TE WAI MĀORI

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Freshwater Reform
Ministry for the Environment

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FRESHWATER REFORM: 2013 AND BEYOND

Introduction

1. Thank you for the opportunity to comment on the discussion paper "*Freshwater reform: 2013 and beyond*".

2. Te Wai Maori was established under the Maori Fisheries Act 2004, which implements the agreements made in the Deed of Settlement between the Crown and Maori in regard to Maori claims to fisheries. The purpose of Te Wai Maori is to advance the interests of Maori in freshwater fisheries. Te Wai Maori considers a crucial part of advancing Maori interests in freshwater fisheries is promoting the protection of habitat to ensure quality water and abundant species.

3. The discussion document on freshwater contains useful proposals that have the potential to improve the management of freshwater. These include provision for greater collaboration in planning and the development of a national objectives framework. It also puts forward proposals for obtaining consistent information on water quality and quantity as the first stage in developing an improved system for managing water within quality and quantity limits. There are many issues yet to be resolved, including new mechanisms for allocating rights to freshwater, and options to address the over-allocation of freshwater in some catchments.

4. Ultimately, the success of these proposals will depend upon a good understanding of the challenges involved in their implementation, including ensuring iwi and other participants are well supported to play their part in the process. However in the process of developing further policy it will be crucial to factor in the unresolved questions about Maori rights and interests in freshwater, and how they might be resolved.

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5. It is not possible to comment on the freshwater discussion document without reference to the changes proposed to the Resource Management Act (RMA). These changes will clearly guide the implementation of the freshwater proposals – but there is little integration between each set of proposals. In some respects they seem to be heading in different directions. The reframing of Part II of the RMA in particular, which endeavors to change the relationship between environmental protection and social and economic considerations, seems to run counter to the direction set by the freshwater proposals, which acknowledge that there are bottom lines that need to be set in the management of water.

6. The short timeframe given to respond to both sets of proposals is entirely inadequate. Due to the limited time available to develop considered responses, we have not made a separate submission on the RMA proposals, but refer as best we can to aspects that are relevant to the freshwater proposals.

7. Finally, this submission is not intended to cut across the views iwi might express in their own submissions. As there has been little opportunity for Wai Maori to develop this submission in consultation with iwi, we wish to offer our views as a contribution to the development of policy in relation to freshwater without prejudice, and would be happy to participate in further discussions on possible options for the future.

Quality decision-making

8. Proposals to improve the quality of decision-making in respect to freshwater contain a number of elements including:
    - a formal role for collaborative groups consisting of iwi and stakeholders, to develop proposals for the management of freshwater that will ultimately be incorporated into councils' planning documents
    - establishment of a hearings panel (which will consist of at least one member with knowledge of tikanga Maori) to consider submissions and make recommendations to the council
    - more limited rights of appeal to the Environment Court.

9. Alongside these provisions are proposals for a separate and more formal role for iwi in providing advice to the council before it makes its final decisions. This role is intended to apply in respect of the new collaborative process as well as the existing process for developing plans outlined in Schedule 1 of the RMA.

The collaborative planning process

10. We support the overall concept of collaborative planning involving iwi and stakeholders. It has long been recognized that "front-loading" the planning process through community engagement helps to generate information about different values and help participants find creative ways of meeting the needs of the community along with managing the effects of activities on the environment.

11. There are many matters that will need to be thought through in the establishment of such a process if it is to improve the quality of decision-making, both for iwi and the community generally. Some of these matters, identified by the Land and Water Forum, include:

- ensuring the process is not captured by powerful or politically influential stakeholders
- insufficient capacity or desire at local government level to facilitate effective collaboration
- individuals or parties being marginalized[1].

12. An on-going issue for many iwi is having the resources to participate in the many processes they are asked to contribute to. Crucial to the success of the collaborative process will be the provision of sufficient support to iwi and other participants (including technical advice and funding) to enable them to do an effective job.

13. It will also be crucial to ensure that those who participate in the collaborative process have the support of those whose interests they are intended to represent. This is certainly important as far as iwi and their hapu are concerned.

14. As part of the Fisheries Settlement, virtually all of the 57 iwi eligible for allocation of settlement assets have mandated iwi organisations in place. The management of freshwater affects the interests of those iwi and their hapu, not only in freshwater fisheries, but fisheries generally – particularly given the downstream effects of land management on lakes, rivers and streams and the coastal waters they flow into. Care must be taken by councils to provide for mandated iwi organisations to ensure that the interests of their members in freshwater and marine fisheries habitats are represented in collaborative processes.

15. Planning should be carried out in such a way that iwi are not stretched across multiple planning processes that are not well coordinated. While a collaborative planning process is proposed for freshwater, the proposals contained in the RMA discussion document move towards single plans. The relationship between these processes, and the role of iwi within them, needs to be clarified.

Limitation on appeals

16. The discussion document proposes to limit the appeal process however we can see no justification for doing so, or indeed any evidence that such a change is necessary. We recognize the need to reduce gaming in the process. However there are a number of different dynamics that need to be managed, and incentives are needed on all parties to play their part. These include incentives on councils to get the collaborative process right and ensure that as many community interests as possible are represented. The way the proposals are framed, there could well be perverse incentives on councils to adopt the recommendations of the hearings panel – even if contrary to the advice of iwi - because adopting the recommendations would restrict any prospect of appeals.[2] We would be concerned if the ability of iwi to appeal a council decision was limited where they consider their advice has not been properly considered by council. It is not clear from the document that the limitations are intended to apply in these circumstances (see also below).

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[1] Land and Water Forum, Second Report, para. 125, p31.

[2] See Nolan, D; Matheson, B; Gardner-Hopkins J; and Carruthers B: "*Faster, Higher, Stronger – or just wrong*?" Russell McVeagh

17. There is a need to guard against the danger of leaving sectors of the community out of the process – effectively disenfranchising them - or the collaborative process failing to deal with an important issue. We think that the proposals as presently structured – with more limited appeal rights - could have the effect of excluding parties.

18. Where managed well, up-front collaborative processes help to clarify and narrow areas of potential disagreement that could go before the Environment Court. If time and costs of the appeal process are a real concern, we note that there are checks and balances in the system already (including awarding of costs). In addition, the proposals to empower the faster resolution of Environment Court proceedings (contained in the RMA reform package), which would increase the Court's power to enforce agreed timeframes and strengthen existing provisions for alternative dispute resolution, should also assist where these problems exist.

A more formal role for iwi

19. The proposal that there be a formal role for iwi in providing advice and recommendations to a council ahead of its decisions on submissions cements in place a step that requires councils to "consider" the advice of iwi. This represents a default process which can be varied by agreement with iwi. We note this approach is also reflected in the RMA discussion document. There are a number of issues to explore in regard to the proposal.

20. First, many iwi and their hapu seek a greater role in decision-making – beyond the advisory role provided for in the freshwater proposals, in which council must "consider" their advice. For instance the Waitangi Tribunal has commented that "it is important for the Crown to actively protect the continuing obligation of kaitiaki towards the environment".[3] They comment further that in some cases kaitiaki may require effective influence and appropriate priority in all areas of environmental management when decisions are made by others. WE consider that as a minimum, a straightforward mechanism for strengthening the role of iwi in decision-making is to place a stronger obligation on council to take into account advice from iwi.

21. Second, taking the proposals as they stand, it is not clear what options there are for iwi to fully contest the council's decision if it is inconsistent with their advice. The concerns we express about limitations on appeals are mirrored here.

22. Third – as a consequence of the changes proposed to the matters contained in section 6 and 7 of the RMA, the weighting given to the Maori relationship with freshwater (and consequently their freshwater fisheries) is likely to be substantially reduced, and have a bearing on the weighting given to the advice that iwi might give to councils before they make their final decisions. We are concerned about these proposals in light of their potential effect, not only on Maori rights and interests in freshwater fisheries but also on their rights and interests in fisheries (including aquaculture) in coastal waters.

23. Ultimately, the removal of the listed matters of "national importance" (such as section 6(e) relating to the relationship of Maori with their ancestral lands, waters, sites and other taonga) and their combination with "other matters" suggests that they are somehow downgraded. These changes have the potential to undermine the agreement entered into

[3] Waitangi Tribunal (2011): Ko Aotearoa Tenei, p285

between the Crown and Maori in relation to fisheries, or for that matter – other settlements with individual iwi that contain natural resource management provisions and protocols.

24. We note that the redrafted version of the wording currently contained in setion 6 (e) tacks on the concept of kaitiakitanga in a way that confuses what the concept means. Better options would be to refer to the concept separately, or reword the section so that it makes more sense. For instance "the relationship of Maori and their traditions, including kaitiakitanga, with their ancestral lands, water, sites, waahi tapu and other taonga". Care should be taken to ensure that "kaitiakitanga", which is grounded in tradition, is also recognized as a crucial component of modern resource management.

25. The reason given for the changes to sections 6 and 7 is stated to be a concern that "the predominance of 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, and "whether these matters actually reflect contemporary issues4". It is not clear what is meant by "contemporary issues".

26. As others have pointed out, the RMA provides for economic, social and cultural matters to carry some weight. The purpose set out in section 5 of the RMA makes clear that sustainable management includes enabling people and communities to provide for their social, economic and cultural well-being. Different weighting is given to protection of the environment than other considerations "because that is the primary role of the Act".5 AS the Parliamentary Commissioner for the Environment comments, "balance of the kind where environmental and economic concerns are given equal weight does not belong inside the RMA. The RMA itself provides the balance to the economic imperatives of the marketplace. It is not and should not become an economic development act"6.

27. The addition of the words "specified" to a number of matters identified as significant (such as outstanding natural features, significant indigenous vegetation and significant habitats of indigenous fauna) suggests that the effects of activities on all significant matters that are not "specified" can be ignored. This has a number of potential consequences – particularly for indigenous vegetation and habitats that support freshwater fisheries of significance to Maori. There will be an additional responsibility on councils to ensure that all those freshwater habitats of significance to Maori will be identified so that they can be "specified". While individual iwi and hapu will consider that the waterways in their rohe are significant for them, there is a danger that they will not be considered significant in regional or national terms.

National objectives framework

28. We consider the overall concept of a national objectives framework including minimum standards is sound. Ultimately it is proposed that over time, the measures or standards to be met for different objectives and values will be defined. However there will be challenges in establishing such a framework. We agree that here should be bottom lines that ensure that aquatic ecosystems are maintained or restored where necessary, and not

[4] NZ Government (2013): "Improving our resource management system – a discussion document", p 35

[5] Parliamentary Commissioner for the Environment (April 2013): "Improving our resource management system – a discussion document - Submission to the Minister for the Environment", p 8.

[6] As above.

further degraded. We consider that priority be first be given to identifying the attributes that need to be managed to meet "bottom lines" and that the standards set are sufficiently high (for instance to manage for "ecosystem health and general protection for indigenous species") to ensure that some waterways cannot be written-off. The bottom-line standards must be sufficiently clear as to what is needed to protect indigenous species, including freshwater fisheries of significance to iwi.

29. We are acutely aware of the concerns that have been expressed about the status of long-fin eels, and we are sponsoring a joint project between Maori customary eelers and the commercial sector to find ways to ensure this species can be protected and used on a sustainable basis. A major factor in the long term health of the long-fin eel is the protection of its habitat and its ability to migrate into rivers and the start of their life cycle and to return to the sea to breed. While specific provision is made in the RMA for trout and salmon, we consider that the habitat of other species of significance to tangata whenua, for example tuna (eels) and inanga warrant specific status. Protection of their habitats must be factored into the establishment of bottom lines. We are keen to engage further as this framework is developed

30. We note that during this consultation process, iwi and others have expressed concern about the proposed changes to Water Conservation Orders and many are concerned that these orders are intended to be removed completely. While we can see benefit in making sure there is provision for some coordination between the Water Conservation Order process and other related processes, it is not clear how this is intended to occur, or what provisions would be put in place to deal with conflicts between the objectives of an application for a Water Conservation Order and the outcome of a regional planning process that affects the same water body. Clearly applications could be made on behalf of sectors that are nationally and not just regionally focused, which also raises questions about:

    - the relationship between an application and any collaborative planning process that involves a water body to which an application applies
    - whether the applicant, or sector represented by an applicant, will be included in the collaborative process.

31. Finally, while we acknowledge the proposal to involve iwi in the Water Conservation order process - it is not clear how or to what extent this intended to occur.

Managing within quantity and quality limits

32. The discussion document states that it is important to ensure the system for managing within quantity limits, as well the assimilative capacity of freshwater (i.e. its ability to absorb what is discharged into it without breaching quality limits), maximizes the value to society of the freshwater available for use, both now and in the future, while ensuring iwi/Maori rights and interests are considered7.

33. We agree it is important to set quality and quantity limits and to maximize the value of water within those limits. The national objectives framework will help establish these limits and the proposals for information gathering, research and modeling should help to define the water quantity and quality measures that are key to meeting those objectives.

[7] See p 37 and p 46

However progress also needs to be made to resolve with iwi the nature and extent of their rights and interests in freshwater, so that a sound management framework can be developed that is capable of giving recognition to those rights and interests.

34. In the first instance, giving Maori a stronger role in the management of water by providing them with a direct role in decision-making, goes some way to recognizing their rights and interests in freshwater, for instance by ensuring that iwi and their hapu have a meaningful influence over the establishment of quality and quantity limits for freshwater.

35. Individual iwi are continuing to take the Treaty settlement route to have their rights and interests recognized. Looking across settlements that have been completed, it is evident that there is no consistent approach to the elements contained in individual settlements as they relate to freshwater. In some cases, provision has been made for co-governance arrangements supported by extensive funding from the Crown. In other cases, provision is made for a lesser form of participation by iwi, and little or no funding support from the Crown. Where settlements that relate to lakes (rather than rivers) involve the return of the ownership of lake beds to claimants, the Crown retains rights to the water above the bed.

36. This variation in approach to the settlement of claims to water points to a lack of any consistent overarching policy in relation to the settlement of Maori claims to water. In addition its focus on models for governance, management and/or participation (for which a default position is provided for in the reform proposals) continues to avoid the more fundamental question about the nature and extent of Maori rights and interests in water – including their relationship to the concept of ownership. Clearly this remains an outstanding issue that should be resolved as part of the remaining policy process.

Developing the freshwater water management regime

37. During the interim hearing on the Freshwater Claim before the Waitangi Tribunal, a comment was made that the fisheries settlement could provide a model for resolving Maori claims to water. It is fruitful to unpack the critical elements of the settlement and to consider the similarities and differences with water in order to provoke robust thinking about possible options – particularly in relation to approaches to conservation, efficiency and the design of property rights.

38. There are many similarities in the way reform of our fisheries and water management regimes have been handled:

- the Government recognised Maori fishing rights but these were initially considered to be non-proprietary and minor
- the Government acted as ‘owner’, was solely responsible for fisheries management and declared that it exercised management for the benefit of all New Zealanders
- the Government authorised fishing beyond what was sustainable in many fisheries
- the Government failed to preserve sensitive fisheries habitats such as estuaries with particularly adverse effects on fisheries of special interest to Maori such as shellfish and eels
- the Government issued private property rights to fishers in the form of permits and licenses.

39. The Government decided to strengthen private property rights to fisheries into the form of individual transferrable quota (ITQ) and to make ITQ tradable to encourage more efficient utilisation of fisheries. Following a High Court injunction the Crown entered into negotiations with Maori. The quota management system for fisheries provides a robust fisheries conservation framework appropriate for fisheries resources, and perpetual property rights that form a durable framework for the fisheries settlement. The system sets limits and provides for the allocation of rights within those limits, including tradeable rights.

40. While different approaches for freshwater may be more appropriate, comparisons with the fisheries regime are a useful means of informing the ongoing design of changes to the system for managing freshwater. For instance there are some important provisos to the use of aspects of the system that would need to be considered if applied to water:
    - the framework for any water market would have to make adequate provision for the protection of water quality and in-stream water uses and values important to Maori that would provide a context and limit to private water rights. Ultimately, Maori endorsement of an overarching framework of water management is a pre-condition of any robust settlement
    - within such a framework, an adequate proportion of private water rights would have to be set aside for Maori in recognition of traditional residuary proprietary rights in water or as compensation for their earlier practical expropriation.

41. Wai Maori acknowledges that Te Ohu Kaimoana has expertise in developing and implementing allocation mechanisms. We understand they would be prepared to assist identify the advantages and disadvantages of different approaches to allocating freshwater.

42. Ultimately the regime that is developed should deliver the most effective way of managing freshwater, taking into account its particular characteristics. The system should also be capable of giving full recognition to Maori rights and interests in freshwater. This should assist them to advance their interests in freshwater fisheries, amongst other things. We recommend a range of approaches be worked through with iwi early in the next stages of policy development.

Conclusion

43. Wai Maori considers that the freshwater reform discussion document contains useful proposals that have the potential to improve the management of freshwater, and as a consequence, freshwater fisheries. We do not support some aspects of these proposals, including the limitation on appeals as we can see no justification for making such a change. We don't consider there is any need to amend sections 6 and 7 of the RMA. Despite the positive processes proposed for freshwater management, the proposed changes to the principles of the RMA are likely to undermine the ability of iwi to protect their rights and interests in freshwater and freshwater fisheries.

44. Ultimately, iwi seek to play a meaningful role in decision-making about freshwater. The advice they provide to councils before they make decisions should be given more weight.

45. In order to develop a framework for managing freshwater that is capable of giving full recognition to Maori rights and interests in freshwater, unresolved questions about the nature and extent of those rights and interests need to be addressed as outstanding policy questions are resolved.

46. Wai Maori considers the timeframe for consultation on these proposals, along with the even shorter timeframe for comment on related proposals to amend the RMA has been inadequate. In addition the lack of integration between each set of proposals has made it difficult to fully comprehend the implications of each.

47. We welcome the opportunity to engage further as these proposals are further developed.

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