Parliamentary Commissioner for the Environment
Te Kaitiaki Taiao a Te Whare Pāremata

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Hon Nanaia Mahuta, Minister of Local Government
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10 September 2021

Dear Ministers

At your request, officials from the Department of Internal Affairs briefed me earlier this week on further proposed amendments to the Water Services Bill currently before the House, in particular those provisions that relate to wastewater networks. The officials explained that Cabinet has decided to make explicit its intention that Taumata Arowai, the new water services regulator, should have the power to impose environmental performance standards on network operators. This raises important questions about the coherence with which future environmental regulation is to be advanced.

Let me say at the outset that I have no disagreement with your determination to ensure that wastewater network operators should meet clear, auditable performance standards. Serious shortcomings in the treatment and regulation of trade waste and wastewater have been drawn to my attention on a number of occasions. The problem appears to be one of long duration. From the operator point of view there has been a lack of investment coupled with inadequate oversight and sub-par technical capacity. From the regulator point of view there has been an absence of national direction on the performance standards we should be able to expect from wastewater management systems.

As I understand it, the Government's plan for four regional, well-equipped water service providers should address the investment and capacity gap. Taumata Arowai's regulatory brief is designed to address the performance gap. In my submission to the select committee on the bill I suggested that Taumata Arowai's focus should, with respect to wastewater and stormwater, be on the *operational* performance of the new water service providers. In simple terms, monitoring the quality of what comes out of their pipes. This would include the extent to which they are meeting environmental performance requirements imposed by the entities responsible for regulating water – the regional councils.

This sort of role would be analogous to the role often adopted by the head offices of large global companies that monitor and report on the performance of their subsidiaries around the world. Reporting levels of compliance and breaches leading to enforcement action provides shareholders and the community with a measure of transparency and accountability. I appreciate that Taumata Arowai is not destined to be the 'owner' of these entities. But it will have some important oversight functions, some of which may be of an economic nature that make the corporate model I have referred to a useful analogy for such a role.

By giving Taumata Arowai powers to impose environmental performance standards on water service providers, the Government is making Taumata Arowai a fully-fledged environmental regulator (among other things). This has significant implications for the coherence of

environmental regulation and represents a significant departure from the current model. It will also require Taumata Arowai to develop the legal and technical capability to competently administer environmental regulations. This sort of capability is quite distinct from that required to regulate water treatment and infrastructure.

The regulation of water has, to date, been in the hands of regional councils subject to whatever national level requirements are imposed by way of policy statements and environmental standards. The Government has recently made major strides in moving to provide comprehensive guidance through such measures as the National Policy Statement for Freshwater Management, which largely covers diffuse pollution from a wide range of land uses.

That same model, applied to wastewater, would have seen the issuance of National Environmental Standards for Wastewater, presumably developed by the Ministry for the Environment (although there is precedent for other ministries to develop such standards). Taumata Arowai's role within that paradigm would be providing oversight and reporting on the extent to which the entities under its charge are meeting the performance requirements of the regulator (the regional councils, carrying through the requirements of a national policy statement and any associated environmental standards).

By making Taumata Arowai the environmental regulator of one source of wastewater, the management of water becomes fragmented. Regional councils will be responsible for setting standards for those industrial entities that discharge wastewater to the environment while Taumata Arowai will be setting them for territorial authorities in the short term and for the four large new public entities envisaged by the Government's reforms in the longer term.

The land, rivers and lakes that are the source of the water that water service providers reticulate through their networks are regulated under the Resource Management Act 1991. So are the waterbodies that receive that water once it has been used. You will have regional councils effectively writing the environmental performance standards for water that comes out of stormwater pipes and non-public wastewater treatment plants, and Taumata Arowai writing the standards that come out of publicly owned wastewater pipes.

Much existing regulation relates to land use which is not easily separable from the uses to which water is put. For example, biosolids are not just a product of wastewater treatment plants. Compost, vegetative waste and manure are also discharged to land. Their environmental impacts can be similar to those of biosolids from wastewater. Complicating matters further, some of the contaminants found in treated wastewater and biosolids, such as chemicals and metals, are already (or can be) regulated nationally by the Environmental Protection Authority (EPA). Carving out regulatory responsibility for just one piece of the jigsaw does not support the notion of integrated resource management.

Interestingly, your officials stressed the ubiquity of this model citing European arrangements in support of this division of labour. Having had some experience at the OECD looking at European directives and the institutional complexities from which they emerge, I am not persuaded that this is a useful precedent. I note, however, that Scotland, often referred to as a model for the reforms, appears to locate the environmental regulation of all water (except drinking water) with the Scottish Environment Protection Agency.

One of the things I like about the Government's approach to freshwater management has been the promotion of Te Mana o te Wai as the overarching principle that should direct water managers. It is a holistic conception that tries to overcome the fragmented way in which our society thinks – or does not think – about water, one of the fundamental sources of life and indicators of the mauri of things. I would have expected the direction of regulatory development to be aligned with the spirit of this principle. The current proposal steps away from this principle.

Before the Government proceeds any further down the legislative path, I would recommend that it provides a clear direction for how it sees the regulatory terrain developing. This is, of course, inextricably linked with two other massive reform processes – the replacement of the Resource Management Act and the future shape and responsibilities of local government. Making institutional changes to the regulatory landscape without having sketched, let alone finalised, how these legislative and institutional reforms will turn out risks a move away from coherence and integration.

I had understood, up until now, that the National Planning Framework proposed under the Natural and Built Environments Act was going to be the instrument through which the Ministry for the Environment would bring national environmental policies and regulations into alignment and resolve conflicts into a more coherent package. How is this going work if a small but significant element of national regulation has been handed to another regulator overseen by a different ministry?

If the regulatory treatment of wastewater is not to be developed on an ad hoc basis, it needs to be thought about in the context of the wider system that is being constructed. One option that should be considered is taking regulatory responsibility for core environmental media back from the regions and placing it in the hands of a national body. There is currently one specialist national level regulator (the EPA) with a somewhat eclectic mix of tasks. The EPA and Taumata Arowai could be merged into a new, comprehensive EPA that could take over the technical, compliance and monitoring staff currently employed by regional councils.

Such an approach would create a larger critical mass of highly skilled staff and the opportunity for more consistency in implementation – something resource users are crying out for. This would obviously have implications for the current local democratic governance of these regional functions and would therefore need to be carefully considered in the context of the wider local government reforms.

A less optimal, but nonetheless interesting option to explore, would be to give Taumata Arowai regulatory responsibility for all freshwater. This would of course create a different regulatory boundary with regional councils but may be more consistent with the principle of Te Mana o te Wai. On the other hand, managing land use and water separately would be contrary to the integrated management of natural resources.

I appreciate the need to make practical progress in a space that has been neglected as too hard for too long. If (as officials inform me) the Ministry for the Environment has been unable to develop national level regulations for wastewater, then there is nothing to stop Taumata Arowai deploying its newly created expertise to draft such an instrument. The legal effect of it being imposed as a national environmental standard under the Resource Management Act would be the same as any standards Taumata Arowai might promulgate

but it would leave open the shape of the institutional and legislative reforms the Government is pursuing in parallel.

Once the future shape and role of local government is known, and the relationship between the Natural and Built Environments Act and the Strategic Planning Act has been determined, you can then decide how Te Mana o te Wai should be delivered from a regulatory point of view. You might decide to have two regulators – but I would be surprised if you did.

This is complex stuff, and I salute your determination to make substantive progress. I had intended to reserve my comments about the future of environmental regulation for the resource management and local government reform processes currently underway. However, the treatment being proposed for wastewater in the context of the three waters reform would create a more fragmented approach to environmental management, and potentially pre-empt the options those other reform paths may offer. Hence my decision to draw these concerns to your attention forthwith.

I would be happy to discuss these issues with you at your convenience. Given the appearance of the new Supplementary Order Paper, I have passed a copy of this letter to the chairpersons of the Health and Environment select committees who participated in hearing evidence on the earlier proposal.

Nga mihi nui

Simon Upton

Parliamentary Commissioner for the Environment
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CC

Dr Liz Craig, Chairperson, Health Committee
Hon Eugenie Sage, Chairperson, Environment Committee