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MEMORANDUM TO:	Bryce Johnson, Chief Executive, Fish and Game New Zealand
MATTER:	Government Reforms to the Resource Management Act 1991
RE:	Impacts of the Proposed Changes to Part 2 of the Act
DATE:	22 May 2013

INTRODUCTION

1. I have been instructed to provide you with advice on the nature, extent and implications for the protection of the natural environment and its recreational enjoyment by all New Zealanders of the Government's proposals to amend the Resource Management RMA 1991 ("RMA"). This memorandum is in the nature of interim advice, until a more specific account of the Government's detailed legislative intentions is available.

2. I have reviewed the Government's discussion document *Improving our Resource Management System.*[1] I have also considered a wide range of the submissions made in response to the discussion document, including those made by the New Zealand Law Society, the Parliamentary Commissioner for the Environment, industry groups, and environmental NGOs.

[1] Ministry for the Environment *Improving our Resource Management System: A Discussion Document* (Ministry for the Environment, Wellington, February 2013) ("*Discussion Document*"). For a broader context to the reform proposals see also, *Business Growth Agenda: Building Natural Resources progress report* (December 2012) and *Business Growth Agenda: Building Infrastructure progress report* (November 2012).

3. In summary, my advice is:

   a. Many of the "process-oriented" proposals will deliver improvements to the current processes under the RMA with limited impacts on environmental protection.

   b. The proposed changes to Part 2 will significantly and seriously undermine environmental protection under the RMA. These changes are largely unnecessary and will lead to greater uncertainty and cost in the application and interpretation of the RMA.

SUMMARY OF THE PROPOSALS

4. The Government's discussion document sets out a number of detailed proposals "designed to make the system easier to use, increase its certainty and predictability, and reduce unnecessary duplication and cost. At the same time, these proposals are designed to deliver the natural environmental outcomes New Zealanders want".[2]

5. The proposals can be loosely grouped into two categories:

   a. process-oriented reforms, including: reducing and simplifying planning documents; amendments to planning and resource consent processes; and provisions for greater central government intervention.

   b. reforms directed at amending the underlying principles of the RMA by redrafting sections 6 and 7.

[2] *Discussion Document*, at p. 6.

PROCESS-ORIENTED REFORMS

6. Considered as a whole many of these proposals have the potential to improve planning processes with limited negative implications for the protection of the natural environment and the recreational enjoyment of New Zealanders under the RMA.

7. For example, the proposals directed towards reducing and simplifying planning documents have considerable merit.[3] So do the proposals for a fixed time limit for the processing of straight-forward non-notified consents,[4] and to improve transparency around costs and fees.[5] I am also of the view that the process to allow for an "approved exemption" for technical or minor rule breaches[6] could be helpful in the case of urban land-use consents, provided that adequate safeguards are in place to manage the cumulative effects of such exemptions.

8. Some of the proposals could undermine proper effects-based decision making under the RMA and have the potential to reduce the level of environmental protection provided. In particular I am concerned that:

    a. a number of the changes will substantially limit the ability of submitters to put forward evidence as to the environmental impacts of proposals and for that evidence to be properly considered at all levels of the decision making process.[7]

    b. proposals for greater central government intervention in planning and consent processes will create a shift from an "effects-based" management approach to an "activity-directed" approach, inconsistent with the central principles of the Act.[8]

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[3] *Discussion Document*, proposals 3.2.1-3.2.3.
[4] *Discussion Document*, proposal 3.3.1.
[5] *Discussion Document*, proposals 3.3.7 and 3.3.8.
[6] *Discussion Document*, proposal 3.3.2.
[7] *Discussion Document*, proposals 3.2.3 (narrowing of planning appeals to the Natural environment Court), 3.3.3 (increasing the types of non-notified consents), 3.3.4 (limiting scope of consent conditions), 3.3.5 (limiting scope of participation in consent submission and appeal processes), and 3.3.6 (changing appeals from a *de novo* to a rehearing basis).
[8] *Discussion Document*, proposals 3.1.2 and 3.1.3,

PRINCIPLE-ORIENTED REFORMS: AMENDMENTS TO PART 2 OF THE ACT

9. Part 2 is the "engine room" of the RMA – it drives all decisions made under the Act. [9] It sets out the "framework against which all the functions, powers and duties of the RMA are to be exercised for the purpose of giving effect to the RMA". [10] That framework is built on the foundation principle of "sustainable management", contained in section 5. That principle draws heavily on and was derived from the internationally recognised principle of sustainable development, articulated in the 1987 World Commission on Environment and Development ("the Brundtland Report"). [11] As defined in the Brundtland Report, "sustainable development" is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[12] It has at its heart the key principle of development to meet human needs within the capacity of the natural environment. [13] The principle is fundamental and weakening it either explicitly or in its application will have adverse consequences for the environment.

10. Sections 6, 7 and 8 are principles of varying importance intended to give guidance to the way in which the purpose is to be achieved.[14] Section 6 sets out a series of "matters of national importance" that decision makers under the Act "shall recognise and provide for" in "achieving the purpose of this Act". Section 7 in turn sets out "other matters" to which decision makers "shall have particular regard". Any amendments to sections 6 and 7 therefore go to the central ability of the RMA to achieve its stated purpose. Given their significance, changes to these sections should be contemplated only where an objectively identifiable need exists and after proper consultation and consideration.

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[9] *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 at [47].
[10] *Brookers Resource Management* (Loose-leaf ed., Thomson Reuters) at [A5.02(1)].
[11] World Commission on Natural environment and Development, *Our Common Future: From One Earth to One World,* U.N. Doc. A/42/427 (Annex) (1987) at 248; for a discussion of the origins and impacts of the Brundtland Report see Drexhage & Murphy *Sustainable Development: From Brundtland to Rio 2012* (United Nations, 2010). Edith Brown Weiss *In Fairness to Future Generations:International Law,Common Patrimony, and Intergenerational Equity* (Dobbs Ferry, New York,1989)
[12] *Our Common Future*, at Chapter 2, paragraph 1.
[13] *Ibid.*
[14] Peter Salmon *Environmental Law - Resource Management RMA 1991* (Online loose-leaf ed., Brookers) at [RMPt2.01] (*"Salmon's Environmental Law"*).

11. The Discussion Document proposes to fundamentally rewrite Part 2, by:[15]

    a. Collapsing sections 6 and 7 into a single list of "principles" to be considered by decision makers.[16]

    b. Inserting a number of new development-focussed principles into the RMA.[17]

    c. Completely deleting several existing environment-focussed matters from the RMA.[18]

    d. Substantially watering down the majority of the remaining environment-focussed elements.[19]

    e. Inserting a new section setting out "methods" to be followed by persons performing functions and exercising powers under the RMA[20].

12. Those changes will significantly and seriously weaken the ability of the RMA to protect the natural environment and its recreational enjoyment by all New Zealanders. Core environmental values that currently have the status of "matters of national importance" will be diminished to mere "matters", including: the preservation of the natural character of the coastal natural environment; the protection of outstanding natural features and landscapes, and areas of indigenous vegetation and habitat; and the maintenance and enhancement of public access to beaches and waterways. Other central environmental factors, such amenity values, the intrinsic value of ecosystems, and the maintenance and enhancement of the quality of the natural environment will no longer have to be considered at all.

13. The environmental principles that remain will be significantly weakened – for example, by limiting protection to "specified" natural features and landscapes and areas of indigenous vegetation, or by deleting directive words such as "enhancement" or "protection". These changes might seem small but they have serious implications. They will inevitably limit the analysis of environmental impacts when assessing proposals against the purpose of the Act.

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[15] *Discussion Document*, proposal 3.1.1.
[16] Proposed new section 6.
[17] Proposed new sections 6(g), (k) and (m).
[18] Existing sections 7(aa), (c), (d), (f) and (g).
[19] Proposed new sections 6(b), (c), (d), (h), (i), and (n).
[20] Proposed new section 7.

14. The proposed new section 6(n) should be of particular concern to the Council. It reads: "areas of significant aquatic habitats, including trout and salmon". This language weakens the current recognition of trout and salmon habitats in two ways. First, the existing statutory direction to have particular regard to the "protection" of such habitats has been deleted.[21] The loss of the word "protection" considerably downgrades their importance. Second, the new provision is restricted only to "significant" habitats. This has the potential to exclude the environmental impacts of activities on small streams and waterways – despite the critical role these play in the ecological integrity of river systems as a whole. Together both changes will make it significantly more difficult for the Council to achieve its statutory purpose for "the management, enhancement, and maintenance of sports fish and game".[22]

15. The changes themselves are unnecessary. The stated basis for the proposed changes is that "there is concern that the predominance of natural environmental matters in section 6, and the hierarchy between sections 6 and 7, may result in an under-weighting of the positive effects (or net benefits) of certain economic and social activities."[23] The implication is that sections 6 and 7 have acted as an unwarranted brake on development, particularly the development of major infrastructure and the provision of land for housing. No research findings are offered in support of the policy contention made.[24] Indeed, earlier advice to the Government concluded: "There is no empirical evidence to suggest that the lack of express recognition of infrastructure in sections 6 and 7 of the RMA is frustrating infrastructure development."[25]

16. The degree to which such "concern" even exists is debatable - no empirical evidence is provided in the Discussion Document. But it is clear that any such concern is not supported by fact:

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[21] Section 7(h) Resource Management Act 1991.
[22] Section 26B(1) Conservation Act 1987.
[23] *Discussion Document*, at p. 35.
[24] The only reference given is to the *Report of the Minister for the Environment's Resource Management RMA 1991 Principles Technical Advisory Group*, February 2012 (*"TAG Report"*) and the *Report of the Minister for the Environment's Urban Technical Advisory Group*, July 2010. Neither report provides empirical evidence to support the contention made.
[25] Ministry for the Environment *Building Competitive Cities: Reform of the urban and infrastructure planning system – a technical working paper* (Ministry for the Environment, Wellington, 2010) (*"MFE Technical Working Paper"*) at p. 28.

a. The significant body of case law established since the RMA was passed clearly establishes that the principles in sections 6 and 7 do not act as a "veto" or matters to be protected "at all cost".[26]

b. Courts and other decision makers under the RMA already routinely take account of social and economic considerations when assessing whether a particular activity is consistent with the "sustainable management" purpose of the RMA.[27] These considerations have specifically included the national benefits of infrastructure,[28] provision of affordable housing, [29]and the value of making land available to meet future housing needs.[30]

c. Only a tiny number of resource consent applications are declined.[31] Even the Government's own advice acknowledges that "90 per cent of significant infrastructure projects successfully progress through the RMA"[32] and "[t]he overall success rate of a sample of infrastructure projects seeking approval would suggest that Part 2 as a whole allows infrastructure projects a better than even chance of obtaining approval".[33]

17. Rather than protecting the natural environment at the expense of development, major indices show that the quality of New Zealand's natural environment has in fact declined in key aspects since the RMA was adopted in 1991.[34]

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[26] See, for example, the summary of case law given at *LexisNexis Resource Management Online* at [3.34], particularly the decisions in *Watercare Services Limited v Minhinnick* [1998] NZRMA 113 (CA) at 127 and *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) at 85-86.

[27] See, for example, the summary of case law given at *LexisNexis Resource Management Online* at [3.29] and *Salmon's Environmental Law* at [RM5.03] & [A5.04(2)].

[28] See, for example, the decision in *Auckland Volcanic Cones Society Inc v Transit New Zealand* [2003] NZRMA 54.

[29] See, for example, the decision in *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* [2011] NZRMA 321 (HC).

[30] See, for example, the summary of case law with respect to the meaning of "inappropriate subdivision, use and development" given in *LexisNexis Resource Management Online* at [3.37].

[31] Only 0.56% of resource consents in the 2010/11 year were declined: see, Ministry for the Environment *Resource Managing Act: Two Yearly Survey of Local Authorities 2010/11* (Ministry for the Environment, Wellington, September 2011).

[32] *TAG Report* at p. 50 citing Hill Young Cooper and Enfocus, *Providing National Guidance on Infrastructure through the RMA 1991* , Report Prepared for MFE and MED, September 2010, at p.38.

[33] *MFE Technical Working Paper*, at p. 28.

[34] See, for example: Environmental Performance Index *Country Profile: New Zealand* (2012)(available at: http://epi.yale.edu/epi2012/countryprofiles); OECD *Environmental Performance Reviews: New Zealand* (2007) (available at: http://www.oecd.org/env/country-reviews/environmentalperformancereviewsnewzealand2007.htm); Ministry for the Environment *Environment*

18. Furthermore, the changes are unlikely to deliver the Government's central stated objective to "make the system easier to use, increase its certainty and predictability, and reduce unnecessary duplication and cost".[35] A well-established body of case law interpreting Part 2 has been built up over time. Much of that case law will now be redundant, leaving decision-makers without guidance, and thereby increasing cost and complexity. I agree entirely with the advice of the New Zealand Law Society that "these changes are likely to create considerable uncertainty, and will not necessarily result in more proactive planning".[36] Indeed, the Government's own advice acknowledges that this will be the case.[37]

19. These risks are exacerbated by the proposed new section 7 on "methods". This provision attempts to distil principles of good decision making into a statutory duty. Whether a decision maker has complied with these methods will accordingly be a matter of law, and therefore a basis for appeal. Requirements to use "best endeavours" and "achieve an appropriate balance" are inherently uncertain and can be expected to be the basis for considerable future litigation.

CONCLUSION

20. The Government's proposals to amend the RMA have significant implications for the protection of the natural environment and its recreational enjoyment by all New Zealanders. While many of the process-oriented reforms will deliver improvements to the current processes with limited impacts on environmental protection, the proposed

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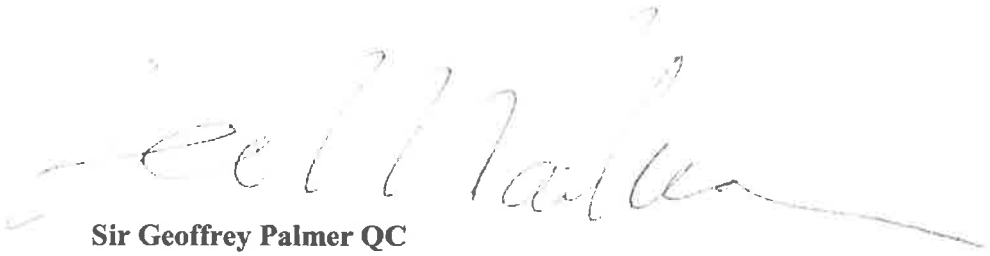
New Zealand 2007 (Ministry for the Environment, Wellington, 2007) and subsequent updates (available at: http://www.mfe.govt.nz/publications/ser/).

[35] *Discussion Document*, at p. 6.

[36] New Zealand Law Society, *Submission: Improving our Resource Management System*, 8 April 2013. The same concerns have been raised by the Resource Management Law Association *Submission:Resource Management Reform 2013 -Improving our Resource Management System*, May 2013

[37] *Discussion Document*, at p. 38: "These changes would involve some costs and may increase uncertainty in the short term, as they would require the review of some plans and render some existing case law obsolete providing interpretation challenges until new case law emerges." In addition, the Cabinet paper underlying the proposals identified the changes to sections 6 & 7 as likely to deliver limited positive benefits for "planning outcomes" and negative outcomes for "increasing community and investor certainty": Submission of the Minister for the Environment to the Cabinet Economic Growth and Infrastructure Committee "Working Towards Better Management of our Natural and Built Environment" 9 November 2012, at Appendix 3 [65] & [69] (released under the Official Information Act 1982).

changes to the principles in Part 2 of the Act will significantly and seriously weaken the ability of the RMA to protect the natural environment and its recreational enjoyment by all New Zealanders. Those changes are unsupported by any rigorous policy analysis and are largely unnecessary. They are also likely to lead to greater uncertainty and increased costs, and so will fail to achieve the central stated objective of the reforms. The projected changes are a step backwards for environmental protection in New Zealand.



Sir Geoffrey Palmer QC
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