

6 March 2020

Hon David Parker
Minister for the Environment
Private Bag 18888
Parliament
Wellington 6160

Hon Damien O'Connor
Minister of Agriculture
Private Bag 18888
Parliament
Wellington 6160

Dear Ministers Parker and O'Connor,

Regional Sector Response to the IAP Report

Thank you for providing the Regional Sector Water Subgroup (RSWS) the opportunity to consider the Independent Advisory Panel's (IAP) report on the Essential Freshwater Reform Proposals.

As you will recall from the joint letter of all advisory groups, dated 6 March 2020, there are many key matters within the reform package on which there is broad agreement across the advisory groups. You will also recall from our joint letter of 7 February 2020 that there is broad agreement between the Regional Sector and primary industry organisations on the need for, and key design elements of, farm plans. For completeness these matters of agreement are set out below. However there is also a range of matters arising out of the IAP report that continue to be of interest to the Regional Sector. The purpose of this letter is to set out those matters for your consideration. We would say, at the outset, that we consider that the IAP has added significant value to the EFW proposals and in broad terms we agree with the direction proposed in its report.

A National Implementation Package

Success of the reforms will depend on a good national implementation package. Both Iwi and the Regional Sector are core implementation partners and should be involved in co-designing the implementation plan. Key to this is ensuring Te Mana o te Wai is appropriately implemented and that iwi have the capacity to participate in plan processes. To enable participation, and for the other reasons set out in our joint letter, plan-making will need to be prioritised.

The Regional Sector agrees with the IAP that the 2025 deadline ought to focus on the date by which plans are notified rather than when final decisions are made. Even then, implementation will be challenging and we agree that plan making prioritisation should occur on the basis of priority catchments (as recommended by the IAP), but also taking into account other salient factors including the state and 'currency' of existing plans. Accordingly, we suggest that decisions on the grant of such extensions past the 2025 date could be made by an appropriate national entity and additionally take into account the particular circumstances of the council, the efforts made towards meeting the date, the revised date proposed by the council and the risk to water outcomes.

In terms of being able to implement the NPSFM quickly, we welcome the IAP recommendations to dispense with the notion of a 'vision' and with the obligation that we 'consult at every stage of the process.' These are material changes that will assist councils to get on with regional plans.

We are aware that there may be concern about delays in new plans coming into force and suggest that these concerns might be ameliorated by amendment to section 20A. The Regional Sector has given this matter some thought and we set out our preliminary ideas in that regard later in this letter.

System Performance Monitoring

We are acutely aware of public concern about freshwater and the performance of agencies charged with managing freshwater. For that reason, we support the common proposal for some form of system performance monitoring by some national, independent, entity that looks across the entire, national, regional, local and industry system and reports on performance. Acknowledging Māori rights and interests in freshwater and in the spirit of partnership we believe that this entity should be a 50/50 partnership with Māori.

The independent entity should not get involved in freshwater policy implementation as then it will no longer be independent. Rather it should have powers of recommendation to Ministers and other appropriate authorities who have intervention powers, depending on the nature of the issue identified.

Iwi Rights and Interests

The Regional Sector is keenly aware that the challenging nature of iwi rights and interests is already creating disruption to implementing the current National Policy Statement Freshwater Management (NPSFM) and this will continue when the NPSFM is amended, prolonging the period before effective policy takes effect. For this reason, we along with the other advisory groups, urge the Government to commence discussions with iwi to progress the necessary policy work.

Greater Māori Representation on Regional Councils

Greater Māori representation on regional councils is important for effective implementation of the reforms. LGNZ supports legislative change to remove barriers to the establishment of Māori wards and constituencies.

Default for DIN and DRP

We have consistently expressed concern about proposals for national DIN and DRP bottom-lines, suggesting that such an approach risks perverse outcomes. Accordingly, we strongly agree with the proposal whereby a national bottom-line for DIN and DRP is set as a default but which enables a process for determining different bottom-lines where the science supports this. Such outcomes would be enabled through regional plan change processes (involving independent, expert, freshwater panels).

The Regional Sector has given further thought to how the above proposal might be given effect to and this is set out in detail in our submission. We note that the IAP suggested that our approach would be 'workable.'

The approach we suggested essentially involves:

- Requiring regional councils to set nutrient target attribute states in prescribed circumstances (essentially where surface water/ecosystem health are susceptible to elevated nutrient levels);
- Set those target attribute states at a level that ensures the target attribute states for other (mandatory) attributes, and coastal receiving water standards (as set in regional coastal plans) will be met; and
- Councils being required to satisfy the above using the NPSFM default DIN and DRP bottom-lines (at least) unless there was regional scale monitoring and research that justified different standards.

At the conceptual level, we continue to consider such an approach to be the most appropriate option and would welcome the opportunity to work with officials on refining the wording to ensure that approach is both clear and robust.

We strongly support the commentary of the IAP report on the matter of DIN and DRP attributes. The IAP recommendation of shifting DIN and DRP to Appendix 2B is welcomed but we are concerned that, unless other parts of the NPSFM are also amended, it may not provide the solution to the issues identified. That is because Policy 7 of the NPSFM rightly requires councils to avoid future over-allocation and phase-out existing over-allocation. 'Over-allocation' is defined by the NPSFM to occur when water is, "being used to a point where one or more target attribute state is not being met." Hence, while the IAP seemed to suggest that moving DIN and DRP to Appendix 2B would remove the mandatory regulatory nature of DIN/DRP attributes (allowing councils to apply them in a regulatory context only when considered appropriate to do so), the NPSFM itself seems to require otherwise. If the IAP recommendation is to be accepted, then the relationship of Policy 7 and the definition of over-allocation needs to be carefully considered to ensure the change has the recommended effect. To be clear, however, RSWS supports the alternative solution outlined above.

Freshwater Farm Plans

The Regional Sector's position on Farm Plans (FW-FPs) is as set out in the joint Regional Sector/primary industry letter set to you on 7 February 2020. You will recall that in that letter we supported:

- Mandatory FW-FPs for all farms;
- FW-FPs deriving from national regulation and being enforceable independent of regional plans or the activity status of the land use under the RMA;
- FW-FPs requiring, at a minimum, transition to good farming practice (GFP), but with regional councils being able to require that FW-FPs go beyond GFP (and any national standards) where that is necessary to achieve catchment objectives;
- FW-FPs including the identification of farm-specific risks to water quality and actions to address those risks. Those actions must be timebound (noting that not all will be able to be in the same time period) and auditable; and
- Minimum content of FW-FPs being established and mandated nationally to support consistency. This should include some minimum regulated requirements (ie national standards) although they may not necessarily apply equally to all parts of New Zealand).

Considerable additional detail was set out in our letter of 7 February 2020. We note the IAP report appears to be in broad agreement with the joint Regional Sector/Primary Sector position. Accordingly, we support the IAP recommendations. Our understanding is that some of the major recommendations for change are:

- Ensure that regional council are certifiers;
- Introduce some form of compliance check by regional councils (similar to a certificate of compliance) for some aspects of FW-FPs (notably wetlands);
- Allow for farmers to draft their own FW-FPs in accordance with approved industry templates (as opposed to requiring all FW-FPs to be certified by a suitably qualified person);
- Where farmers do prepare their own FW-FPs, require that audit occurs within 12 months, although we note that the recommended amendment would give such farmers 24 months before audit is required;
- A disputes and complaints resolution process for farm plans;
- Ensure FW-FPs addresses risks that the draft National Environmental Standards (NES) has previously sought to address; and
- Amend the Act to improve enforceability.

While we agree with the general tenor of these recommendations there seems to us to be some detail yet to be worked through. The Regional Sector is committed to continuing to assist officials to resolve the outstanding issues in a workable and effective manner. One issue we would flag as being of some potential concern to us is the idea that farmers could prepare their own FW-FPs (where they use approved templates) subject only to audit after two years (rather than four). While we acknowledge that this would assist the speed at which the programme could be implemented, we suggest that that proposal could give rise to very large numbers of poor quality FW-FPs that will be of uncertain environmental benefit and create a significant administrative challenge for councils at a later date.

Taking Early Action – Amendment to Section 20A

As noted earlier, we are aware of the desire for rapid introduction of new and more effective planning provisions. While making rapid progress on getting plans *operative* is one means of achieving that, another is to require that the provisions of proposed plans have greater, or earlier, effect. That could be achieved by amendment to the existing use rights that apply in respect of regional rules. As you will recall, under section 20A of the Act, an activity that did not need a consent before a regional plan was notified, continues to not need a consent after a new plan is notified requiring such consent, until six months after that new plan becomes operative. This can lead to lengthy delays in initiating consenting processes when it is blatantly obvious that consents will be required (because of the state of the catchment and the activities contributing to that state). While there is an obvious difficulty in consenting activities against plan provisions that are subject to change, with careful management this may be overcome. As a concept for further discussion we propose the following.

Amend Section 20A so that it does not apply where the activity:

1. Is:
 - a. a discharge activity; or

- b. a land use activity with a diffuse discharge that is permitted by the proposed plan; and
2. Is proposed to be undertaken in a catchment where an applicable national bottom-line is exceeded for any NPSFM Appendix 2A attribute.

Provided that, any resource consent granted before the proposed plan becomes operative shall:

- Be conditional upon adoption of good management/farming practice and a FW-FP (rather than a fixed contamination reduction target); and
- Includes a review clause such that any consent is amended when the plan becomes operative to impose additional condition(s) as may be necessary to implement a specific load reduction in the relevant contaminant as may be required by the operative plan.

To implement this proposal, regional councils would need some way to achieve the review of conditions as a group. The current proposal to amend section 128 of the Act included within the Resource Management Amendment Bill would (subject to further advice) be adequate for this purpose.

Section 20A would still need to give dischargers and farmers a suitable period of time to make applications and we would suggest that one year would be appropriate. There will likely be many other issues to consider before such an amendment could be recommended but we would be happy to assist officials considering this matter further.

Social and Economic Considerations

The LGNZ submission on the Essential Fresh Water (EFW) proposals expressed some concern regarding the ability to provide for communities' needs and to take into account social and economic considerations. We were pleased to see that the IAP considered these points.

We note, and strongly support, the IAP's recommendation to introduce into clause 3.9 (6) of the NPSFM the following matters:

- v. Any reduction in state that may be anticipated as a result of laqs in the hydrologic system and already authorised further discharges;*
- vi. The limits that would be required, in accordance with clause 3.10, to achieve the target attribute states;*
- vii. Any implications for resource users, people and communities arising from the target attribute state and associated limits, including implications for social and economic wellbeing.*

This will allow councils to consider the costs faced by people and communities of meeting target attribute states and associated limits when setting those target attribute states. It is a vital recommended change but one we note does not appear to have been brought through from the body of the report into the key recommendations.

With regard to the wider concerns raised by the LGNZ submission regarding the requirement to maintain or improve, the IAP said the following:

We note that the requirement to maintain or improve applies to 'ecosystem health and wellbeing,' a term that needs to be made as an overall judgement across indicators. This includes the state of individual attributes, but is not limited to them, requiring a more holistic judgement. This needs to be reflected in references throughout the NPS (Policy 2, 3.9(2) (b), and 3.15 and 3.16.)

We agree with the IAP on that point but it is not clear to us that the wording of the NPSFM allows for such an approach. Indeed, the reference to 'overall' in the current NPSFM is to be removed by the 2020 version which in our understanding reduces the ability to apply an overall judgement. It appears to us that our ability to exercise such an 'overall judgement' is constrained by the ability to ensure that the state of each and every attribute is maintained or improved everywhere. Indeed, as quoted above, the definition of 'over-allocation' requires councils to consider matters on an attribute-by-attribute basis. In short, we continue to have reservations about whether the NPSFM will lead us into an unrealistically strict application of policy that may lead to effects on community well-being that have not been anticipated. Further it is not clear to us that the IAP's comment that the need to take a 'holistic judgement' has been reflected in the NPSFM as the IAP suggests it needs to be.

Attributes

As you will be aware, the proposed NPSFM (2020) released for consultation contains 23 attributes in two categories: 2A (attributes requiring the setting of resource limits); and 2B (attributes requiring an action plan)

The IAP has recommended this structure be amended to group attributes into four categories:

- 2A – mandatory limits, mandatory monitoring, for implementation in regional plans;
- 2B – mandatory action plans, mandatory monitoring, non-regulatory catchment or water body action plans;
- 2C – optional targets, mandatory monitoring, to start to establish a database of information; and
- 2D – optional targets, non-mandatory monitoring, transparent community process to establish attributes (NB. IAP have identified a range of additional attributes that could be considered.)

Overall, we consider the changes to the 'status' of attributes proposed by the IAP are a sensible solution to the varying importance of attributes in driving freshwater outcomes.

The IAP has recognised the necessity for flexibility of management responses within catchments and regions. For example, by moving the nutrient attributes (TN, TP, DIN and DRP) to category 2B, the IAP is explicitly recognising the need for flexibility in management responses to deal with these contaminants. In contrast they have retained important outcome variables (ie periphyton and phytoplankton biomass) as attributes requiring resource limits (2A). We support this re-classification.

The IAP has also recognised the varying levels of maturity of some proposed attributes, as was highlighted in technical submissions from NIWA and regional sector scientists. By moving some attributes to 2C or 2D the IAP is highlighting the paucity of information for some attributes and the need to build knowledge before making them mandatory.

You will recall that the LGNZ sought an increase level of protection around nitrate and ammonia toxicity attributes so that the bottom-line reflect 90 per cent species protection. We are pleased to see that the IAP agrees with that submissions and recommended increasing the level of protection.

NESFM

Overall, it is clear to us that the IAP makes many valid and useful recommendations for change to the draft NES. The Sector will have a very high level of agreement with these detailed recommendations.

In particular, we support recommendations relating to rule structure and the use of accepted rule making norms, including matters such as the use of terminology consistent with the Act. We note that the observations and recommendations made by the IAP are consistent with the many matters LGNZ raised in its submission. There appears to be work to be done to finalise the drafting of many of these matters and we reiterate our offer to assist in the drafting drawing on the considerable experience held by regional councils.

In addition to these recommendations for structural and terminology changes, we support many of the IAP's more substantive recommendations for amendment to regulations. For example, we agree with the IAP that, "drains and irrigation races," should not be subject to stream loss regulations, as long as they are clearly artificial watercourses, and not modified natural watercourses. We also agree with permitted activity status for activities that are associated with the restoration or maintenance of wetlands, activities such as earth disturbance and earth disturbance for drainage that have no more than minor effect, or minor effects that are temporary and reversible.

However, there are also recommendations that give rise to questions and reservations about how some of the regulations will apply. For example, for nitrogen management, while the IAP has suggested the N-surplus may be used as an alternative to Overseer as an interim measure, we are aware that there are two very different ways of determining N-surplus and it is not clear to us which one the IAP supports. In addition the IAP recommendations appear to endorse the calculation of the 80th percentile at the catchment scale without regard to soils and rainfall. While we accept that such an approach will target the highest leachers, it will not necessarily target those with the poorest practices. If the objective is to target poor practice then a more sophisticated approach should be taken to calculating the 80th percentile that takes into account the biophysical context in which farming occurs.

We appreciate that at this time it has not been possible to prepare consolidated, updated NPS or NES and that understanding the recommendations in context is challenging for all at this point. It is also clear from comments that the IAP makes, that work by officials continues on some of the more challenging issues. Be assured that the Sector is eager to assist further with the next iterations of the NPS and NES if that would be of assistance to you and your officials.

Yours sincerely,



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