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THE WEST COAST
REGIONAL COUNCIL

7 November 2019

Committee Secretariat
Environment Committee
Parliament Buildings
Wellington

Dear Sir/Madam

Submission on the Resource Management Amendment Bill

The West Coast Regional Council welcomes the opportunity to make a submission on the Resource Management Amendment Bill and generally supports the proposed amendments to the consenting and enforcement provisions. However, we do have some concerns about the new Freshwater Planning Process.

Attached is the Council's submission.

The Council does not wish to be heard at the hearing.

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Yours faithfully

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Planning, Science and Innovation Manager

West Coast Regional Council Submission on the Resource Management Amendment Bill

Introduction

The Council **generally supports** the Resource Management Amendment Bill's (the Bill) proposed changes to the Resource Management Act 1991 (RMA). We think that the proposed changes generally improve the consenting process and enforcement provisions. While the intent to 'speed up' the freshwater planning process under the NPSFM is well-meaning, we do not support some of the provisions and timeframes proposed to achieve this.

Our submission specifically focusses on the proposed provisions for reviewing conditions of multiple consents, the increases in infringement fees and the new freshwater planning process.

Improving resource consent processes and enforcement provisions

Changes to Section 128 - Enabling review of conditions of multiple resource consents concurrently

We **strongly support** amending the RMA to allow councils to review conditions of multiple resource consents relating to freshwater simultaneously. This will ensure that consent conditions reflect the National Policy Statement for Freshwater Management (NPSFM), and any changes made to freshwater provisions in regional plans as a result of the FMU process, especially where an issue at the catchment level involving multiple water users needs to be addressed.

Increasing maximum infringement fees under the Resource Management (Infringement Offences) Regulations 1999

We **support** the increase in fines up to $2,000 for a natural person and $4,000 for companies. However, the proposed changes trigger the need for an amendment to the Resource Management (Infringement Offences) Regulations 1999 (Infringement Regulations), to align with the proposed changes to the RMA.

The proposed amendments do not appear to allow for different levels of fines for different offences. For example, the current infringement regime results in a $300 fine for a Section 9 offence and a $750 fine for a Section 15 offence. It is not clear from the proposed amendments whether the increased fines will vary depending on offence, or whether the amounts proposed are maximums with some ability for discretion for lesser amounts.

We are concerned that a simple increase in the infringement rate to $2,000 and $4,000 could result in councils issuing more formal warnings for what may have previously been a $300 infringement notice. We would support the Regulations having a two tier approach to infringement requirements. This would allow councils to infringe someone for an amount that is relevant to the scale of their offence. For example, where an offence has a minor adverse effect and there is very little negligence or deliberateness involved, a lower level fine may be more appropriate than a $2,000 fine. Whereas significant offending that has an adverse effect and a high degree of negligence and deliberateness involved, but does not warrant prosecution action, a fine of $2,000 for a natural and $4,000 for a company is more appropriate. If a two tiered approach was to be implemented, the amount of the

lower tier should also be set through the regulations. This would give councils some discretion over the level of the offence, but still allow for consistency in infringement amounts.

It is therefore our submission that the Infringement Regulations should have a two tiered approach for fines where councils can consider on a case by case basis the significance of the offending and infringe at an appropriate level.

Freshwater Planning Processes

We support the removal of the Collaborative Planning process from the Resource Management Act 1991, and replacing it with the proposed Freshwater Planning Process, subject to the changes we seek below.

New Section 80A Freshwater planning process

The timeframes stated in clause (4)(b) and new section 51, to publicly notify a freshwater plan change by 31 December 2023, and release decisions on submissions to the plan change by the end of December 2025, may not be achievable for small councils such as ours. Both the current and the proposed NPSFM require councils to make significant amendments to their regional plans, involving a number of staff members from various teams. Small councils may not have the staff capacity to undertake a comprehensive change to their relevant regional plan while undertaking their other business and usual workload. One option for councils is to outsource some of this work to consultants. However, this results in significant additional costs to small councils. The West Coast has a very small rating base, meaning that costs to undertake plan changes are spread over a limited number of ratepayers, making the cost per ratepayer disproportionately high. The shorter timeframe to prepare and notify plan changes, and have decisions released, may also affect the quality of provisions being added to the plan. The perverse outcome being that small councils only meet the bare minimum requirements of the NPSFM.

The proposed new timeframes, and other provisions, may not necessarily speed up the freshwater planning process. For example, we think that stakeholder submitters will make more comprehensive and detailed submissions and provide more detailed evidence at hearings, potentially prolonging the Summary of Submission and hearings stages.

We **support** the timeframe being extended out to 2030, as it is currently set out in the existing NPSFM. The current timeframe allows this Council the ability to undertake plan changes to the relevant regional plan where the costs can be spread out over an additional five years, and within timeframes that are achievable for us.

Schedule 1 - New Part 4 – Freshwater planning process

New Section 37 Regional Council must submit freshwater planning documents and give nominations to Chief Freshwater Commissioner

We have concerns that the six month timeframe specified in clause (4)(c) for notifying the proposed plan change, preparing the Summary of Submissions, notifying it for further submissions, adding further submissions to the Summary and forwarding these documents to the Chief Freshwater Commissioner, are too restrictive for our small planning team of two to meet if we receive a large

number of detailed submissions. The initial submission period for a plan change is 20 working days. If we allow 6-8 weeks to prepare and notify the Summary of Submissions, then allow 10 working days for further submissions to be lodged, and another 10-20 working days to add the further submissions into the Summary, as well as time spent on administrative tasks such as preparing mailing lists, sorting out incomplete submission forms, and other unforeseen matters, plus the 20 working day period for giving notice to the Chief Freshwater Commissioner that the documents will be forwarded to - the six month timeframe is simply too tight. Planning staff still have other work streams to progress over this time.

We **seek** that the timeframe in clause (4)(c) being extended to 12 months, as this would allow councils additional time to work through the submissions, and further submission, stage without putting unreasonable pressure on planning staff.

New Section 38 Chief Freshwater Commissioner must convene freshwater hearings panel

This section implies that the hearing will be held within a few weeks after the Chief Freshwater Commissioner receives the documents under new Section 37. However, key stages of the planning process are omitted in the amendments, or do not allow sufficient time to assess submissions. This raises considerable uncertainty about whether this stage of the new planning process is robust and fair, and whether it can be undertaken in a shorter period of time.

Standard planning practice is for councils to complete a section 42A staff recommending report on submissions and further submissions. The purpose of this report is to assess submission points and make recommendations to accept, accept in part or reject them, and give reasons for the recommendations. As part of this assessment process, it is also standard planning practice to hold pre-hearing meetings with some submitters to try and resolve key issues in a collaborative way. Submitters and further submitters can then speak to their submission and respond to any recommendations made in the section 42A report at the hearing. A section 42A report can take months to complete depending on the number of submissions and further submissions received, their length and the complexity of the issues raised. Given how contentious water management is, we anticipate that the number of submissions and further submissions will be substantial, and any recommendations by the hearing panel will require extensive assessment of the submissions.

Therefore we do not understand how the resolution of issues can be progressed at the hearing stage without a section 42A assessment undertaken prior to the hearing and circulated to submitters. Although the new section 45 provides for the hearing panel to request a report from council, a consultant or anyone during the hearing, the lack of requirement for a section 42A report means that submitters will not have the opportunity to consider and reply to any initial recommendations or solutions suggested by the council before the hearing. This seems contrary to the principle of consultation and could give an impression that all submissions may not be given due consideration. Solutions considered 'on the hoof' during a hearing may not necessarily be complete or best practice. If issues around fairness of the process arise during the hearing, it could potentially delay the length of the hearing.

For these reasons, we consider that new Section 38 needs to be amended to require the hearing panel to either complete a section 42A report, or direct the council to prepare such a report, and circulate it to submitters before the hearing commences.

See also our comments on sections 45 and 61 of the proposed changes on this matter.

New Section 40 Powers of freshwater hearings panel

We **strongly oppose** clause 40(2) permitting cross examination during a freshwater plan change hearing. We question the purpose of permitting cross examination and see this as potentially turning a council hearing into an Environment Court hearing, and likely prolonging the hearing. This could discourage lay submitters from making a submission and participating in the hearing if they are uncomfortable with being cross examined or cross examining others. It is important to have lay submitters involved in the process because they are often the ones who have to implement the provisions within the plan, as well as being the most impacted.

We **strongly seek** the removal of this clause from the new Section 40.

New Section 41 Council must attend hearings

We **support** this section clarifying that regional councils can make submissions themselves on the freshwater planning instrument and can be heard in respect of their submission. This provides an opportunity for councils to identify matters that were overlooked in the plan change drafting. Council staff also have local knowledge to draw on that an independent hearing commissioner from outside the region does not have. This will help to reduce the risk of the plan having gaps or inconsistencies between provisions, and/or having provisions that cannot be practically implemented.

New Section 43 Conference of experts

We **strongly support** section (6) which provides that the regional council may attend a conferencing of experts if authorised to do so by the hearing panel. This will enable council staff to keep fully informed about the issues and options for resolution, especially when advising their council on the hearing panel's recommendations.

New Section 44 Alternative dispute resolution

We **support** including this section in the freshwater planning process. However we do question whether there will be enough facilitators and mediators within New Zealand for alternative dispute resolution. We anticipate that many issues raised within submissions and further submissions will be complex and contentious, requiring a number of alternative dispute resolution processes to occur simultaneously during the hearing phase. It is likely that regional councils will be holding their freshwater hearings at similar times.

New Section 45 Freshwater hearings panel may commission reports

We generally **support** this section, however clause 1 of section 45 needs to be amended to allow the hearing panel to require reports prior to the hearing, as well as during the hearing. When reading the freshwater plan change and submissions and further submissions, the hearing panel may become aware of topics and issues that will require a report. So in some instances the hearing panel will be able to inform the relevant party that they need to write a report on a particular topic prior to commencing the hearing. The sooner a party is aware that they need to write a report, the sooner the party can start writing, which will likely lead to more thorough and robust reports being created. It could also avoid delays during the hearing process.

New Section 48 Freshwater hearings panel must make recommendations to regional council on freshwater planning instrument

We **strongly oppose** Clause (2)(b) of Section 48 giving the hearing panel the power to make recommendations that are out of scope of submissions. This goes against natural justice principles. Councils will have gone through a public consultation process in notifying their proposed RPS and plan changes, and the Hearing Panel has the power to disregard what's been put forward in the submission process. This means submitters do not have the opportunity to comment on the Panel's recommendations for changes that are outside the scope of submissions.

Under Schedule 1 of the RMA, if independent hearing panels for any other regional or district plan change want to recommend changes that are outside the scope of submissions, it would need to adjourn the hearing and seek that a variation be prepared and notified for submissions. Such processes would obviously take more time, and we assume that the reason for giving the hearing panel powers to recommend changes outside of submissions is so that all matters that need to be in the plan change can be put in place or corrected if anything substantive is omitted or erroneous. However, it is not appropriate to give greater priority to having a faster decision-making process above having a fair process.

The current RMA provisions provide for minor, non-substantive updating and correcting changes in a plan change process that may not be identified in submissions.

The hearing panel's ability to consider changes outside the scope of submission would only be useful if there are gaps or errors in the proposed plan changes and no one submits on them. However, although s48(2)(b) has qualifiers, there is too much uncertainty about how this provision will be used.

The word "decisions" in clause (4)(b) needs to be changed to "recommendations". The hearing panel makes recommendations on submissions, whereas the Council makes the final decisions on submissions, based on the recommendations received from the hearing panel.

We also have concerns about how Section 48(2) relates to Section 51(1)(b)(2). Section 51(1)(b)(2) only permits regional councils to come up with alternative options that are within scope of submissions. Whereas Section 48(2) allows the hearing panel to make recommendations outside the scope of submissions.

Based on our concerns, Section 48 needs to be reconsidered, including how it relates with Section 51.

New Section 51 Relevant regional council to consider recommendations and notify decisions on them

We **oppose** clause (4) of section 51 requiring regional councils to notify decisions no later than 20 working days after receiving the recommending report from the hearing panel. Recommendations from the hearing panel could be extensive, complex, and potentially contentious and so councillors will need time to comprehend the recommendations.

The 20 working day timeframe could be difficult to achieve in relation to the dates of council meetings and workshops. Most councils meet once a month to make decisions on various council matters, including planning matters such as making decisions on freshwater plan changes. Documents relevant to a Council meeting are sent out to the Councillors at least a week in advance to give the Councillors

sufficient time to read and consider the documents, before making a decision at the Council meeting. For decisions on plan changes, we hold a workshop with Councillors to explain and clarify the hearing panels' recommendations. This is to ensure that Councillors understand what they are deciding on and the impact their decisions will have. Even if Council receives the hearing panel's recommendations at least four weeks before the next Council meeting, there may still be insufficient time to organise a workshop and take the recommendations to the Council meeting.

This section also provides for the Council to accept or reject the hearing panel's recommendations, including giving reasons for rejecting particular recommendations, and providing alternative solutions. While in most cases the Council will accept the recommendations made by the hearing panel, there may be some recommendations that the Council rejects. This level of consideration is beyond what Councillors usually have to decide on, so they will need sufficient time to consider the recommendations and come up with alternative solutions if they disagree with the hearing panel. This may mean planning staff will need to hold multiple workshops with Councillors. The timeframe for notifying decisions is likely to go beyond the 20 working days proposed in this clause.

Therefore we **seek** that the timeframe for councils to notify decisions is extended out to a maximum of 60 working days from when the hearing panel recommendations are received.

New Section 54 Right of Appeal to Environment Court

We **strongly support** limiting appeals on freshwater plan changes. The appeal stage can add lengthy timeframes before a plan change becomes operative. However, there is a risk that with limited appeal options, the main stakeholders who often lodge appeals will put a greater emphasis on the hearing as potentially their last opportunity to advocate for their interests in changes to regional plans. Hearings may increase in scale and length of time, which will stretch the staff resources of smaller councils. Plan hearings are not cost recoverable like consent hearings, so the additional costs are borne by ratepayers.

New Section 58 Composition of freshwater hearing panel

We **generally support** the proposal for expert hearing commissioners and Environment Court Judges being on the hearing panels for freshwater plan changes. However, we question whether this is practically achievable as all regional councils will want to hold hearings around similar times in order to release their decisions by December 2025.

We **strongly support** having two commissioners nominated by the regional council on the hearing panel. Having two local hearing commissioners will ensure that decisions are tailored to the local context.

New Section 61 Funding of freshwater hearings panel and related activities

We **strongly oppose** regional councils having to cover all costs incurred by the Ministry-appointed hearing chair and commissioner under the proposed freshwater planning process. We are a small rural Council with a very small rating base, and so the Council has limited revenue available to cover these costs. Given the complexity and contentiousness of freshwater management, the hearings could last for a number of weeks, especially if additional reports, and expert conferencing are required during the hearing rather than before it. The current lack of provision for s42A assessment and pre-hearing

meetings with submitters to resolve issues prior to the hearing is likely to add to the hearing costs. If the proposed freshwater planning process provides for s42A submission assessment and pre-hearing meetings undertaken by council staff, the cost of these processes could be absorbed by staff time that is already budgeted for. The longer the hearing lasts, the more costly the hearing is for the Council.

We understand that Environment Court judges can be more expensive than other hearing panel commissioners. For example, we have received quotes ranging between $190 and $400 an hour for Environment Court judges to chair a hearing panel for one of our regional planning documents. We suggest that the Government sets a fixed remuneration rate for each Ministry-appointed hearing panel member for all freshwater hearings. Consultation with all regional councils on this fixed rate needs to occur before deciding on a rate.

In addition to the above, the cost of travel for the hearing panel could be significantly more for the West Coast than other regions. We are located a significant distance away from major cities and have limited flights in and out of Hokitika and Westport.

We **seek** the following:

That provision be made for the Hearing Panel to request that councils undertake section 42A assessments of submissions, and have pre-hearing meetings with submitters to resolve issues where practical, prior to a hearing, to reduce the length and costs of hearings for small councils.

That the Government sets a fixed remuneration rate for each Ministry-appointed hearing panel member for all freshwater hearings.

That the Chief Freshwater Commissioner and the Minister for the Environment consider local financial constraints when appointing hearing commissioners, to ensure that the process is as cost effective as possible for small regional councils. We also support the Ministry covering the costs of accommodation and travel for commissioners and Environment Court Judges appointed by the Ministry.

This ends our submission.