

DISCUSSION PAPER BY COUNSEL ASSISTING DEALING WITH ISSUES 8, 9, 10

DRAFT AS AT 14 JULY 2017

1 Introduction

- 1.1 This is a preliminary discussion paper provided by counsel assisting the Inquiry on Issues 8, 9 and 10 of the Stage Two Issues and Questions in advance of the filing of submissions by parties on 21 July 2017 and the August 2017 hearing.
- 1.2 This paper has been prompted by material received by the Inquiry just prior to the June 2017 and the August 2017 hearings, including from the Hawke's Bay Regional Council¹ and the Canterbury District Health Board.² This material provided helpful views on aspects of Issues 8, 9 and 10.
- 1.3 In summary:
 - (a) Issue 8 addresses the **adequacy of the existing NES Regulations**;³
 - (b) Issue 9 addresses the **adequacy of the current approach taken by regional councils to assessing and granting water permit applications by water suppliers**;
 - (c) Issue 10 addresses the **adequacy of the current approach taken by regional councils to first barrier protection (other than under the NES Regulations)**.
- 1.4 Issues 8, 9 and 10 as formulated in the Stage Two Issues and Questions arose as a result of issues identified by the Inquiry in Stage One.
- 1.5 The following sections set out points for discussion on the matters identified by Issues 8, 9 and 10. The Inquiry's consideration is, of course, not limited to the material set out in this document. The intention is to provide some focus and points of discussion for submissions and the August 2017 hearing.

2 Scene setting

- 2.1 This paper takes Issue 8 as a starting point but there is merit in addressing Issues 8, 9 and 10 together. Sub issues arising include:
 - (a) Whether there is a critical "gap" in the current Resource Management Act 1991 (**RMA**) regime for managing and/or protecting drinking water sources?
 - (b) Whether that gap has been, or could be, adequately plugged by the NES Regulations?
 - (c) If the NES cannot "plug the gap", whether a more comprehensive regulatory framework is needed for the management and/or protection of present and future drinking water sources? Consideration of such a framework might allow the Inquiry to look forward (i.e. to plugging the gap) instead of looking backwards (i.e. by fixing the NES Regulations), and to focus on how regional councils can in future address the matters identified by Issues 9 and 10.

¹ Refer Report from Hawke's Bay Regional Council, dated 20 June 2017.

² Refer Canterbury District Health Board Stage Two Submission, dated 6 July 2017.

³ Resource Management (National Environmental Standard for Sources of Human Drinking Water) Regulations 2007.

- (d) How any options proposed for a more comprehensive regulatory framework should be tested, for example, by way of an examination of the appropriateness of the proposal in achieving the purpose of the RMA and, in particular, the benefits and costs of the environmental, economic, social and cultural outcomes?⁴
- (e) What sort of timeframes would be desirable and achievable for any proposed solutions? Accepting that some changes may take longer, are there any changes that can and should put in place as soon as possible, and if so how could that be achieved?

2.2 It is important to recognise that recommendations in this sphere, particularly any clarification to the role of regional councils, must be expressly limited to the management and/or protection of drinking water *sources* through the control of discharges to land, take and use of water, or use of land that might impact on water quality. Unless this distinction is made very clear, there would be potential for regional council obligations to overlap with the regime under the Health Act 1956 (**Health Act**). For example, any suggestion that regional councils are to be responsible for managing drinking water to certain specified standards, would duplicate and inappropriately undermine other specific statutory responsibilities, for which other bodies have prime responsibility.

3 Points for consideration and discussion

3.1 In light of the questions posed above, there is a range of potential initiatives to address Issues 8, 9 and 10, all of which have benefits and possible limitations. Various points for discussion are set out below. These should be considered together and, as noted above, are not indicative of the only options available for consideration by the Inquiry. Additional suggestions and perspectives are welcome. Parties filing submissions or comments on Issues 8, 9 and 10 may wish to follow the same order of topics as set out below.

| | Question/potential concern | Options/discussion points |
|---|--|---|
| 1 | Regulatory recognition of the management and/or protection of drinking water sources | Bespoke legislative provision? Expanding the Health Act regime? For either of the above, would there then be a need to expressly exclude this matter from the RMA regime? Expanding the RMA regime? Under any new scenario, which entity would be responsible for source protection? |
| 2 | Higher order direction in the RMA | New matter of national importance in s 6 of the RMA? For example (and these could be combined): <i>(x) The protection of potable freshwater sources from inappropriate use and development; or</i> <i>(y) The management of significant risks to potable freshwater sources;</i> What is inappropriate use and development? What would constitute a “significant physical risk”? Issues with definition of potable freshwater sources? <ul style="list-style-type: none"> • Physical extent of “source”? • Whether to incorporate underutilised or potential future sources? • Individual regional council definition vs |

⁴ Refer to the requirements for an evaluation report under s 32 of the Resource Management Act 1991.

| | Question/potential concern | Options/discussion points |
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| | | <p>standardised approach?</p> <ul style="list-style-type: none"> Any reference to size of supply? |
| 3 | Express recognition as regional council function | <p>New function of regional councils in s 30 of the RMA? For example (and these could be combined):</p> <p><i>(x) The protection of potable freshwater sources from inappropriate use and development; or</i></p> <p><i>(y) The management of significant risks to potable freshwater sources;</i></p> <p>Extent of overlap with existing functions? Is this needed given current functions?</p> |
| 4 | Express requirement for monitoring by regional councils | <p>Expressly and specifically require monitoring of consents/permits related to (or with a potential effect on) drinking water sources in s 35?</p> <p>Monitoring could practically be carried out by consent holder or consent authority?</p> <p>Include an accompanying reporting requirement? (Beyond that required by state of the environment monitoring)</p> |
| 5 | Requirements for consultation | <p>If so, with which parties?</p> <p>Expressly list Minister of Health and other relevant parties in Schedule 1, clause 3 for matters relating to drinking water sources, prior to notification by any council of any policy statement or plan?</p> |
| 6 | Requirement for consideration of drinking water sources for all consents/permits | <p>Expressly incorporate consideration of drinking water sources in s 104 of the RMA, and/or in either ss 105 or 107 as a matter to which specific regard must be had (s 105), or which must not result in certain adverse outcomes (s 107)?</p> <p>Expressly require consideration of water safety management plan type documents?</p> |
| 7 | Inclusion of specific objectives and policies in regional plans to ensure recognition of management and/or protection of drinking water sources | <p><i>Short term:</i> through the s 55 process by way of a new national policy statement? Another mechanism?</p> <p><i>Longer term:</i> through a new national policy statement? Through the current NPSFM? Through new or amended NES Regulations? Another mechanism?</p> <p>Provides desirable consistency across regional councils and regional plans?</p> <p>Could/should provisions take into account a wide range of management and/or protection matters, such as provision for existing/future drinking water sources, and the appropriateness of location of drinking water supplies near to risky infrastructure assets (like sewerage pipelines), and vice versa?</p> <p>Should rules be developed through the normal schedule 1 process, or should they be nationally applied through an amended or new NES?</p> <p>Refer to Appendix 1 for some existing examples of such provisions in regional plans.</p> |

| | Question/potential concern | Options/discussion points |
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| 8 | Immediate inclusion of specific conditions on all existing and future water permits for drinking water supplies | New or amended NES Regulations that specify deemed conditions to be attached to such permits, or deemed permitted activity standards where no consent is required, until a regional plan becomes operative that specifies different/more stringent alternative rules? |
| 9 | Classification of water take permits for drinking water supply | Is permitted or controlled activity status appropriate? Should all such activities be restricted discretionary or more onerous, to enable a consent authority to decline resource consent in appropriate circumstances? Mechanism to implement this? |
| 10 | Adequacy of existing NES Regulations | Need to extend their “trigger” (i.e. current already non-compliance, at which point health is already at risk)? Better to apply by spatial criterion? Need to expand their scope (i.e. size of supply and type of consent/permit)? Need to provide for retrospective effect? Need to expressly require consideration of cumulative effects? Need to amend or clarify various definitions, including abstraction point and upstream? How to manage and ensure there are no increased compliance costs for water suppliers (i.e. monitoring, fixing bores, extra treatment)? |
| 11 | Implementation of existing NES Regulations | Roll out new programme of implementation of NES Regulations, on basis that they are adequate in their current form? |
| 12 | Drinking water supplies as a “compulsory” national value in the NPSFM | Drinking water already in NPSFM as an “additional” national value - Wai Māori / municipal and domestic water supply. Are other changes needed to better reflect the importance of drinking water? Reclassifying drinking water supply as a “compulsory” national value would likely require the development of specified numeric attribute states. Would this result in an undesirable overlap with/duplication of drinking water standards? |