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MEMORANDUM

TO: Martin Taylor, Chief Executive Officer, New Zealand Fish and Game Council
FROM: Geoffrey Palmer QC and Elana Geddis
DATE: 30 August 2018
Re: Conservation (Indigenous Freshwater Fish) Amendment Bill

INTRODUCTION

1. You have asked us for our advice on the implications of the Conservation (Indigenous Freshwater Fish) Amendment Bill for the sports fisheries regime managed by Fish and Game under the Conservation Act 1987.
2. The Regulatory Impact Statement notes that *"the reforms being proposed do not directly affect sports fish but will more effectively manage some threats to sports fish"* (pg. 7). We do not consider that this is entirely accurate. Aspects of the reforms impact directly and negatively on Fish and Game. Others have the potential to impact on sports fish.
3. In particular, we highlight:
 - a. **Clause 5** of the Bill will give Freshwater Fisheries Management Plans prepared by DOC priority over the Sports Fish and Game Management Plans prepared by Fish and Game.
 - b. **Clause 6** of the Bill will allow Treaty settlements to override several important elements of the sport fisheries management regime. This is inconsistent with the Court of Appeal's finding in *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139.
 - c. **Clause 17** of the Bill revokes existing regulations in the Freshwater Fisheries Regulations 1983 that expressly require the consent of Fish and Game Councils before fish can be transferred or released in their area of jurisdiction.

- d. The **ongoing overlap** between DOC's statutory powers in respect of "freshwater fish" and Fish and Game's statutory powers in respect of "sports fish". There is currently no mechanism to ensure Fish and Game is consulted before decisions are taken by DOC that could impact on the sports fish management regime.
4. Central to all of these points is the need for the provisions of Part 5A of the Act regarding sports fish (administered by Fish and Game) and Part 5B of the Act regarding freshwater fisheries (administered by DOC) to operate consistently with each other. This is an ongoing issue. It would benefit both parties for the cooperative relationship between DOC and Fish and Game to be placed on a clear statutory footing.
5. We earlier provided you with preliminary advice that **clause 6** of the Bill had the potential to undermine section 26ZI of the Act, which prohibits any person from fishing for sports fish without a licence. We have reviewed that preliminary advice and advise that this specific problem does not arise. But, as discussed further below, Clause 6 still has the potential to impact on other important elements of the sports fisheries regime.

CLAUSE 5

6. At present section 17J of the Act creates the power for the Minister to adopt Freshwater Fisheries Management Plans on a regional basis. When preparing a Freshwater Fisheries Management plan the Director-General must have regard to any Sports Fish and Game Management Plan having effect in that region. This ensures that the two sets of plans are coherent.
7. Clause 5 of the Bill extends the impact of Freshwater Fisheries Management Plans in two significant ways:
 - a. It enables the Minister to adopt a national Freshwater Fisheries Management Plan that applies "throughout all New Zealand"; and
 - b. It provides that Freshwater Fisheries Management Plans prevail over Sports Fish and Game Management plans in the event of any conflict.
8. Under the amendments any Freshwater Fisheries Management Plan will therefore have priority over the Sports Fish and Game Management Plans prepared by Fish and Game. This is despite the fact that both types of management plans are approved by the Minister and have the same legal status under the Act.
9. The new power to adopt a national Freshwater Fisheries Management Plan increases the potential for conflict with Sports Fish and Game Management Plans, which are adopted on a regional basis.

10. For example, a Freshwater Fisheries Management Plan could identify the restoration of indigenous freshwater fish as an over-arching priority objective – either nationally or in a particular area. That objective could be implemented by DOC requiring trout and salmon to be removed from particular water bodies in order to give priority to indigenous fisheries. In that case the objective in the Freshwater Fisheries Management Plan would prevail even if a water body has previously been identified by the Minister as a significant trout and salmon habitat in a Sports Fish and Game Management Plan.
11. Similar situations have already arisen, particularly where commitments have been given by the Crown as part of Treaty settlement negotiations. Fish and Game has not been consulted during the settlement negotiations and Sports Fish and Game Management Plans and Part 5A of the Act have not been taken into account in the settlement agreements.
12. Clause 5(3) will therefore impact directly on the specific management regime for sports fish set down in the Act. Sports fish are managed under a series of detailed rules and licence conditions developed by Fish and Game and approved by the Minister. These flow from the management objectives for each region approved by the Minister in the regional Sports Fish and Game Management Plans. Section 17L(3)(c) of the Act already provides that a Sports Fish and Game Management Plan must not derogate from the provisions of a Freshwater Fisheries Management Plan. This provision is sufficient to address any situation of conflict that might arise.
13. We accordingly recommend that **Clause 5(3) of the Bill should be deleted.**

CLAUSE 6

14. Clause 6 exempts a person who is authorised under Treaty settlement legislation from the restrictions on taking, possessing or selling fish under Part 5B of the Act. This allows the Crown and iwi to agree to set aside the ordinary rules of Part 5B as part of a Treaty settlement.
15. Part 5B includes a number of provisions that apply to sports fish.
16. Central to these is section 26ZI, which prohibits fishing for sports fish without a licence. Clause 6 will not create an exemption from section 26ZI. Existing section 26ZG(3) of the Act provides that the provision amended by clause 6 does not apply to section 26ZI. We consider that section 26ZG(3) is sufficient to protect Fish and Game's interests with respect to section 26ZI. It will not be changed by the Bill.
17. But there are several other provisions in Part 5B which contain important elements of the sports fisheries regime that would be affected by the amendment in clause 6. In particular:
 - a. Section 26ZK, which prohibits fishing competitions for sports fish except in accordance with regulations adopted under the Act.

- b. Section 26ZN, which prohibits the sale of fishing rights.
 - c. Section 26ZO, which requires occupiers of land to comply with the requirements of Anglers Notices adopted by the Minister to set out the conditions for sports fishing.
 - d. Section 26ZQ(1A), which prohibits the sale of sports fish.
18. From the Cabinet paper and other background material there appears to be no intention to use the new provision in clause 6 to specifically override these provisions. But even if this is not intended clause 6 creates the legal possibility that this could occur. It opens up the potential for direct conflict between Treaty settlement legislation and the sports fisheries regime. This is inconsistent with the Court of Appeal's finding in *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139.
19. In order to avoid this potential conflict, we recommend that clause 6 be amended by inserting the language in bold as follows:

- “(c) the taking, holding, possession, sale or disposal of freshwater fish by—
- (i) a person who is specifically authorised under the Fisheries Act 1983, the Fisheries Act 1996, or any regulations made under either of those Acts; or
 - (ii) **other than for sports fish**, a person who is specifically authorised under any regulations made under section 48B of this Act; or
 - (iii) a person acting under the authority of a registration of a fish farmer under Part 9A of the Fisheries Act 1996; or
 - (iv) **other than for sports fish**, a person who is authorised (whether generally or specifically) by or under Treaty settlement legislation.”

CLAUSE 17

20. Clause 17 and the Schedule to the Bill revoke several regulations in the Freshwater Fisheries Regulations 1983. These include:
- a. Regulation 59, which requires that fish or ova cannot be released in an area under the jurisdiction of a regional Fish and Game Council without that Council's consent; and
 - b. Regulation 63, which prohibits the transfer of sports fish and ova between the North and South Islands without the written agreement of the relevant Fish and Game Council.

21. If these regulations are to be revoked it is important that some other mechanism is put in place to ensure that regional Fish and Game Councils are consulted with respect to the introduction or release of fish within their regions.
22. In particular, it is critical that regional Fish and Game Councils are consulted in relation to any transfer or release of sports fish in waters under their jurisdiction. This is necessary if regional Fish and Game Councils are to properly discharge their functions under section 26Q of the Act. Fish and Game Councils are responsible under the Act for monitoring sports fish populations and for stocking or restocking sports fisheries.
23. We recommend that Clause 12 of the Bill be amended to insert a new sub-section 26ZM(3A) into the Act as follows:

“(3A) Provided that the Minister must not grant approval under subsections 2 or 3 to authorise the movement, transfer or release of any live aquatic life to any location within the jurisdiction of a Fish and Game Council without prior consultation with that Council.”

OVERLAPPING POWERS

24. The Bill creates a number of new powers for DOC and the Minister with respect to the management of freshwater fish generally. Clauses 9, 11 and 12 create new authorisation powers on the part of the Director-General of DOC. Clause 16 creates several new regulation making powers for the Minister.
25. These powers have the potential to be used in a way that could impact on sports fish. This arises in two ways:
 - a. Directly from the fact that as defined in the Act “sports fish” are a sub-set of “freshwater fish”. So all powers in the Act held by DOC or the Minister that relate to “freshwater fish” can also potentially be applied to “sports fish”.
 - b. And indirectly, in that decisions taken with respect to the management of other types of freshwater fish could have implications for any sports fish population in the same area.
26. This could have both positive and negative implications. For example:
 - a. Clause 16 authorises regulations to prohibit, restrict or regulate any structure that could impede the passage of freshwater fish. This would include the passage of migratory sports fish such as trout or salmon. Greater protection for fish passage would be very positive and would help Fish and Game to discharge its statutory purpose of managing, maintaining and enhancing sports fish.

- b. On the other hand, Clause 9 creates a new power for the Director-General to authorise an activity that would disturb or damage spawning freshwater fish, including sports fish such as trout or salmon. The Director-General must first be satisfied that the activity “is unlikely to have a significant effect on the affected fish population”.
27. In both cases, Fish and Game would have a legitimate interest in how the new statutory powers are exercised. The relevant regional Fish and Game Council will be best placed to assess the impact of activities on sports fish or their habitats. However, at present the Act does not specifically require Fish and Game to be consulted before these powers are used.
28. It is important that the management regimes created by the Act operate in harmony. Actions taken by DOC under its management powers for freshwater fish should take account of and not undermine the maintenance, management and enhancement of sports fish as provided for in Part 5A of the Act.
29. An obligation for DOC to consult with Fish and Game will arise as a matter of common law given the statutory purposes and functions of both the New Zealand Council and the regional Fish and Game Councils under sections 26B, 26C, 26P and 26Q of the Act. The need for consultation is already recognised in the Act in certain circumstances. Section 26ZL(3), for example, provides that the Director-General may not impose any restriction that relates to the taking of sports fish without first consulting with the relevant regional Fish and Game Council. However, there is at present no clear mechanism to ensure that such consultation takes place in all cases.
30. We consider that the Bill provides a useful opportunity to clarify this point and to record the consultation obligation in the Act itself. We accordingly recommend that section 6 of the Act be amended to include a new sub-section 6(2) as follows:
- “(2) In exercising its functions and powers the Department shall have regard to the provisions of Part 5A of the Act. Where a decision is likely to affect the management of sports fish and game or the interests of angler and hunters the Department shall consult with the New Zealand Fish and Game Council or the relevant regional Fish and Game Council as appropriate.”**
31. A general provision of that nature would provide a statutory basis for Fish and Game and DOC to develop a memorandum of understanding setting out how the consultation obligation would operate in practice.

CONCLUSION

32. The functions of DOC under section 6 of the Act include both the preservation of indigenous fisheries and the protection of recreational freshwater fisheries and freshwater fish habitats. These sit alongside specific functions given to Fish and Game to manage, maintain and enhance sports fish under Part 5A of the Act.
33. It is important that the two parts of the Act work together in a coherent way and that the increased emphasis on the protection of indigenous fisheries under the Bill does not undermine the system for the management of sports fish already in the Act. We consider that the amendments outlined above will achieve that objective while still meeting the central purpose of the Bill.



Sir Geoffrey Palmer
Queens Counsel



Elana Geddis
Barrister