

# REGULATORY V NON-REGULATORY METHODS

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## OVERVIEW

### Introduction

When is regulation justified? What level of regulation is required? How far can non-regulatory methods go in achieving environmental outcomes? The workshop on regulatory versus non-regulatory methods will examine these questions. This paper provides a brief overview of the issues surrounding the debate. It then presents two case studies from the Auckland region (prepared by Craig Shearer), that are relevant to the debate.

### The case for regulation

There are two principal circumstances under which regulation is justified:

- **Public resources** – The management of “public resources” (water, air, the coastal marine area, etc.) automatically requires some form of regulation, owing to the fact that the market place cannot adequately manage these types of resources. For example, without some form of regulatory framework, it would be very difficult to stop people discharging an unacceptable level of contaminants into air or water. Regulation is thus required, as a minimum, to set environmental standards.
- **Private resources** – By contrast, regulation of “private resources” (land, subdivision, buildings, etc.) is justified if it can be argued that individuals are not the best judge of their own interest. In particular, it might be in the “public interest” to regulate an individual’s actions (e.g. in relation to excessive noise or building height). Alternatively, there may be a need for “collective action”, which individuals cannot bring about, but a regulatory agency can (e.g. management of urban growth).

The fundamental difference between regulation of public and private resources is that the presumption is in favour of regulation of public resources, but non-regulation of private resources. Regulation of private resources (including land) should only be introduced if the regulatory agency can clearly demonstrate that regulation is needed (and that the benefits outweigh the costs).

## The degree of regulation

How much regulation is required? The Resource Management Act (“the RMA”) contains a detailed hierarchy of activity classifications, ranging from permitted activities to prohibited activities. Many local authorities appear to still be developing their ideas on how to best utilise this hierarchy, and there are significant differences from one local authority to the next. This is not surprising, given the fact that there are 86 local authorities, each making their own decisions in the absence of any significant national guidance.

The most common problem in the use of rules appears to be the retention of unnecessary discretion by a local authority. The overwhelming majority of resource consents are not declined (meaning that local authorities should look seriously at what activities actually do need to be classified as discretionary or non-complying). Another common problem is an activity-based focus to the development of rules. For example, permitted activity rules are often written such that specific activities, as opposed to specific environmental effects, are permitted. However, this is changing in many councils, particularly as their level of information about the state of the environment increases.

Overall, the principle for deciding the degree of regulation should be to use the least restrictive option. A more specific requirement under the RMA for local authorities to assess, and be accountable for, the costs and benefits of any proposed regulation might aid this.

## Other issues

There is a plethora of issues surrounding the regulatory versus non-regulatory methods argument. In addition to the comments made above regarding the case for regulation, and the degree of regulation, the workshop will discuss the following:

- **Certainty** – Certainty for businesses is critical, in terms of likely constraints on business activity. Is there a case for more regulation, in the form of specific environmental standards, if this increased certainty?
- **Costs** – To what degree are resource users really hamstrung by the costs associated with environmental regulation? How do these costs compare with other costs of their business activity?
- **Regulation versus consent processing** – Are consent processing matters, including time requirements and notification/non-notification, more problematic than the balance struck between regulation and non-regulation?
- **Regulation versus enforcement** – Have local authorities got the right balance between regulation (in the form of rules and resource consents), and enforcement action? Could the use of enforcement action be enhanced, as a means of reducing the overall level of regulation?

# **CASE STUDY 1: OMAHA GROUND WATER ALLOCATION**

## **Background**

The Omaha groundwater aquifer is located 50 kilometres north of Auckland. The soils above it are used extensively for horticulture. As there are no significant surface water resources, the aquifer underlying the area is the main source of water for irrigation. The aquifer is currently fully allocated to users.

## **Previous management regime**

In the late 1980's the Auckland Regional Council ("the ARC") took a very regulatory approach to managing the resource. The water was allocated, its use was strictly monitored, and if consent holders were not using all their allocation, the unused water was taken off them at the time of review of the consent. However, this led to consent holders pumping water to waste to ensure they used their allocation - they had to use it or lose it. Enforcement procedures were used if necessary, and arguments about allocation ended up in the Planning Tribunal at the time of re-issue of consents and new allocations.

It is fair to say that the ARC was not always seen as acting in the best interests of all the users of the aquifer. Consumption, however, became unsustainable, with the aquifer starting to be drawn down and the risk of saltwater intrusion occurring.

## **Current management regime**

The resource is now largely managed by the users themselves, within a framework set by the ARC. The ARC has prepared a management plan which sets out the amount of resource which is available to be allocated - a bottom line of 105,000 m<sup>3</sup>/year, which ensures that the level of the aquifer is sufficient to avoid salt water intrusion.

Resource consents have been granted to users of the resource, with an annual allocation review clause. A water user's committee (WUC) meets regularly to discuss issues and to agree any variations in the use of water. There is a very flexible approach to use of water. Users frequently give up part of their allocation for others to use, and help others conserve water. Such changes in allocation are made on an as required/agreed basis, and can be formally established through the annual allocation process.

The WUC works well, and it sees the ARC's role as being one of providing technical expertise when required, of being a facilitator, and of being the "backstop" if there is any dispute regarding allocations and use. For example, the WUC expects the ARC to take some action if one of the users is using more than they have been allocated.

Essentially, after the allocations have been decided, the users self-regulate the use of the water, although all the monitoring records are collated by the ARC before being given to the users. A monthly report is supplied to the users. Overall, the ARC's role is now very small.

The objective of minimising bureaucracy, reducing the ARC's management cost, giving more control to the users, and developing a partnership involving the users, has now occurred.

## **The future**

In future, the ARC could set up a programme of transferable (tradable) water permits, whereby access to the scarce resource could be bought and sold on the open market in much the same way as fish quotas. There are other parties who have an interest in getting access to the water. For example, the nearby Omaha coastal settlement is reliant upon roof water for water supply. At this stage, such initiatives are, not surprisingly, not supported by the present users.

# **CASE STUDY II: AUCKLAND REGIONAL GROWTH STRATEGY**

## **Background**

In 50 years Auckland could be home to 2 million people - up from 1.1 million people today. There are a whole range of issues associated with such growth, including unsustainable use of natural resources, and under-investment in both physical and social infrastructure. Although the adverse effects of resource use could be managed on an individual resource basis, this could lead to conflicts because of the multitude of resources being managed. The ARC considers that there needs to be a strategic approach to managing the effects of the Auckland region's growth.

## **Historic approach**

A very regulatory approach has been taken to managing growth in the past. In the urban area, for example, the approach largely comprised enforcement of an urban growth boundary, the Metropolitan Urban Limits. Previous documents, although well researched and comprehensive, were not the products of extensive consultation and buy-in of affected parties. The Auckland Regional Policy Statement is a good example of this. The chapter dealing with growth, and how it should be managed, attracted by far the most references to the Environment Court, both in support and in opposition to it. Implementation of the growth policies was envisaged via a raft of other policies and methods, which obligated both the regional council and the territorial councils in their statutory processes.

## **Current Approach**

The Auckland Regional Growth Forum, which was responsible for preparing the Auckland Regional Growth Strategy, was developed out of a desire for a new and different approach to managing growth issues in the Auckland region - for vision, leadership, partnership, certainty and a unified voice for Auckland. It was also a reaction to the increasing litigation costs due to a lack of policy co-ordination, a recognition that public money could be better spent, and a reaction to the view that there was a vacuum in the planning for infrastructure, especially after the water crisis in 1994.

Also, industry and infrastructure agencies in Auckland wanted a greater degree of certainty so that they could, in turn, do their strategic planning. Whereas the Regional Policy Statement provided a degree of certainty, the strategic direction and rationale for it was not always in accordance with what the business sector saw as being cost-effective.

The rapid population growth in the Auckland region, and the growing awareness as to the effects and costs of growth, underlay the voluntary participation of all councils, stakeholders (e.g. utility providers, iwi, business and environmental groups) and the public in the Forum.

The draft Auckland Regional Growth Strategy was released on 6 July 1998. The draft Strategy presents a vision and framework for 50 years. It is a high level document resulting from collaborative efforts. It is viewed as dynamic - a living document that will be refined and developed with input from the regional community, throughout its lifetime.

The draft Strategy seeks to limit the spread of urban Auckland so as to protect the natural environment. It encourages most growth within the existing metropolitan area, with development outside the current urban area only where environmental, accessibility and community principles could be met.

The draft strategy takes an integrated approach, encompassing a wide legislative context and involving all Auckland authorities in partnership with central government, infrastructure operators, the private sector, tangata whenua and the regional community. It takes a co-operative rather than a directive approach. It is a non-statutory document in terms of its implementation.

## **Implementation**

The Growth Forum has operated under a philosophy of consensus and co-operation and this will need to flow through into its implementation. Rather than being a statutory document which could be directive in manner, the Strategy is non-statutory

and will be reviewed every five years. It is intended to be a “living” strategy, which will respond to statutory, market and community changes and preferences.

However, certain mechanisms for the implementation of the Strategy will need a statutory base. These will largely be confined to changes to the RPS, which will include changes to the Metropolitan Urban Limits.

There will be further investigation of alternative mechanisms that could, if shown to be more effective in achieving the desired regional outcomes, ultimately replace the Metropolitan limits in the future.

The Regional Growth Strategy will provide a context within which the region’s city and district councils can prepare their strategies, policies and plans. In addition, mechanisms such as accords, partnerships, heads of agreement and joint ventures will be used in implementation.

Once there is agreement on the form and direction of growth in the region, investment decisions will start to shape growth. It is essential that government agencies, including electricity, power, transport, water and sewerage, lead the way in the development of infrastructure, in line with the agreed vision. Investment opportunities for the private sector in property development and commerce will follow.