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For: Bryce Johnson

New Zealand Fish & Game Council
PO Box 13141
Johnsonville
WELLINGTON 6440

Anderson Lloyd
Level 10, Otago House
Cnr Moray Place & Princes Street
Dunedin 9016, New Zealand
Private Bag 1959, Dunedin 9054
P: 03 477 3973
F: 03 477 3184
Also in:
Christchurch
Queenstown
www.andersonlloyd.co.nz

Dear Bryce

Freshwater Reform 2013 and beyond - Proposed changes to Water Conservation Orders

1. In the section introducing a new "National Objectives Framework" the discussion document has an incongruous section titled "Improving the Process for Water Conservation Orders". In general this section is vague and the implications of it range from positive in terms of process (costs, timeframes and certainty) to very negative in terms of legal tests and devolving decision making to regional councils. To give you an understanding of the range of potential effects of the reforms I have tried to predict a realistic worst and best case scenario for each one.

1. Providing clear circumstances in which the responsible Minister might refer an application to a regional council or unitary authority, or put it on hold

2. The example given in the discussion document is "*if a regional council advises that the matters the application covers are being (or will be) considered through a regional planning process*". On Morning Report today Minister Adams' explanation of this point was solely in respect to collaborative planning processes. She emphasised several times that if there is a collaborative process being undertaken at the regional level then this proposal is designed to ensure that a water conservation order application (or application to amend a water conservation order) is dealt with through this process.
3. The worst and best case scenarios for this point are **both** negative from Fish and Game's point of view.
4. The **best case scenario** is that the regional council would be directed to apply the standard water conservation order test under Part 9 of the Act, which is not subject to the provisions of Part 2 that are contrary to the protection of outstanding features and characteristics. The proposal to have regional councils make decisions on water conservation orders is however negative even if this test is retained. Decisions on nationally important values are more appropriately made at national level. Most applications for water conservation orders have been actively opposed by regional council to date.

5. The **worst case scenario** is that the Government intends not only that the regional council is the decision maker, but also that the decision be considered subject to the standard test of sustainable management under Part 2, given the statement that a WCO will be considered "through a regional planning process". If this is the outcome this effectively spells an end for WCOs, as there will be very little to differentiate them from regional plans in terms of process, legal requirements and effectiveness.

2. Aligning the process with Board of Inquiry processes for matters of national significance

6. The example given is "*have similar appointment processes and/or only allow appeals on points of law*". It could also presumably include the tight timeframes to which Boards of Inquiry are subject, which include the requirement that the Board issue a decision within 9 months of notifying a proposal for submissions (unless the Minister grants leave for an extension).
7. One point of concern is reference to "matters of national significance". Under the Board of Inquiry provisions in the RMA currently, the range of matters that may qualify as nationally significant include when there is widespread public concern, significant use of resources, areas of national significance, significant or irreversible changes to the environment, use of technology, processes, or methods that are new to New Zealand and that may affect its environment, the Crown's public health, welfare, security, or safety obligations or functions, affects more than 1 region or district or relates to a network utility operation that extends or is proposed to extend to more than 1 district or region.
8. Given that case law has clearly established that water conservation orders are to protect matters that are "outstanding" on a national basis, the reference to matters of national significance is either superfluous, or when one takes into account the above proposal in respect of the involvement of regional councils, may be an attempt to significantly narrow the circumstances in which water conservation orders are considered at a national level, effectively raising the bar from where it is currently and making it harder to have a water conservation order application considered at an appropriate national forum.
9. The **worst case scenario** is therefore a narrowing of opportunities for water conservation orders to be considered in an appropriate national forum and the raising of the bar above what is already a very high bar for the granting and amending of water conservation orders.
10. The **best case scenario** is that the process for the hearing of water conservation orders may be improved both in terms of total timeframes and time and cost that is spent at hearings. Currently, a water conservation order is heard first by a Special Tribunal appointed by the minister. That hearing allows no cross examination and can take some weeks. Appeals are then heard by the Environment Court where there is full cross examination and appropriate testing of the evidence. If the process is instead similar to the Board of Inquiry process there will be one main hearing equivalent to an Environment Court hearing where full cross examination is allowed, and then any appeals would be to the High Court on points of law. The downside of such a process is that it is less user friendly for lay submitters as it will move faster and it will move straight into a more formal court process. However, this has to be weighed against the cost of fully involved parties such as Fish and Game for having to prepare and attend two full hearings rather than one.

Requiring a clear scope for the application to be established at the beginning of the process and prevent changes to that scope once consideration is underway

11. This point comes from the current ability for a Special Tribunal or Court to potentially inquire into additional areas, such as additional values or additional tributaries, which were not raised in the original application nor potentially raised in submissions. Submitters in support of an application can also extend the scope of the inquiry by, for example, seeking in their submission that extra values or tributaries be included.
12. This proposal, depending on the detail of it, is positive and should provide more certainty for all participants. The **worst case scenario** is that the scope for the entire water conservation order inquiry is restricted to what the application seeks only. In my opinion this scenario is too restrictive. The **best case scenario** would be a framework that would still allow submissions to extend the scope of the inquiry to additional values or additional related waterbodies. However, in order for this type of framework to be fair it should also require that if submissions do seek to extend the scope of the inquiry those submissions should be notified to ensure newly affected people have the opportunity to submit on the new addition.

Requiring water conservation order processes to involve iwi and ensure that tangata whenua values and interests are considered in the decision making

13. This proposal seems fairly neutral and until further detail is provided it is difficult to evaluate its implications.

Yours faithfully
Anderson Lloyd



Maree Baker-Galloway
Partner Owner
P: 03 471 5447
M: 027 295 4704
E: maree.baker-galloway@andersonlloyd.co.nz

Copy: Neil Deans
Nelson/Marlborough Fish and Game Council
P O Box 2173
Stoke
NELSON

By email: ndeans@fishandgame.org.nz