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Dear Nicholas

ADVICE TO THE BOARD OF INQUIRY ON THE PROPOSED NATIONAL POLICY STATEMENT FOR RENEWABLE ELECTRICITY GENERATION

1. INTRODUCTION

1.1 You have asked us to provide advice in relation to the following question posed by the Board of Inquiry considering the Proposed National Policy Statement for Renewable Electricity Generation:

“Do the provisions of a National Policy Statement take precedence over Water Conservation Orders in instances where both are relevant considerations?”

1.2 In answering this question, we discuss those situations where both a national policy statement (“NPS”) and water conservation order (“WCO”) are relevant considerations, namely:

- (a) The development of regional policy statements, regional plans, and district plans (collectively referred to in this advice as “Planning Instruments”);
- (b) Resource consent applications; and
- (c) Notices of requirement.

1.3 We note that our advice relates to approved NPSs issued under section 52 of the Resource Management Act 1991 (“the Act”).

1.4 For the sake of completeness, we also briefly discuss the relationship between WCOs and national environmental standards.

2. PLANNING INSTRUMENTS

2.1 The contents of any NPS and WCO can be a relevant consideration when a regional policy statement, regional plan, or district plan is being made or changed.

2.2 Section 62 of the Act specifies the contents of regional policy statements. Subsection (3) states:

“A regional policy statement must not be inconsistent with any water conservation order and must give effect to a national policy statement or New Zealand coastal policy statement.”

- 2.3 Section 67 of the Act describes the contents of regional plans. Subsection (3) requires that a regional plan must give effect to any NPS, and subsection (4) states that a regional plan must not be inconsistent with a WCO.
- 2.4 Section 75 of the Act describes the contents of district plans. Subsection (3) requires that a district plan must give effect to any NPS, and subsection (4) states that a district plan must not be inconsistent with a WCO.
- 2.5 Accordingly, in the case of each of these three types of Planning Instrument there is a requirement that the relevant instrument must give effect to a NPS and must not be inconsistent with a WCO.
- 2.6 In our view the obligation to “give effect” is a stronger and more directive requirement than the obligation not to be inconsistent with a WCO.
- 2.7 Giving effect requires implantation of the relevant aspects of a NPS in the relevant Planning Instrument. It requires positive action. Regard must be had to the relevant provisions of a NPS and the policy intent of those provision must be implemented in the Planning Instrument, within the bounds of matters that the particular Planning Instrument is authorised to address.
- 2.8 The obligation to “not be inconsistent with”, imposes a lesser obligation. The Planning Instrument does not have to address the content of a WCO in order to be consistent with it. A requirement that a Planning Instrument not be inconsistent with a WCO does not prevent a Planning Instrument from taking a somewhat different perspective than is contained in the WCO. Indeed it may not address the issues dealt with in a WCO. Silence on the issues will not necessarily create an inconsistency. However, any provision included in a Planning Instrument that is inconsistent with the content of a relevant WCO will be ultra vires.¹

3. RESOURCE CONSENT APPLICATIONS

- 3.1 Section 104 of the Act lists the matters that must be considered when an application for a resource consent is being determined. Subsection 104(1) requires that a consent authority must, subject to Part 2, have regard to any relevant provisions of a national policy statement² and “*any other matter the consent authority considers relevant and reasonably necessary to determine the application*”.³
- 3.2 Accordingly, in a situation where the contents of a WCO are relevant to the determination of a resource consent application it will have equal priority with the content of any NPS, in that regard must be had to both of them under section 104.
- 3.3 However, in addition subsection 217(2) of the Act contains additional provisions specifically relating to WCOs. It states:

1. *Auckland Regional Council v Rodney District Council* [2009] NZCA 99, Baragwanath J, at para 15.
2. Section 104(10)(b)(i) of the Act.
3. Section 104(1)(c) of the Act.

“Where a water conservation order is operative, the relevant consent authority—

- (a) shall not grant a water permit, coastal permit, or discharge permit if the grant of that permit would be contrary to any restriction or prohibition or any other provision of the order:*
- (b) shall not grant a water permit, a coastal permit, or a discharge permit to discharge water or contaminants into water, unless the grant of any such permit or the combined effect of the grant of any such permit and of existing water permits and discharge permits and existing lawful discharges into the water or taking, use, damming, or diversion of the water is such that the provisions of the water conservation order can remain without change or variation:*
- (c) shall, in granting any water permit, coastal permit, or discharge permit to discharge water or contaminants into water, impose such conditions as are necessary to ensure that the provisions of the water conservation order are maintained.”*

- 3.4 Accordingly, while a consent authority is required to have regard to the contents of a NPS when assessing a resource consent application, there are specific prohibitions on granting resource consents of certain types when they conflict with the contents of a water conservation order. Consequently, a WCO has potentially greater power than a NPS when a resource consent application is being considered, dependant on the facts of the particular situation.
- 3.5 Section 217 of the Act will not, however, have any effect in a situation where a NPS is made that contains policy on an activity that conflicts with a WCO and the policy makes that activity permitted in terms of the Act. Such policy would have to be given effect to in relevant Planning Instruments, and where an activity is classified as permitted no resource consent is required and so section 217 does not come into play. The potential for such a situation to occur is discussed in more detail in part 6, below.

4. NOTICES OF REQUIREMENT

- 4.1 Section 171 of the Act lists the matters to be considered by a territorial authority when making a recommendation on notice of requirement. A territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement having particular regard to (among other things) a NPS, and any other matter the territorial authority considers reasonably necessary in order to make a recommendation on a requirement. A WCO could fall within the ambit of “any other matter”.
- 4.2 A notice of requirement is not a resource consent application and accordingly section 217 of the Act does not apply.
- 4.3 Notices of requirement are analogous to land use consents and accordingly WCOs are not intended to apply to them.⁴ However, any notice of requirement that involves associated activities impacting upon water are likely to require regional consents (unless the activity is a permitted activity), and section 217 will apply to such consent applications.
- 4.4 Accordingly, in relation to notices of requirement the consideration of a NPS and a WCO is at an equal level (particular regard must be had to both), but it is unlikely that a WCO will be relevant to the consideration of a notice of requirement. Where it may have a role in the consideration of any associated regional council water related consents that may be required.

4. *Kemp v Queenstown-Lakes DC* at 319, citing and applying *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc* [1988] 1 NZLR; (1987) 12 NZTPA 298.

5. NATIONAL ENVIRONMENTAL STANDARDS

- 5.1 For the sake of completeness we briefly discuss the relationship between national environmental standards and WCOs.
- 5.2 Sections 43B through 43E address the relationship between national environmental standards and other planning tools.
- 5.3 There is no discussion of the relationship between national environmental standards and NPSs in the Act.
- 5.4 Section 43C discusses the relationship between national environmental standards and WCOs and provides that a WCO that is more stringent than a national environmental standard applying to water prevails over the standard and that a national environmental standard applying to water that is more stringent than a WCO prevails over the order.
- 5.5 Accordingly the most stringent provision prevails. Such an approach is consistent with both the purpose and principles of the Act and does not derogate from the force and effect of a WCO.

6. SITUATIONS WHERE DIRECT CONFLICT ARISES BETWEEN THE CONTENTS OF A NPS AND A WCO

- 6.1 A question arises over which, if either, of a NPS or WCP takes precedence where the contents of a NPS and WCO are in conflict.
- 6.2 Such a hypothetical situation could occur, for example, if a NPS contained a directive policy making a particular activity a permitted activity that directly conflicted with a prohibition or control contained in a WCO. The Court of Appeal has recognised that it is permissible for strong directive policies to be included in planning instruments developed under the Act.⁵
- 6.3 The purpose of a NPS “*is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of th[e] Act.*”⁶ None of the provisions relating to the creation of a NPS make any reference to WCOs or any obligation to take them into account when deciding upon the content of a NPS.
- 6.4 By contrast, section 207 of the Act states:

“In considering an application for a water conservation order, a special tribunal shall have particular regard to the purpose of a water conservation order and the other matters set out in section 199 and shall also have regard to—

- (a) The application and all submissions; and*
- (b) The needs of primary and secondary industry, and of the community; and*
- (c) The relevant provisions of every national policy statement, New Zealand coastal policy statement, regional policy statement, regional plan, district plan, and any proposed plan.”*

- 6.5 Section 199 sets out the purpose of a WCO:

“Notwithstanding anything to the contrary in Part 2, the purpose of a water conservation order is to recognise and sustain—

5. *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18, [1995] NZRMA 424 (CA).
6. Section 45 of the Act.

- (a) *Outstanding amenity or intrinsic values which are afforded by waters in their natural state:*
- (b) *Where waters are no longer in their natural state, the amenity or intrinsic values of those waters which in themselves warrant protection because they are considered outstanding.”*

- 6.6 The Environment Court has said that “[t]he effect of s 199(1) is that the purpose of the RMA loses primacy if there is a conflict between that purpose and the purpose of a water conservation order: Buller Conservation Order (1996) (Environment Court, C32/96, 31 May 1996) referring to the effect of s 199(1).”⁷
- 6.7 Thus special tribunal considering an application for a water conservation order is directed to have “particular regard” to the specific purpose of a WCO, but only “regard” to relevant provisions of national policy statements. This indicates the specialised and directed nature of WCOs.
- 6.8 There is no specific provision or mechanism contained in the Act to resolve conflict between the content of a NPS and a WCO. This lacuna could create difficulties in the development of Planning Instruments. Where there is a clear conflict between a NPS and a WCO it will obviously not be possible for a Local Authority to develop a Planning Instrument that both gives effect to a NPS and is not inconsistent with a WCO. Section 310 of the Act enables a declaration to be sought from the Environment Court on “*any other issue or matter relating to the interpretation, administration, and enforcement of th[e] Act...*”.⁸ However, the Court does not have the jurisdiction to alter the content of either a NPS or WCO through the declaration process so this does not provide an avenue for resolution of any conflict, merely identification of it.
- 6.9 Section 82 of the Act enables the Environment Court, upon application by a Minister or a responsible local authority, to resolve any dispute about whether there is an inconsistency between a WCO and a regional policy statement, regional plan or district plan; or whether a regional policy statement, regional plan, or district plan fails to give effect to a NPS. There is no comparable provision allowing such resolution of a conflict between a NPS and a WCO.
- 6.10 In our view, given that the Act does not provide any mechanism for resolution of conflict between the content of a NPS and a WCO it would be preferable for any Board of Inquiry considering a NPS that could conflict with a WCO to ensure that such conflict is avoided.

7. CONCLUSION

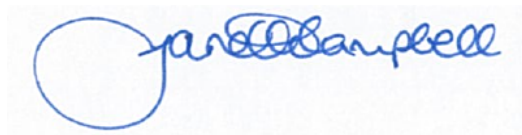
- 7.1 In relation to the development of regional policy statements, regional plans, and district plans there is a requirement that the relevant Planning Instrument must give effect to the contents of a NPS. There is a lower requirement in relation to WCOs in that the relevant Planning Instrument must not be inconsistent with the contents of a WCO.
- 7.2 When considering a resource consent application a consent authority is required to have regard to the relevant contents of a national policy statement, however, section 217 of the Act prevents a water related resource consent being granted that will derogate from the contents of a WCO. In this situation a WCO could “trump” the provisions of a NPS if the facts warranted it.
- 7.3 The relative power of a national policy statement and water conservation order are equal in relation to notices of requirement, however as notices of requirement relate to land use only the situations in which a water conservation order may be relevant are likely to be few, if any.

7. *Kemp v Queenstown-Lakes District Council* [2000] NZRMA 289, at 318.

8. Section 310 of the Act.

- 7.4 Section 310 of the Act enables the Environment Court to make declarations on matters relating to the interpretation, administration and enforcement of the Act. Such a declaration could identify a conflict between the content of a NPS and WCO, but there is no consequential power for the Court to amend either document to resolve the conflict.
- 7.5 Given this difficulty we consider that it would be preferable for any Board of Inquiry considering a NPS that could conflict with one or more WCOs to ensure that such conflict is avoided. This could be achieved by prefacing the appropriate provisions with words such as “*Except to the extent required by any water conservation order ...*”. This would allow the WCO made for a specific river to prevail over any nation-wide policy directives.
- 7.6 We note that section 51 of the Act enables a Board of Inquiry to consider “any other relevant matter”,⁹ and to then report and make recommendations to the Minister.¹⁰ Given the broad terms of reference for this Board, the Board could report to the Minister on the potential for conflict to arise between the contents of a NPS and WCO, and the lack of a mechanism in the Act to resolve such conflict, and make such recommendations as it sees fit.
- 7.7 If we can be of any further assistance in relation to this matter please feel free to contact us.

Yours faithfully
Cowper Campbell



Janette Campbell / Michael Moodie
Partner / Senior Solicitor

9. Section 51(1)(e) of the Act.
10. Section 51(2) of the Act.