonder if policy 1.1.5 “It is a national priority to restore and rehabilitate the natural character of the coastal environment where appropriate” has ever been decisive?

The first NZCPS brought the precautionary principle into the RMA regime. However, a study of its implementation found that officials were anticipating the failure of the application of the precautionary principle and so were no longer advancing it. Rather than place decision-makers in positions that meant they might want to go against the advice given them, they were not advancing their actual assessment, but an ‘acceptable’ or ‘realistic’ assessment (Chandran 2007). If their ‘planners’ are not presenting the case professionally, the decision-makers can hardly be blamed for bad decision-making.

Even if they do act professionally, do our planners have the skills needed for coastal planning? Are they graduates of professional planning programmes?

My impression is that most councils do not use qualified professional planners for coastal consent processing. In any case, I am not sure that a professional planning qualification would make any difference. At the time the RMA was passed into law my recollection is that there was only one coastal planner on the staff of any planning programme accredited by the New Zealand Planning Institute. At one stage in the 2000s four specialist coastal planners were permanent staff at University planning programmes. Today it is back to two.

As far as I am aware, there are no specific compulsory coastal planning courses taught in planning programmes, although there may be modules within compulsory courses (e.g., Lincoln University). I do not think this is sufficient given the variety of coastal planning issues and contexts and the distinctive difference between coastal and terrestrial planning.

Moreover, despite the scientific orientation of effects-based and environmental planning, only two planning programmes require their graduates to have a scientific competency to at least second year level. One of these programmes is not recognised by the NZ Planning Institute. That means that not only the past, but the current and future generation of planners dealing with coastal planning will essentially have to learn from experience without a basic competency in science. This bodes ill.

What about the decision-makers? Judges do not take coastal planning courses, they learn by experience and on the basis of arguments presented to them. Regional councillors are in a similar position. A recent significant step forward has been the establishment of a certification procedure for hearing committee members, but the first round of exercises for certification did not include a coastal component. That has been rectified in the re-certification assessments, but the role of national policy statements is only a marginal component of the course and the content is not likely to lead to an understanding of coastal protection issues.

As a response to the review of the NZCPS, the Department of Conservation established a national panel of people that the Minister would draw from to appoint his representative to hearings of RCAs. The Department does not pay the costs of certification for these people and while they may be expert in their specific fields of coastal management – which in itself is not necessarily a good thing – they may be less effective in their role as a consequence of not being certified. Most have individually completed the certification process, but few are experienced or trained in coastal planning as opposed to their specific speciality and what they have learnt on the job.

### *Expert witnesses*

So we are reliant on expert witnesses. Some companies have developed coastal planning specialists and capacity. However, there is considerable confusion over conflicts of interest. In one recent non-coastal case, *one* expert from a major research institute was employed by an applicant. The institute then allegedly refused to let any of its other relevant experts appear for the opponents as it considered, wrongly, that this would be a conflict of interest. Other experts were under retainers to another objector and when that opponent negotiated an out of court settlement the evidence of those experts was never presented to the Court. In the absence of contrary expert evidence the Courts find it easier to rule in favour of the expert evidence they receive and can test.

In the face of conflicting evidence, rather than adopt the precautionary principle the court tries to decide which expert to give weight to. Leaving aside the issues of who is the more persuasive actor, the flawed decision of the Environment Court in *Briggs v Christchurch City Council* is indicative of some of the problems in such an approach. This decision effectively removed from consideration the expert evidence that weighed in favour of substantially greater areas of natural character being given a degree of protection.

### *Political will*

Political will is another key variable and here we have a clear signal from National. It does not want to take responsibility for coastal decisions on restricted coastal activities. The Minister of Conservation's role in approving RCAs is to be removed in the current reform of the RMA. In the most significant case where the Minister of Conservation turned down a recommendation from an Environment Court inquiry into an RCA (involving Whangamata Marina), his decision was overturned on procedural grounds and then reversed by the Minister for the Environment acting on delegated authority.

The Minister for the Environment has not used the existing powers of the RMA to call-in a coastal permit application, but under the new proposals that Minister may well be asked to do so. It will be interesting to see the response. At the local level, enforcement activities are both problematic and often under-resourced. Local communities trying to ensure conditions are enforced face the direct costs of taking action and the threat of even greater costs should the action fail.

There is political will to alter the legislation and it appears to me that this is misplaced. The concerns with the implementation of the legislation fail to adequately recognise the inherent lag effects of implementation. The certification of commissioners and the establishment of a national panel of RCA appointees is relatively recent and post dates the independent review of the NZCPS94. Moreover, the NZCPS is implemented through plans and the second generation plans are much improved on the first generation, many of which were largely completed before the NZCPS and/or have been delayed in extensive court actions since. Much of the interpretation has now been clarified through case law. The current proposed changes to administrative structures and the Act's processes may not be required, but are distracting, resource consuming and unsettling.

In summary, the capacity to implement the NZCPS is currently low, and has always been, and the political and professional will is not necessarily there or well-advised. When the current generation of coastal 'planners' retires, who will replace them?

### **The post-postmodern era**

The final major change is that we are in a **post**-postmodern era. Acceptance of legal and ontological pluralism has resulted ironically in a utilitarian re-emergence of engineering and positivist epistemologies. Put another way, Maori concepts of reality are now accepted in law and by decision-makers, but this is being expressed in practice through the language of the market and the engineer. The approach is now to find an engineering solution, a design solution to coastal 'problems' and to rely on 'expert' witnesses – technical or evaluative.

In the 1990s, soft approaches to coastal management were being developed and these included the development of new language (Jacobson and Rennie 1991). The masculine militarism inherent in traditional coastal management language, such as coastal 'defences', was replaced with the feminist-influenced rhetoric of 'harmonising'. It is interesting to note the re-emergence of the term 'coastal defence',

and the attempts to develop complex systems-based predictive tools, largely driven by the availability of 'super' computers. This is a 'back to the future' era – the reification of positivism and rational 'man'.

Nor can we expect the acceptance of Maori ontologies to change this. The internal tensions between putting food on the table and traditional concepts of kaitiakitanga are difficult for Maori. Increasingly, Maori appearing before hearings on coastal aquaculture issues emphasise enabling Maori development. Maori also have a history of opposition to marine reserves and other non-Maori approaches that prevent Maori using resources. Expectations that Maori concerns over their taonga equate to a general protection of the coast are misplaced.

Non-Maori may have similar waahi tapu, but must use formal Western mechanisms to manage these. The spiritual component is lost and even ecocentric arguments based on the RMA's provision for intrinsic values are reduced to neo-market calculations of existence value and ecosystem services.

## **Conclusion**

Experience and reviews indicate that the new NZCPS should be prescriptive. Even if the NZCPS is quite prescriptive, however I have very real doubts about its ability to result in adequate protection, whatever that might be. It will result in improved protection, but the inertia of development will not be matched by counterbalancing protection in the current context of tightening budgets and RMA decision-making systems. It is unlikely to be rapid in its practical implementation. The human and other capital resources are insufficient. The proposed reforms of the RMA may well further undermine the original integrated effects-based approach. In the absence of strategic national planning and implementation capacity the introduction of a portfolio approach is unlikely to be successful. The new NZCPS may well provide an adequate framework for protection of the coast, but it will not be well-implemented and adequate protection is not its purpose under the RMA.

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