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

Submission on Local Government (Water Services) Bill

To the Finance and Expenditure Committee

17 February 2025

Submitter details

This submission is from the Parliamentary Commissioner for the Environment, Simon Upton.

I wish to appear before the Finance and Expenditure Committee to present my submission.

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Parliamentary Commissioner for the Environment

The Parliamentary Commissioner for the Environment was established under the Environment Act 1986. As an independent Officer of Parliament, the Commissioner has broad powers to investigate environmental concerns and is wholly independent of the government of the day. The current Parliamentary Commissioner for the Environment is Simon Upton.

Key points

- In an attempt to simplify treatment of wastewater and stormwater, the Bill proposes an inflexible, one-size-fits-all approach to environmental management. It will not be able to take account of the extensive regional and local variations around New Zealand. The result will either be over-engineered solutions that cost councils and ratepayers more than necessary or lower standards that will mean greater environmental degradation with no ability for local communities to manage it.
- Clause 273 should be revised so that the status quo – where councils are allowed to impose more restrictive provisions than the national standards but not weaker ones – is preserved and provisions in the Bill that prevent councils from considering environmental effects should be deleted (clauses 274 and 275).
- ‘Environmental performance standards’ should be redefined and limited to ‘operational performance standards’ or ‘infrastructure performance standards’.
    - Stormwater should be removed from the water services legal architecture or the Bill’s application should be limited to stormwater pipes only.

- The Bill proposes to elevate technical wastewater and stormwater standards above all other environmental issues in the Resource Management Act 1991 hierarchy. In other words, wastewater and stormwater would be more important than freshwater, biodiversity, natural hazards, urban development or other infrastructure (including electricity and roading) – no matter how important those things might be. This is disproportionate. Rather than changing the hierarchy, the Bill should make it clear that standards made under the Bill will be national environmental standards (NESs) under the RMA.
- The proposed mechanisms for infrastructure design solutions and national engineering design standards are sensible, with some modifications.
- Preparation of stormwater network risk management plans to identify any hazards and assess risk relating to the network is a sensible idea. Regional councils should lead this work.
- The Committee should ask the Commerce Commission and Taumata Arowai – the Water Services Regulator – to consider the degree of regulatory overlap and duplication that this Bill might create between their agencies and to suggest ways to reduce it.

Introduction

When the original Water Services Bill was going through Parliament in 2021, I wrote to the then Health Select Committee considering the Bill to express my concern that the Bill was not only regulating the infrastructure and treatment of water, wastewater and stormwater, but was also expanding into environmental regulation. That would require Taumata Arowai – the Water Services Regulator[1]— not only to have technical expertise in water and wastewater engineering and treatment, but also expertise in the environmental impacts of water discharges on a large variety of receiving environments. I noted that it would duplicate the environmental expertise of regional councils, who have wide-ranging responsibilities for managing freshwater. In short, I was concerned that the Bill was effectively creating a more complex and fragmented regulatory regime with regard to managing water, and the environment more generally.

I proposed a simple fix to use the phrase ‘operational performance’ instead of ‘environmental performance’. The committee agreed with that change and recommended it to the House. The Minister at the time, Hon Nanaia Mahuta, reversed it via a Supplementary Order Paper and the change did not make it into law. No convincing explanation was given.

The current Bill not only continues the fragmented approach, but in some respects, doubles down and makes for an even more complex, fragmented and incoherent approach. This is more than unfortunate and highlights again that the initiators of this reform had (and still have) little idea of how the environment is managed.

National standards

National standards for wastewater and stormwater environmental performance

The Bill's explanatory note says that the Bill "amends the Water Services Act 2021 and the Resource Management Act 1991 to provide for a single standard for wastewater and stormwater environmental performance."[2] Regional councils will be unable to set additional requirements, neither higher nor lower, than the standard.

On the face of it, the changes could be seen as simplifying the system by forcing regional councils to adopt the same approach across New Zealand. The problem with that approach is that the receiving environment into which wastewater and stormwater are discharged is very different around the country.

I have no problem with simplifying and, where appropriate, standardising the playbook on pipes and pumps. But it is a different matter when it comes to the receiving environment.

In some places, water is discharged into long ocean outfalls or fast-moving, high-volume rivers with high absorption capacity for contaminants and where the potential negative environmental impacts are low. In other places, the water will be discharged into more environmentally sensitive areas, such as lakes, smaller rivers, groundwater estuaries and places where food is grown or gathered. Here, the risks of negative environmental impacts are high. Further, if water discharges seep into groundwater aquifers, contamination might bite us several years down the track, especially if groundwater is used as a drinking water source. In short, the variability of receiving environments will make setting a single environmental standard for wastewater very difficult (if not impossible).

The officials who have driven this approach from the start have not understood the environmental management implications of their policy. Interestingly, in the hands of Taumata Arowai – the Water Services Regulator, the approach to date has led to the issuance of something called 'environmental performance measures'. These, on inspection, turn out to be largely about the performance of physical assets, like pipes and pump stations. The environmental impacts of failings are not assessed. It is a classic engineering approach in which technological performance supplants environmental impact analysis. You do not need to know anything about the receiving environment because technical performance is a proxy for it.

This simply reinforces the point I made to the Select Committee in 2021 that while this may be a sensible regime for the operational standards of drinking water and wastewater plants, it doesn't make sense for setting environmental standards.

It makes even less sense for stormwater. Not only are the final receiving environments different around the country, but stormwater (by its very nature) flows over different surfaces and environments picking up a variety of unknown contaminants. That variable nature will make it even more difficult to have a single national standard for stormwater.

1 Proposed to be renamed by the Bill as the Water Services Authority – Taumata Arowai.

2 It should be noted that while the explanatory note says the Bill provides for a single standard, the Water Service Act 2021 enables standards (plural). Nothing in the current Bill seems to change that. However, the intention of this Bill is clear that the standards will be applicable nationally, with little or no exceptions or local variability.

In summary, the Bill proposes a one-size-fits-all approach to discharges that simply will not be able to account for the nature of the different receiving environments into which that water will be discharged. This leaves us in one of two undesirable situations:

- For national standards to be effective at minimising environmental harm, they would need to be designed to accommodate the most sensitive environment that water would be discharged into. That would mean, for many parts of New Zealand, that wastewater and stormwater systems will be over-engineered. This would add significant and mostly unnecessary cost to local councils and ratepayers.
- If the standards are set to some lower threshold to avoid the costs of over-engineering in some settings, environmental harm will occur. How significant that harm would be will depend both on the particular place and how low the standards are set. The law would give regional councils little or no flexibility to impose more rigorous standards to protect those particularly sensitive places, meaning more sensitive environments will be degraded.

Incredibly, there is no requirement in the Bill for the state of the environment or impacts on the environment to be taken into account when the Government sets the standards. Why else are we setting **environmental** standards? If Parliament is being asked to give the Government the power to make wastewater and stormwater standards, it should at the very least be required to spell out the environmental outcome to which standards must be linked. That would provide a measure of transparency about how much environmental harm the Government considers acceptable and allow people to judge for themselves whether they think that is appropriate for their local environment.

Further, under this Bill, councils are expressly prohibited from considering, among other things, the sensitivity of the receiving environment or any significant adverse effects on aquatic life when making decisions on applications for wastewater and stormwater consents.[3] In a nutshell, not only does the Bill propose to leave responsibility for the environmental impacts of wastewater and stormwater to an entity not equipped to judge environmental impacts, it expressly prohibits those entities that are so equipped from doing so.

The Bill's proposed amendments to the RMA require councils to ensure conditions on consents are "no more or less restrictive" than the applicable environmental performance standard.[4] In effect, councils are prevented from making any variation to the standards themselves, even if there would be adverse environmental impacts on a particular receiving environment. This is a change from the current Water Services Act, which allows councils to set more rigorous requirements, but not less onerous ones. Maintaining the status quo would at least avoid the first of the two undesirable situations (over-engineering) outlined above.

In the Bill's explanatory note, a mechanism for exceptions to the standardised approach is referenced. But it appears that the mechanism is not clearly spelt out in the provisions of the Bill. The only clause, which seems to allow for exceptions is that the environmental performance standards "may specify circumstances in which part or all of the [wastewater or stormwater] environmental performance standard does not apply".[5] As these will be made by the Minister (by Order in Council), it is hard to see how the circumstances prescribed nationally will be able to take account of specific local variations.

Recommendations:

- Replace 'environmental performance standards' with 'operational performance standards' or 'infrastructure performance standards' to better reflect where consistency is both sensible and achievable.
- **Either** remove stormwater from the water services legal architecture **or** restrict the legislation's applicability to stormwater pipes only.
- Delete clauses 274 and 275 so that councils can consider the sensitivity of the receiving environment or any significant adverse effects on aquatic life when making decisions on applications for wastewater and stormwater consents.
- Revise clause 273 sub clauses (2) and (4) so that both wastewater and stormwater conditions can be more restrictive but not less than applicable environmental performance standards.

Changes to the RMA's hierarchy

The RMA is designed so that there is a hierarchy of documents. Lower-order documents need to be consistent with higher-order ones. At the top of that hierarchy are the Government's environmental policy objectives – expressed as National Policy Statements (NPSs)[6] – on macro-level environmental issues, such as freshwater, coastal policy, biodiversity, urban development, etc. Below that are national environmental standards (NESs), which are detailed rules and standards that help operationalise national policy consistently across New Zealand. Below that, councils are free to make policies, objectives and rules through regional and district plans to address their local environmental issues, provided those policies, objectives and rules are not contrary to a NPS or NES.

The Bill proposes (through clause 269) that the wastewater and stormwater environmental performance **standards** made under the Water Services Act become the top of the RMA hierarchy. In effect, it proposes that the wastewater and stormwater technical standards are deemed so important that they trump any of the Government's other policy or technical objectives for any other part of the environment. In other words, wastewater and stormwater will be more important than any other freshwater, any biodiversity, natural hazards, urban development or other infrastructure (including electricity and roading), no matter how important those things might be.

Whoever would have imagined that wastewater and stormwater would attain such pre-eminence? And it seems an especially odd change to be making at the same time that the Government is reviewing all existing RMA national direction, considering new national direction and embarking on a complete rewrite of resource management law.

This is not to say that wastewater and stormwater operational performance standards (as I recommend they should be styled) made under the Water Services Act should not have some status under the RMA. There is a good case that they should. Wastewater and stormwater operational performance standards are akin to NESs in the RMA hierarchy. Rather than rejigging the hierarchy, the Bill should make it clear that wastewater and stormwater operational

3 Clauses 274 and 275 of the Bill amend RMA sections 105 and 107, which require councils to consider those, and other issues, when determining consents.
4 Clause 273 of the Bill amends section 104 (Consideration of applications) of the RMA.
5 For wastewater, clause 328(2) adds a new subclause (2A) (a) to section 138 of the Water Services Act. For stormwater, clause 330(2) adds a new subclause (3B) (a) to section 139A of the Water Services Act.
6 NPS include the New Zealand Coastal Policy Statement.

performance standards made under the Water Services Act are to be considered as NESs under the RMA. That would ensure that they achieve national consistency and that they prevail over rules in regional and district plans, without tying the Government's hands to make environmental policy on other issues.

A broader issue that the Committee might like to consider is the extent to which this Bill will be setting up one regulatory standard for urban areas and a different one for rural areas. The bulk of wastewater discharges covered by the Bill come from urban areas and the stormwater provisions in the Bill are essentially limited to urban areas.[7] That means that water issues for urban areas will be primarily governed by the water services regime as it is proposed to trump other aspects of the RMA. Water issues in rural areas will primarily be governed by the NPS for Freshwater Management and NES for Freshwater under the RMA. In other words, the Bill will help set-up a differential and potentially inequitable treatment of rural and urban areas.

Recommendations:

Delete clause 269 of the Bill and instead insert provisions that state that wastewater and stormwater operational performance standards made under the Water Services Act are considered NESs under the RMA.

Infrastructure design solutions

The Bill also introduces a mechanism for establishing infrastructure design solutions to ensure consistent standards for the design and construction of key components of water infrastructure, such as treatment systems.[8] Having standardised solutions that are capable of meeting desired environmental performance outcomes should reduce the need for bespoke design solutions. Unlike environmental performance standards, which govern discharges into the natural environment that varies from place to place, the physical infrastructure and treatment systems depend little on geographic location.

The addition proposes that "if wastewater or stormwater infrastructure complies with an infrastructure design solution, it is deemed to meet the relevant environmental performance standard."[9] That infrastructure, when new and built to the specifications, will likely treat water to meet the environmental performance standard. That is unlikely to remain true as the infrastructure ages. If that infrastructure is not operated and maintained correctly, it will not continue to treat water to the required standards. The way that clause is drafted may constrain Taumata Arowai – the Water Services Regulator or a regional council from taking appropriate enforcement action if the way the infrastructure is operated is not producing water that actually meets the environmental performance standards.

As for the environmental performance standards, and for the same reasons, I do not agree that infrastructure design solutions should automatically take precedence over some national RMA documents (NPS and NES).[10]

7 Clause 4 of the Bill states that stormwater service means the collection, treatment, drainage, reuse or discharge of stormwater in an urban area, but does not include a service relating to a transport corridor.

8 Principally through clause 331 which inserts a new subpart 7B into the Water Services Act 2021.

9 Clause 331 of the Bill proposing a new subclause 139B (4) in the Water Services Act 2021.

10 Clause 269, inserting a new section 58JB into the Resource Management Act 1991.

Recommendations:

- Support the inclusion of infrastructure design solutions as drafted, with the two changes recommended below.
- Amend clause 331 to make it clear that infrastructure design solutions are only deemed to comply when new and built to the specifications.
- Delete clause 269 of the Bill and instead insert provisions that state that infrastructure design solutions made under the Water Services Act are to be considered NESs under the RMA.

National engineering design standards

The Bill also introduces a mechanism for establishing mandatory national engineering design standards to ensure consistent standards for the design and construction of water network infrastructure.[11] Having design standards that apply nationally is sensible. Unlike environmental performance standards, which govern discharges into the natural environment that varies from place to place, pipes and other associated infrastructure depend little on geographic location. It seems perverse that developers and others building water infrastructure could be required to meet different standards in different local authorities' areas.

Recommendation:

- Support the inclusion of national engineering design solutions as drafted.

Role of the Commerce Commission

Part 5 subpart 2 amends the Commerce Act 1986 to, amongst other things, extend the Commerce Commission's powers for information disclosure, revenue threshold regulation, quality regulation, performance requirement regulations and price-quality regulation.[12] Schedule 6 of the Bill then inserts a new Schedule 7 into the Commerce Act 1986, which outlines "additional matters relating to regulation of water services".

These provisions are an extension of those enacted by the previous Government in the now repealed Water Services Economic Efficiency and Consumer Protection Act 2023 and modified to make them similar to powers the Commerce Commission has for other sectors. However, it appears that the way they have been designed creates a large potential cross over between the regulatory scope of Taumata Arowai – the Water Services Regulator and the powers to be given to the Commerce Commission. There is potential both for duplication and conflict.

The performance and quality of water services infrastructure are required to be defined under the Water Services Act 2021 through environmental performance standards (and infrastructure design solutions and national engineering design solutions). These are mandatory and little deviation from them is allowed. In other words, all water service providers must meet those minimum standards.

The role of the Commerce Commission in the water system is essentially to ensure fair costing and charging, and the provision of consumer information and complaints processes. The biggest contributors to the cost of providing water services are the quality to which the water

11 Principally through clause 319, which inserts a new subpart 1AA into the Water Services Act 2021.
12 Clause 220 (3).

must be treated and the quality and design of the associated infrastructure. Given that these are set under the Water Services Act, it is not clear how many other levers the Commerce Commission will actually have, or if it tried to use those levers, what would happen if the quality and performance standards the Commission wants to recommend are in conflict with those set under the Water Services Act.

The Bill does not define, for the purposes of the Commerce Act, what is meant by quality or performance with regard to water services, so it is difficult to be certain how big the overlap in scope is. Neither does the Bill articulate how conflicts between the two regulators should be managed.

The Committee should work closely with officials, Taumata Arowai – the Water Services Regulator and the Commerce Commission to delineate the scope between the two regulators and how they might resolve conflicts.

Recommendations:

- Include clear definitions in any amendment to the Commerce Act about what is meant by quality and performance with regards to water services.
- Include provisions to resolve conflicts between regulators should they arise.

Other

Stormwater network risk management plans

The Bill proposes requiring water service providers (which in most cases will be territorial authorities) to prepare stormwater network risk management plans to identify any hazards and assess risk relating to the network in the district.[13] This is a sensible idea. What is not clear is why the responsibility rests solely on the shoulders of water service providers (noting that this could be transferred to water organisations). Regional councils also have responsibilities for water, including some stormwater, and are specifically responsible for natural hazards identification and management. For most regions, the principal expertise to prepare these risk plans is likely to sit within regional councils. A large amount of stormwater flows overland. Given this overlap in expertise and responsibility, the plans should be led by regional councils with input from water service providers.

Recommendation:

- Require regional councils to lead the preparation of stormwater network risk management plans with input from water service providers.

13 Clauses 165–169.

Concluding comments

There is no doubt that the way we provide for and manage drinking water, wastewater and stormwater needs to be brought onto a more sustainable footing with flexibility for local circumstances. This Bill restores some flexibility to local communities on who they want to manage their water services rather than compelling regional amalgamation.

However, the Bill is also an exercise in greater centralisation and national state control of water services. I don't argue with the value of standardising pipes, treatment systems and other physical infrastructure – they can be the same or similar everywhere. Environmental performance is another matter altogether. The environment is dynamic, highly variable and different from place to place. The Bill explicitly removes flexibility to manage that variability from the very people who have a fine-grained understanding of local environmental conditions and understand their communities' expectations. Takapuna, Taupō, Moa Point and Golden Bay are very different environmental settings.

This Bill will be costly. Either the systems will be over-engineered and therefore more expensive for local ratepayers than they need to be, or the natural environment will suffer excessive harm. It is not too late for the committee to find a better middle ground.

I remain of the view that responsibility for the operational performance of pipes and treatment plants should not extend to the receiving environment. The previous Government refused to listen to the last Committee's advice on this matter. Rather than agreeing to compound the issue, the Committee should recommend a more sensible division of labour. The Government can eliminate costly duplication of operational performance as is sensibly proposed without perpetuating an indefensible carve out of environmental management decision-making from those best qualified to make those decisions.

Rt Hon Simon Upton

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