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MEMORANDUM

Privileged and Confidential

TO: Bryce Johnson, Chief Executive New Zealand Fish and Game Council

FROM: Geoffrey Palmer QC and Elana Geddis

DATE: 10 April 2017

RE: **NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT 2014 — PROPOSED ECONOMIC WELL-BEING AMENDMENTS AND THE OECD REPORT ON NEW ZEALAND'S ENVIRONMENTAL PERFORMANCE**

Introduction and Summary

1. The Government has proposed a series of amendments to the National Policy Statement for Freshwater Management 2014. These are set out in the *Clean Water* discussion document published by the Ministry for the Environment in February 2017.¹
2. The focus of media attention has been on the proposed amendments to introduce new "swimmability" standards for rivers and lakes. However, the Government is also proposing a series of amendments to require councils to consider the implications for economic well-being before they establish environmental limits for both freshwater quality and quantity. You have asked for our advice on the implications of those amendments.
3. These changes will undermine the degree of environmental protection currently provided for in the existing Freshwater NPS. That is inconsistent with the emphasis placed on environmental protection in Part 2 of the RMA by the Supreme Court in the 2014 landmark *King Salmon* case.

¹ Available at: <http://www.mfe.govt.nz/sites/default/files/media/Fresh%20water/clean-water.pdf>

4. Our legal analysis of the NPS amendments needs also to be considered in the context of the recent OECD Environmental Performance Review of New Zealand 2017.² This report was published after the proposed amendments were released for consultation. The portions of the OECD report on freshwater management conclude that the present policy settings are inadequate. The OECD report supports our conclusion that the proposed economic well-being amendments should be abandoned and suggests further that the 2014 Freshwater NPS itself should be revised.

Summary of Proposed Economic Well-Being Amendments

5. One of the Government's stated purposes for its proposed amendments to the Freshwater NPS is to provide for "economic well-being".³
6. The *Clean Water* discussion document states that: "[c]oncerns have been raised that the Freshwater NPS does not specifically oblige councils to consider implications for economic well-being before they establish environmental limits."⁴ It does not specify who has raised these concerns. The issue does not appear to have been raised by the Land and Water Forum.⁵
7. The discussion document proposes:⁶

To address these concerns, we propose amending the Freshwater NPS to make clear that regional councils must consider the community's economic well-being when making decisions about water quantity, deciding what level or pace of water quality improvements will be targeted, and when establishing freshwater objectives.
8. Three specific amendments have been proposed, to: existing Objective A2; existing Objective B1; and new policy CA2(f)(iaaab).

Proposed Amendment to Objective A2—Water Quality

9. Objective A2 regarding water quality is to be amended as follows (new language is underlined):

Objective A2

The overall quality of fresh water within a freshwater management unit is maintained or improved while:

- (a) protecting the significant values of outstanding freshwater bodies;
- (b) protecting the significant values of wetlands; and
- (c) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated;

then providing for economic well-being, including productive economic opportunities, within environmental limits.

² OECD (2017) *OECD Environmental Performance Reviews: New Zealand 2017*, OECD Publishing, Paris.

³ *Clean Water* discussion document at p.20.

⁴ At p.20.

⁵ This issue was not raised in either the *Fourth Report of the Land and Water Forum (November 2015)* or the formal *Advice from the Forum to Ministers on NOF Development (August 2016)*.

⁶ At p.20.

Proposed Amendment to Objective B1—Water Quantity

10. Objective B1 regarding water quantity is to be amended as follows (new language is underlined):

To safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems of fresh water, in sustainably managing the taking, using, damming, or diverting of fresh water, while providing for economic well-being, including productive economic opportunities.

Proposed Amendment to Policy CA2(f)—Setting Freshwater Objective and Limits

11. Policy CA2(f) is to be amended by introducing a new matter (iaaab) that regional councils must consider when establishing fresh water objectives and limits (new language is underlined):

f) considering the following matters at all relevant points in the process described in Policy CA2(a)-(e):

iaaa. how to improve the quality of fresh water in large rivers and lakes so the human health risk is reduced and they are suitable for immersion more often;

iaaab. how to provide for economic well-being, including productive economic opportunities, within the context of environmental limits;

i. the current state of the freshwater management unit, and its anticipated future state on the basis of past and current resource use, including community understandings of the health and well-being of the freshwater management unit;

ii. the spatial scale at which freshwater management units are defined;

iii. the limits that would be required to achieve the freshwater objectives;

iv. any choices between the values that the formulation of freshwater objectives and associated limits would require;

v. any implications for resource users, people and communities arising from the freshwater objectives and associated limits including implications for actions, investments, ongoing management changes and any social, cultural or economic implications;

vi. the timeframes required for achieving the freshwater objectives, including the ability of regional councils to set long timeframes for achieving targets; and

vii. such other matters relevant and reasonably necessary to give effect to the objectives and policies in this national policy statement, in particular Objective AAA1 and Objective A2.

Effect of the Proposed Amendments

The Legal Effect of the NPS

12. The purpose of an NPS is “to state objectives and policies for matters of national significance that are relevant to achieving the purpose [of the RMA].”⁷
13. The language of the Freshwater NPS is therefore very significant. Changes to the objectives and policies of the Freshwater NPS will result in changes to the decision-making framework applied by Regional Councils and hence to the final decisions taken to manage freshwater at the regional level.
14. The Freshwater NPS is a legal instrument. It sits at the top of the hierarchy of planning documents under the RMA. The importance and legal role of an NPS was emphasised by the Supreme Court in the 2014 landmark decision in the *King Salmon* case.⁸
15. An NPS states objectives and policies which must be implemented in lower order planning documents. Regional policy statements,⁹ regional plans¹⁰ and district plans¹¹ must all “give effect to” an NPS and must be amended to do so if necessary.¹² The Supreme Court emphasised that “give effect to” is a strong directive, creating a firm obligation on regional and district councils to implement the NPS through their planning documents.¹³
16. The Supreme Court found in the *King Salmon* case that an NPS is a self-contained legal document. It translates the general purpose and principles in Part 2 of the RMA into more specific objectives and policies. It is not necessary or appropriate for a council to refer back to make its own assessment of the purpose and principles in Part 2 of the RMA when making decisions under an NPS.¹⁴ Instead, councils must give effect to an NPS in the terms it is drafted.
17. The Supreme Court identified three caveats to that principle. If the NPS is inconsistent with Part 2 of the RMA, does not “cover the field”, or is uncertain—then a regional council may refer back to Part 2 of the RMA when making decisions under the NPS.¹⁵

⁷ Section 45(1) RMA.

⁸ *Environmental Defence Society Inc. v New Zealand King Salmon Co. Ltd.* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442.

⁹ Section 62(3) RMA.

¹⁰ Section 67(3)(b) RMA

¹¹ Section 75(3)(b) RMA.

¹² Section 55 RMA.

¹³ *King Salmon* at [77].

¹⁴ *King Salmon* at [89]-[91] and [106]-[148].

¹⁵ *King Salmon* at [88].

Effect of Proposed Amendment to Objective A2—Water Quality

18. Objective A2 currently requires that the overall quality of fresh water is “maintained or improved” while meeting certain “environmental bottom lines” of protection. This is fully consistent with the purpose and principles in Part 2 of the RMA. The Supreme Court in the *King Salmon* case emphasised repeatedly that environmental protection is a core element of sustainable management under the Act.¹⁶
19. The proposed amendment to Objective A2 creates a new secondary objective: “then providing for economic well-being, including productive economic opportunities, within environmental limits”.
20. The phrase “economic well-being” is used in the RMA but is not defined. It is usually interpreted to mean economic development and associated economic opportunities—such as employment, operational spend or tourism revenue.¹⁷ This emphasis on economic development is reinforced by the further reference to “productive economic opportunities”. In the freshwater context these are likely to be interpreted to include agriculture, irrigation, industrial use and tourism.
21. “Then” has the effect of a subordinating conjunction, so that the provision for economic well-being is dependent on the achievement of the primary objective to maintain and improve overall water quality.
22. The proposed amendment to Objective A2 therefore retains the priority currently given to the protection of freshwater quality under the Freshwater NPS. This is confirmed by the further caveat that economic well-being must be provided for “*within* environmental limits” (emphasis added). This caveat is important and is fully consistent with the concept of sustainable management—use, development and protection within the bounds of the environment’s capacity—that underpins the RMA.

Effect of Proposed Amendment to Objective B1—Water Quantity

23. As it currently stands, Objective B1 is to “safeguard the life-supporting capacity, ecosystem processes, and indigenous species including their associated ecosystems of fresh water” when making decisions about taking, using, damming or diverting fresh water. Safeguarding these environmental attributes is therefore given priority. They operate as an “environmental bottom line”, particularly in relation to the impact of activities on the natural flow of rivers and other water bodies.
24. This is fully consistent with the purpose and principles in Part 2 of the RMA. Environmental protection is a core element of the purpose of “sustainable management” in section 5(2) of the RMA.¹⁸ Section 5(2)(b) specifically refers to “safeguarding the life-supporting capacity of air, water, soil, and ecosystems”. The

¹⁶ See, for example, *King Salmon* at [24](d), [28], [47], [146], [148], [149] and [152].

¹⁷ See, for example, *Kawarau Jet Services Holdings Ltd v Queenstown Lakes District Council* [2015] NZRMA 185 at [161]. Note that a different approach has been taken to the interpretation of “economic well-being” in the context of the EEZ and Continental Shelf (Environmental Effects) Act 2013. In that context, at least one Decision-Making Body has interpreted “economic well-being” to include the direct and indirect values of resources, including for their intrinsic and ecosystem services values (*Trans-Tasman Resources Ltd: Marine Consent Decision (June 2014)* at [86]).

¹⁸ See, for example, *King Salmon* at [24](d), [28], [47], [146], [148], [149] and [152].

Supreme Court in the *King Salmon* case noted that it is consistent with the definition of “sustainable management” in section 5(2) of the RMA for an NPS to direct decision-makers to give primacy to environmental protection in particular circumstances.¹⁹

25. However, the proposed amendment to Objective B1 will remove the priority currently placed on the protection of life-supporting capacity and associated environmental attributes of fresh water. It will require these attributes to be protected “while providing for economic well-being, including productive economic opportunities”.
26. “While” can be understood to mean “at the same time as”.²⁰ The objective therefore becomes to safeguard life-capacity and associated environmental attributes “at the same time as” providing for productive economic opportunities. The expression “productive economic opportunities” is open-ended and potentially far-reaching. As noted above, it is likely to be interpreted to include large-scale irrigation and intensified agricultural land-use.
27. This is different to the proposed amendment to Objective A2, which makes providing for economic well-being secondary to environmental protection. Further, unlike the proposed amendment to Objective A2, there is also no caveat that productive economic opportunities must be provided for “within environmental limits”.
28. The effect of the proposed amendment to Objective B1 is therefore to give the protection of the life-supporting capacity of freshwater and provision for economic opportunities the same priority when making decisions that will impact on water quantity. This significantly undermines the degree of environmental protection currently provided by the Freshwater NPS.
29. The conflicting objectives for water quality (Objective A2) and water quantity (Objective B1) create confusion and have the potential to lead to bad environmental outcomes. The proposed amendment to Objective B1 will have flow-on effects for water quality. Reduction of, or interference with, natural flow rates and levels is a significant factor in the degradation of water quality. Recognising and working within environmental limits when making decisions that impact on the *quantity* of water is therefore a critical first step in managing and improving the *quality* of New Zealand’s fresh water.

Effect of New Policy CA2(f)(iaaab)

30. Paragraph (f) of Policy CA2 sets out the matters that a council must consider when setting objectives and limits for fresh water management. It is an exhaustive list. That is, it lists all the matters that are to be considered. Consistent with the Supreme Court’s guidance in the *King Salmon* case, a council will not be permitted to go outside the list in paragraph (f) and refer back to the general principles in Part 2 of the RMA when setting objectives and limits for freshwater management.

¹⁹ *King Salmon* at [149] and [152].

²⁰ The Supreme Court confirmed this ordinary meaning of “while” in the context of section 5 of the RMA in *King Salmon* at [24](d).

31. The proposed new sub-paragraph (iaaab) inserts a new matter that must be considered by councils. It requires all councils to consider “how to provide for economic well-being, including productive economic opportunities, within the context of environmental limits”. Councils will therefore be required to expressly consider “how to provide for economic well-being” when making their decisions. There is no corresponding requirement to consider any of the environmental matters of particular importance set out in sections 6 and 7 of the RMA.²¹
32. Further, it is not clear what “within *the context of* environmental limits” is intended to mean. This is different to the reference to “environmental limits” in Objective A2. That reference makes clear that “environmental limits” are fixed limits within which decisions must be taken. The reference to “the context of” environmental limits suggests that such limits are only a contextual factor, rather than fixed limits within which economic well-being must be provided for.
33. The effect of the proposed new sub-paragraph (iaaab) is therefore to tilt decision-makers away from environmental protection as a bottom line and towards consideration of the economic opportunity costs of environmental protection. Together with the proposed amendments to Objective B1 it undermines the level of environmental protection that the Freshwater NPS currently provides.
34. The proposed new sub-paragraph (iaaab) is not necessary in our view. The economic impacts on resource users and any future economic opportunity costs are already included in the list of matters that councils must consider under Policy CA2(f). Existing sub-paragraph (v) already requires councils to consider “any implications for resource users arising from the freshwater objectives and associated limits including implications for...investments...and any...economic implications”.

Consistency with Part 2 of the RMA?

35. Making provision for economic well-being is consistent with the purpose and principles in Part 2 of the RMA. Section 5(1) of the RMA provides that the purpose of the Act is “to promote the sustainable management of natural and physical resources”. “Sustainable management” is defined in section 5(2) to mean:

...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

²¹ These include such matters as: the preservation of the natural character of wetlands and lakes and rivers and their margins (section 6(a)); the protection of significant habitats of indigenous fauna (section 6(c)); the intrinsic value of ecosystems (section 7(d)); the maintenance and enhancement of the quality of the environment (section 7(f)); any finite characteristics of natural and physical resources (section 7(g)); and the protection of the habitat of trout and salmon (section 7(h)).

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

36. Economic well-being is, however, only one aspect of sustainable management. The Supreme Court in the *King Salmon* case emphasised that the definition of “sustainable management” in section 5(2) does not consist of two distinct parts, one to be balanced against the other.²² Rather, it should be read as an integrated whole:²³

The use of the word “while” before subparas (a), (b) and (c) means that these paragraphs must be observed in the course of the management referred to in the opening part of the definition. That is, “while” means “at the same time as”.

37. Consistent with this interpretation, the Supreme Court repeatedly stressed that environmental protection is a core element of sustainable management, so that “sustainable management of natural and physical resources involves protection of the environment as well as its use and development”.²⁴ Environmental protection does not in itself have primacy.²⁵ But Part 2 when read as a whole does contemplate the adoption of “environmental bottom lines”.²⁶ The three matters in section 5(2)(a) to (c) - including the life-supporting capacity of freshwater - therefore cannot be traded off to provide for economic development.
38. The Government’s decision to undermine the existing level of environmental protection in the Freshwater NPS through its proposed amendments is inconsistent with the emphasis on environmental protection in the *King Salmon* case. In particular, the amendments to Objective B1 and Policy CA2(f) are at odds with the recognition given to environmental protection by the Supreme Court. However, the Supreme Court did not go so far as to find that economic well-being cannot be considered at the same time as environmental protection.²⁷ We therefore cannot conclude that the proposed amendments are clearly “ultra vires” or in breach of the purpose of the RMA. But they certainly do represent a considerable back-track from the standard of environmental protection adopted by the Government in 2014 in the Freshwater NPS as it is currently drafted.

Conclusions on the NPS Amendments

39. In our view the Council should oppose the economic well-being amendments proposed by the Government for the following reasons:
- a. They will *undermine the degree of environmental protection currently provided for* in the Freshwater NPS.
 - b. The difference between the amended objectives for water quality (Objective A2) and water quality (Objective B1) is *unclear and confusing* and will lead to *bad environmental outcomes*.

²² *King Salmon* at [24](c).

²³ *King Salmon* at [24](c).

²⁴ *King Salmon* at [24](d). See also similar statements: [28], [47], [146], [148], [149] and [152].

²⁵ *King Salmon* at [149].

²⁶ *King Salmon* at [47].

²⁷ See the discussion in Nolan ed *Environmental and Resource Management Law* (LexisNexis NZ Ltd, online edition) at [3.23].

- c. The amendments are *not necessary*—the Freshwater NPS already requires regional councils to take account of economic well-being when making decisions about the management of fresh water.
- d. The *Government's reasons for the amendments are not transparent and are unconvincing*.

The 2017 OECD Environmental Performance Review of New Zealand

- 40. The policy context in which the proposed amendments to the Freshwater NPS fall to be considered has fundamentally altered with the publication of the 2017 OECD report. That report contains a critical analysis of New Zealand's performance in protecting the quality of its freshwater and makes policy recommendations for the adoption of a new water policy that bring into question not only the amendments proposed, but also the adequacy of the existing Freshwater NPS.
- 41. From the point of view of the New Zealand Fish and Game Council the critical finding is that: "Agricultural and urban storm water run-off continues to put pressure on freshwater quality and ecosystems, and increased irrigation water has led to water scarcity in some areas."²⁸ The OECD identifies the expansion of dairy farming and the Government's subsidies for irrigation as major factors creating this pressure.²⁹
- 42. New Zealand's failure to systematically appraise significant cumulative environmental effects is criticised.³⁰ This is particularly the case for freshwater.³¹ Further, the report also criticises New Zealand's approach to monitoring and enforcement of environmental standards.³² The non-compliance rate for resource consents is relatively high at 20% of inspected consents.³³ For the New Zealand Fish and Game Councils the revealed rates of non-compliance and inadequate enforcement must be a matter of concern.
- 43. The report makes clear that changes will need to be made to the existing approach to land use and irrigation if environmental effects are to be addressed.³⁴ It notes that Government subsidies for irrigation projects "do not systematically consider the environment and social cost of irrigation, and the benefits largely accrue to the agricultural and processing industries".³⁵ It particularly identifies the link between pastoral intensification and pressures on freshwater quality and quantity.³⁶ The report makes clear also that "[a]chieving water quality improvements in many New Zealand catchments will likely require significant manipulation of existing land management...".³⁷

²⁸ OECD Report, above, note 2 at p.16.

²⁹ At pp.15-16. See also pp.34-41 and the discussion in Chapter 4.

³⁰ At p.27.

³¹ At p.158.

³² At pp.27-28 and 29.

³³ At p.27.

³⁴ At pp.34-41. See also the discussion in Chapter 4.

³⁵ At p.16. See also the discussion in Chapter 4 at pp.172-174.

³⁶ At pp.35-36. See also the discussion in Chapter 4 at pp.158&ff.

³⁷ At p.36.

44. The report highlights the level of pollution of New Zealand's freshwater:³⁸

The pollutants of most concern are nutrients, pathogens and sediments. In particular, nitrogen levels from different agricultural sources have continued to increase; between 1998 and 2009, the nitrogen balances worsened more than in any other OECD member country. Over 1990-2012, nitrogen leaching into soil from agriculture increased by 29% and total nitrogen levels by 12%.

45. Later the report makes clear that much of the increase in nitrogen and phosphorus is caused by the expansion of intensive agriculture, primarily dairy production.³⁹ This has led to an increase in the consumption of nitrogen fertilisers.⁴⁰ These increases contrast with declining trends in fertiliser use in most other OECD countries.⁴¹

46. As the report points out, agricultural runoff is also a health risk contributing to New Zealand's high rates of preventable gastro-intestinal disease:⁴²

Contamination of groundwater with nitrates and microbial pathogens is recognised as a human health risk. For example, New Zealand has relatively high rates of largely preventable enteric or gastro-intestinal disease in comparison to England, Australia and Canada (Ministry of Health, 2016).

47. The report emphasises the dangers of the existing situation to the life supporting capacity of freshwater. It identifies the threat posed to fish and other aquatic life. These concerns are central to the New Zealand Fish and Game Council's statutory mission. Further loss of biodiversity seems inevitable unless steps are taken to improve water quality:⁴³

Deteriorating water quality remains one of the biggest threats to native freshwater species, alongside habitat loss and predation from introduced species. New Zealand has some of the highest levels of threatened freshwater species in the world, with almost three-quarters of native fish threatened from extinction. Macroinvertebrate Community Index scores are poorest in rivers located downstream of catchments where agricultural intensity and urban land cover are high (Larned et al., 2016).

The full impacts of past and present agricultural land-use practices on water quality have yet to materialise; the time lag between improved land-use practices and improved water quality can be long (up to decades), particularly for groundwater resources. There are concerns that even with best mitigation practices, recent elevated inputs from continued large-scale conversion of land to dairy farming, coupled with time lag effects, will result in more freshwater degradation (Figure 2).

³⁸ At p.36.Citations omitted.

³⁹ At pp.79-81 and pp.159-161.

⁴⁰ At p.80.

⁴¹ At pp.80-81.

⁴² At p.36. See also pp.161-163.

⁴³ At pp.36-37.

48. The report welcomes the 2014 updates of the 2011 Freshwater NPS.⁴⁴ Naturally it cannot evaluate the proposed 2017 changes. However, the report identifies several aspects of the existing Freshwater NPS and its implementation that require review.⁴⁵
49. Notably, the report states it is too early to evaluate collaborative moves in freshwater reform.⁴⁶ It criticises the long time-frame given to Councils to set water quality objectives and limits under the Freshwater NPS.⁴⁷ And it is suggested that the minimum standards in the National Objectives Framework for water may not meet the life supporting capacities of ecosystems.⁴⁸ The report notes in particular the tension between the Government's policy of doubling the real value of primary industry exports by 2025 and the need to manage freshwater within environmental limits.⁴⁹
50. The report also states that the revision or development of new water quality parameters should be expedited to minimise the need for repeated engagement and consultation. There needs to be, the report states: "[c]ontinued progress through unambiguous national guidance and a more comprehensive NOF, coupled with holding respective Councils accountable for achieving the NPS-FM in their regions will be necessary to ensure success".⁵⁰
51. In light of these concerns, the OECD makes a series of important recommendations, including to:⁵¹
- Review implementation of the NPS-FM to ensure that water quantity and quality limits set locally are ambitious and comprehensive enough to achieve national ecosystem and human health objectives and public expectations; establish performance indicators to track and evaluate implementation of the NPS-FM by regional councils, and strengthen compliance monitoring and enforcement of resource consent conditions; ensure the revision or development of new water quality parameters is expedited to minimise the need for repeated community consultation and updates of regional plans.
 - Require regional councils and collaborative groups to start discussions around water quality limits at the highest level (e.g., at water quality suitable for swimming); if necessary, the case can be made to argue away from such limits, within the bottom lines, if disproportionate costs can be proven.
52. These recommendations are supported by a wider suite of recommendations, including recommendations to: review existing Government support for irrigation; and apply the "polluter pays" principle and introduce pollution charges to capture the costs of diffuse pollution such as agricultural run-off.⁵²

⁴⁴ At pp.38-39. See also pp.166-172.

⁴⁵ *Id.*

⁴⁶ At p.38.

⁴⁷ At p.38. See also p.167.

⁴⁸ At p.39. See also p.170.

⁴⁹ At p.39. See also p.168.

⁵⁰ At p.39. See also p.163.

⁵¹ At p.42. See also the discussion in Chapter 4.

⁵² *Id.*

Policy Conclusion

53. A close reading of the OECD analysis compels the conclusion that the Government's proposed economic well-being amendments to the Freshwater NPS should be abandoned and focus instead directed towards urgently addressing the issues identified in the OECD recommendations. There is widespread recognition in the OECD report that New Zealand's freshwater quality has deteriorated at alarming rates under the existing policy settings, and will continue to do so, and remedial action is required urgently to retrieve the situation.



Geoffrey Palmer QC



Elana Geddis