

SUBMISSION ON CONSULTATION DOCUMENT – NEXT STEPS FOR FRESH WATER

To: Fresh Water Consultation 2016
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INTRODUCTION

1. The Environmental Defence Society (**EDS**) is a public interest environmental law group, formed in 1971. The focus of its work is on achieving positive environmental outcomes through improving the quality of New Zealand's legal and policy frameworks and statutory decision-making processes.
2. EDS welcomes the opportunity to comment on the consultation document "*Next steps for fresh water*" (**Consultation Document**).

SUBMISSION

Overarching comments

Re-energise the system

3. Implementation of New Zealand's fresh water management system needs to be re-energised. Over the last 25 years many measures of water quality have declined at monitored sites throughout the country¹. Most sites in lowland pastoral catchments and all of the sites in urban catchments do not have pathogen standards that are safe for swimming². 32 percent of

¹ Ministry for the Environment and Statistics New Zealand 2015.

² Ministry for the Environment and Statistics New Zealand 2015.

monitored lakes are classed as polluted with nutrients³. The Consultation Document lacks the commitment to change that is required for degradation of New Zealand's waterways to be halted.

4. Fresh water objectives (**FO**) need to be set, and they need to be set fast. These will set limits or targets for water quality and quantity⁴. A framework for managing within limits and reaching targets needs to be actioned. Implementation needs to be accelerated across the entire National Policy Statement Fresh Water Management 2014 (**NPSFM**) panoply otherwise the fresh water reform process will take a significant reputational hit. There is a widening gulf between the time horizons contemplated for fresh water quality improvements and public expectations. The timeframes in the NPSFM and the Consultation Document are too drawn out to impress any urgency on regional government or land users to change. They need to be revisited.
5. FO setting and regulation of water body nutrient levels has become one of New Zealand's most contentious issues⁵. Clear direction on how the NPSFM's fresh water management system should operate is required. The Consultation Document does not provide that direction. Central Government has a critical role as system describer. It needs to define the roles and responsibilities of different actors, provide direction on good management practice (**GMP**), allocation, on appropriate regulatory tools, and to incentivise change.

EDS seeks that:

- *The date for implementation of the NPSFM in Policy E1 is brought forward to 31 December 2020.*
- *Central Government develops a clear and directive operational framework for managing within limits and reaching targets, based on the Land and Water Forum's recommendations, and consults on that framework.*

Section 104 Resource Management Act 1991

6. The Consultation Document (like the Resource Legislation Amendment Bill) fails to address the anomaly in section 104 of the Resource Management Act 1991 (**RMA**) that consent authorities are only required to "*have regard to*" environmental bottom lines in superior planning instruments when deciding whether to grant a resource consent application and on what terms. This creates a lacuna in the implementation and application of environmental bottom lines in the RMA and the NPSFM whereby resource consents for activities that will cumulatively result in a breach of a directive bottom line can be granted⁶. This can have a

³ Verburg et al, 2010.

⁴ The FO will set the acceptable level of water that can be taken from a water body and the acceptable level of each attribute. If the amount of water currently being taken from the water body and the attribute level are below the FO it is a limit and must not be exceeded. If they are above the FO it is a target and steps must be to reach it.

⁵ Chisholm et al, 2014).

⁶ See Land and Water Forum, *Land and Water Forum Second Report*, 2012, recommendation 13.

significant and detrimental impact on fresh water. It means, for example, that resource consent(s) can be obtained in a catchment that is over-allocated, and where the activity will lead to further over-allocation, despite the freshwater plan setting water quality limits/targets, and the direction in the NPSFM and RMA that water quality be maintained or improved. This will lead to water quality decline and will undermine community input and belief in the NPSFM system.

EDS seeks that:

- *The RMA is amended so that water quality and quantity limits/targets must be given effect by consent authorities when deciding whether to grant a resource consent application and on what terms.*

Prioritisation

7. Regional councils are afforded a significant time period for implementing the NPSFM. Even then implementation of the NPSFM only means that FOs have been set. It does not mean these objectives have been achieved or progress made toward them.
8. Even if the timeframes for implementation are reduced, in many water bodies delaying action until the NPSFM is implemented will result in further, potentially irreversible, degradation⁷.
9. The Government should implement that Land and Water Forum's recommendation that regional councils must prioritise high-risk Fresh Water Management Units (**FMU**) in the FO setting process⁸, and in the meantime, set interim measures to address the specific water quality pressures in those FMUs.

EDS seeks that:

- *The NPSFM be amended to require regional councils to set interim measures to address the specific pressures on water quality in high-risk FMUs.*
- *The NPSFM be amended to require regional councils to prioritise high-risk FMUs in the FO setting process.*

Water pricing

10. EDS contends that the time is right for the Government to put a price on fresh water. This will encourage efficient use of fresh water and ensure that it is used for the best purpose. We suggest the charge should be set at an initial level and ramped up over a 10 year period. The revenue from the charge (which could be called a royalty, akin to that imposed on Crown-owned minerals) should go directly into the Fresh Water Improvement Fund to accelerate

⁷ Parliamentary Commissioner for the Environment, *Managing water quality: Examining the 2014 National Policy Statement*, June 2015, pages 13 and 14.

⁸ Land and Water Forum, *Third Report of the Land and Water Forum*, October 2012, recommendation 2.

clean-up efforts on historical water quality problems. We accept the Government's contention that no-one owns freshwater, but that should not prevent the imposition of a charge. This charge does not relate to ownership but to the right to use a public resource for personal gain. It will no doubt raise questions of equitable treatment of iwi and that could be accommodated by having co-governance and co-management of the Fresh Water Improvement Fund.

EDS seeks that:

- *A charge is set on fresh water takes. The charge should be set at an initial base level and progressively increased over a 10 year period.*
- *The revenue from the charge go into the Fresh Water Improvement Fund.*

Proposal responses

“Maintain or improve overall”

11. The Consultation Document proposes to amend Objective A2 NPSFM⁹ as follows:

The overall quality of freshwater within a ~~region~~ fresh water management unit is maintained or improved while...

12. EDS supports replacing “region” with “fresh water management unit”. FMUs define the spatial area for managing fresh water under the NPSFM. Values and FOs may differ between FMUs within a region. It is appropriate to align the maintain and improve directive with the spatial scale at which management occurs.

13. The deletion of “overall” is not proposed. It should be. The ‘unders and overs’ approach has been rejected by the Parliamentary Commissioner for the Environment¹⁰ (PCE) and the Environment Court¹¹. It is inconsistent with section 6 and section 30 RMA. It is unworkable because of the practical difficulties in assessing what beneficial effect would counterbalance an adverse effect. The replacement of “region” with “FMU” does not change this. It does not remove the ‘unders and overs’ approach to maintenance and improvement that “overall” implies. It simply shrinks the scale at which that trade off would occur. The use of “overall” is *ultra vires* the RMA and renders the NPSFM susceptible to challenge.

14. The Consultation Document proposes that¹²:

- a. “maintain” be defined as ensuring water quality stays within an attribute band when relating to an attribute specified in the NOF.

⁹ Proposal 1.1.

¹⁰ Parliamentary Commissioner for the Environment, *Managing water quality: Examining the 2014 National Policy Statement*, June 2015, pages 6-8.

¹¹ *Ngati Kahungunu Iwi v Hawkes Bay Regional Council* [2015] NZEnvC 50. The references in paragraph 2.9 come from [62], [63], [104], [105].

¹² Proposal 1.2.

- b. “*maintain*” be defined as demonstrating that the values chosen for a FMU are not worse off when an attribute band is not defined in the NOF.
15. The requirement in Objective A2 NPSFM that water quality be “*maintained or improved*” applies in two different contexts:
- a. Setting FOs (limits/targets) under the NOF.
 - b. Managing FMUs to meet FOs.
16. The definition of “*maintain*” proposed in the Consultation Document would allow for the following to occur in each context:
- a. FOs could be set at a point below the state of the attribute at the time the FO is set, provided that point is within the same attribute band.
 - b. An attribute would be able to fall below its state at the time the relevant FO was set provided it stayed within the same attribute band.
17. Whether this approach is available turns on the width of the attribute band. If the band width is set so that movement within it can be scientifically shown to have no impact on water quality¹³ then movement within the band is acceptable. Providing for downward movement with any other result would be *ultra vires* the RMA and NPSFM and contrary to the plain, everyday meaning of “*maintain*”: “*keep (something) at the same rate or level*”¹⁴.
18. EDS understands that some (if not all) of the attribute bands are so wide that a downward shift in state would result in significant degradation of water quality. For example, for ammonia toxicity a shift in the “B” band from an annual median of 0.03mg/L to 0.24mg/L is a significant decline in median water quality and moves the impact risk on sensitive species from 95% protection to 80% protection at the upper and lower bounds respectively.
19. It is clear that defining “*maintain*” as staying within an attribute band would make maintenance synonymous with degradation. This is unacceptable.
20. An alternative definition is required. EDS considers that this should be based on the ‘current state’ of the attribute in the FMU at the time the FO (limit/target) setting process begins. The ‘current state’ should be the average attribute figure calculated using the previous three years of monitoring data. This provides sufficient flexibility for fluctuations in individual monitoring results. It fits comfortably with the NOFs attribute band framework. It will ensure that the attribute, and so water quality, is “*kept at the same level*”.
21. “*Improved*” should also be defined. This would help to set a clear expectation and measureable goal for regional councils. In line with the definition of “*maintained*” proposed above EDS considers that “*improved*” should be defined as moving above the ‘current state’.

¹³ I.e on ecosystem health and human health, and the other values attributed to the FMU.

¹⁴ Oxford English Dictionary – online version.

22. The definition of “maintain” proposed for attributes not included in the NPSFM is extremely vague. The purpose of attributes, and of specific and measurable limits/targets, is to remove subjectivity from the assessment of whether an identified value is being achieved. This principle should apply to all attributes not only those in the NPSFM.

EDS seeks that:

- “Region” is replaced with “fresh water management unit”.
- “Overall” is deleted from Objective A2 NPSFM.
- “Maintain” is defined as ‘keep at the current attribute state’.
- ‘Current state’ is defined as ‘the average attribute figure within a fresh water management unit calculated using the previous three years of monitoring data on the date the NOF process is notified as commencing in the region’.
- “Improved” is defined as ‘moving above the current state’.

Macroinvertebrate Community Index

23. EDS supports including the Macroinvertebrate Community Index (**MCI**) in the NOF¹⁵. MCI is commonly used for measuring the effect of increasing nutrient pollution on fresh water aquatic ecosystems. QMCI is the quantitative variant and the two must be used in tandem.
24. EDS also supports the Government working with the Land and Water Forum to determine whether MCI/QMCI can be included as an attribute in the NOF¹⁶.
25. The Ministry for the Environment has previously received expert advice that MCI/QMCI could be included as an attribute¹⁷. It chose not to follow that advice. Biological and ecological measures are essential attributes for the NOF if the NPSFM is to provide for ecosystem health as a compulsory national value^{18 19}. MCI/QMCI is that measure. It is a well understood and well researched. There is strong evidence that the ‘levers’ that need to be pulled in order to instigate a change in MCI/QMCI can be identified²⁰.

EDS seeks that:

- *MCI/QMCI is considered with an open mind in any future attribute assessment process.*

¹⁵ Proposal 1.3.

¹⁶ Proposal 1.4.

¹⁷ Parliamentary Commissioner for the Environment, *Managing water quality: Examining the 2014 National Policy Statement*, June 2015, page 16 referring to Collier K.J, Clapcott J & Neale M, *A macroinvertebrate attribute to assess ecosystem health for New Zealand waterways for the national objectives framework – Issues and options*, 2014, Environmental Institute Report 36, University of Waikato. Attribute bands are set out in Appendix 3 to the report.

¹⁸ http://freshwater.science.org.nz/pdf/NZFSS_response_to_NPS-FM_July_2014.pdf.

¹⁹ The PCE also holds this view: Parliamentary Commissioner for the Environment, *Managing water quality: Examining the 2014 National Policy Statement*, June 2015, pages 15-16 and page 22 recommendation 5.

²⁰ MCI/QMCI was specifically developed to assess eutrophication (Stark 1985) and have been shown to be insensitive to heavy metals, acid mine drainage and deposited sediment (Death and Death, 2014).

Significant infrastructure and water quality

26. EDS supports the proposal for further direction on when infrastructure exceptions can be included in Appendix 3 NPSFM in principle²¹. It emphasises that the NPSFM is underpinned by non-derogable, national, environmental bottom lines. Exceptions must be limited to ensure these bottom lines are respected.
27. The criteria provided in the Consultation Document are generally acceptable with the exception of *“whether infrastructure contributes to any breaches”*²². This is opposed. Any criteria set for considering exceptions must be designed to prevent Appendix 3 being used as a *“get out of jail free card”*²³ by regional councils. Exceptional circumstances should only apply where existing infrastructure is the reason for a FMU being below a national bottom line. A broader interpretation would allow discharges from infrastructure that contribute to a FMU being below a bottom line, no matter how small that contribution, to be used to leave a river below a bottom line if the regional council considered it *“appropriate”*²⁴. This is not the intention of the Appendix^{25 26}.
28. *“Existing”* infrastructure should also be defined. Appendix 3 was intended to provide an exception for infrastructure in place when the NPSFM came into effect in 2014²⁷. This should be clearly stated.

EDS seeks that:

- *The NPSFM include specific criteria that regional councils must consider when determining whether an Appendix 3 exception to national bottom lines is appropriate.*
- *Policy CA3(b) (and any criteria) is amended to state that the exceptional circumstances only apply where the existing infrastructure is the reason for the FMU being below the bottom line.*
- *“Existing infrastructure” is defined to refer to infrastructure in place before the date on which the NPSFM came into effect.*

²¹ Proposal 1.5.

²² Consultation Document page 15, bullet 7.

²³ Parliamentary Commissioner for the Environment, *Managing water quality: Examining the 2014 National Policy Statement*, June 2015, page 12.

²⁴ Policy CA3 NPSFM.

²⁵ Ministry for the Environment, *Proposed amendments to the National Policy Statement for Freshwater Management 2011: A discussion document*, 2013, page 27.

²⁶ Parliamentary Commissioner for the Environment, *Managing water quality: Examining the 2014 National Policy Statement*, June 2015, page 12 and page 22 recommendation 3a.

²⁷ Parliamentary Commissioner for the Environment, *Managing water quality: Examining the 2014 National Policy Statement*, June 2015, page 12, endnote 19 and page 22 recommendation 3b.

Coastal lakes and lagoons

29. EDS supports the proposal that the lake attributes in the NOF apply to intermittently closing and opening lakes and lagoons²⁸.

Stock exclusion from water bodies

30. EDS supports the proposal for national regulation for stock exclusion in principle²⁹. It does not support a number of the elements of the Consultation Document's proposal. Specifically:
- a. The dates for when stock other than dairy cattle (on the milking platform) should be excluded are unjustifiably protracted. For stock exclusion to have any effect on water quality it needs to be rolled out as fast as possible. The Government needs to inject some urgency into addressing New Zealand's declining water quality. The deadlines proposed will provide no incentive for change.
 - b. The Consultation Document does not address the scale at which slope classification should occur³⁰. Classification could occur at a sub-catchment, property or intra-property level. The scale of classification will significantly impact upon the extent and cost of exclusion. An intra-property classification would provide the best environmental benefits and the most-cost effective outcome for the land owners.
 - c. The Consultation Document expressly excludes riparian setbacks. This is a significant omission and ignores recommendation 31 of the Land and Water Forum's 4th Report. Stock exclusion and riparian setbacks are intimately linked. Although exclusion prevents stock from entering waterways it does not prevent overland or subsurface flow of nutrients. Setbacks, in particular vegetated setbacks, act as a filter. They preserve and enhance natural riparian habitats and prevent erosion. Without a complementary setback requirement, any stock exclusion regulation risks placing a significant cost on land owners for insignificant environmental outcomes.

Setbacks and riparian management are heavily influenced by context and depend on factors such as terrain, soil, and flow patterns. EDS supports the Land and Water Forum's view³¹ that the Government commission a review of existing riparian management and setback assessment tools to produce a new consolidated tool with mandatory national application. A NES would be the most appropriate mechanism for implementing this tool.

²⁸ Proposal 1.6.

²⁹ Proposal 1.8.

³⁰ The Land and Water Forum expressly recommended that the scale of classification be included in public consultation.

³¹ Land and Water Forum, *Fourth Report of the Land and Water Forum*, November 2015, page 57 recommendation 40.

EDS seeks that:

- *Stock exclusion is required on all dairy support by 2018 and on all other areas by 2020.*
- *The spatial scale for slope classification is defined in the regulation.*
- *The Government produces a consolidated setback calculator that applies across the full range of circumstances to be implemented nationally.*

Technical efficiency standards and good management practice

31. EDS supports the introduction of technical efficiency and good management practice (**GMP**) standards in principle³². It does not support a number of the elements of the Consultation Document's proposal. Specifically:

- a. Technical efficiency standards should be introduced in all catchments as part of the transition to a FO (limit/target) based regime³³. Their application should not be limited to catchments that are at, or approaching, full allocation. Technical efficiency standards will identify where water has been allocated and is not being used efficiently, or not being used at all. This will not only reduce over-allocation but will provide room for new users.
- b. GMP should not only be required where discharge allowances have been allocated or in catchments that are, or are approaching, over-allocation. GMP is analogous to a social licence to operate³⁴. It should be the minimum requirement for all industries in all catchments^{35 36}. The Consultation Document shows little leadership. It is unclear on what GMP is. It does not, for example, address how it would be nested in regulation, how it would be modelled and monitored, the role of audited self-management schemes and farm plans. The Government should be driving the implementation of GMP nationally.

EDS seeks that:

- *Technical efficiency standards are applied in all catchments as part of the transfer to a FO (limit/target) based management regime.*
- *GMP is the set as the minimum requirement for all industries in all catchments.*

³² Proposals 2.1, 2.2, 2.3.

³³ Land and Water Forum, *Fourth Report of the Land and Water Forum*, November 2015, pages 65-66, recommendation 49.

³⁴ Land and Water Forum, *Fourth Report of the Land and Water Forum*, November 2015, pages 65-66, page 32 at [136].

³⁵ Land and Water Forum, *Third Report of the Land and Water Forum*, October 2012, recommendation 15.

³⁶ Land and Water Forum, *Fourth Report of the Land and Water Forum*, November 2015, pages 65-66, page 34, recommendation 16.

Consent transfer and over-allocation

32. EDS supports better enabling transfer between users in principle³⁷. However, the measures listed to provide for this fail to consider how transfer effects re-consenting. This is a significant gap. If users do not have some surety of retaining their allocation during re-consenting, transfer will be dis-incentivised. Conversely, if there is no recourse for regional councils to reduce allocation quantities on the basis of transfer then the initial user is effectively granted a property right in that quantum in perpetuity. The application of technical efficiency standards during re-consenting, and a water charge, could provide an appropriate median.
33. The Consultation Document is largely silent on allocation. It indicates further work will be done but sets no timetables for this work. It does not address the range of allocative issues on which the Land and Water Forum has made recommendations, or on which agreement was not reached but extensive comment provided. Allocation and GMP are the core of the system the Forum recommend for managing water quality. It is extremely concerning neither has been adequately addressed.

Council funding for fresh water management

34. The Consultation Document proposes the broadening of the \$100 million Fresh Water Improvement Fund, beyond purchase and retirement of riparian corridors³⁸. The broadening of scope is supported. EDS recognises that improved water quality can be achieved through other methods.
35. Notwithstanding this support, EDS is concerned that the scope of the funding is now too broad, and could extend to funding activities with perverse consequences for fresh water, including those that might undermine improvements elsewhere. For example, the funding could be used to further bolster irrigation projects despite detrimental effects on water quality (i.e. from increased nutrient runoff stemming from increased production).
36. Instead EDS proposes that such funding be explicitly targeted at projects with direct **net** ecological benefits, limited perverse consequences and that have the potential to contribute to wider goals. For example, the loss of wetlands in New Zealand has been significant (c.9% of original extent remaining), and the primary agency responsible are regional councils. A targeted project of wetland restoration and reinstatement at the bottom of catchments, in addition to upstream removal of fish barriers, erosion control, riparian planting and other such initiatives would do much to restore water quality and sustain fresh water biodiversity.
37. In addition, EDS is concerned at the amount of funding available to support irrigation projects. It is clear that some recent irrigation schemes are questionable in terms of their commercial viability. It is not appropriate for Government funding to be used to support such schemes.

³⁷ Proposal 2.4.

³⁸ Proposal 4.1.

EDS contends that an additional \$200 million should be transferred out of the two irrigation support schemes and into the Fresh Water Improvement Fund.

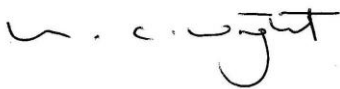
EDS seeks that:

- *The Freshwater Improvement Fund application criteria include a requirement of net ecological benefit.*
- *The Freshwater Improvement Fund application criteria include contribution to an identified wider, strategic environmental goal.*
- *An additional \$200 million is transferred out of the two irrigation support schemes and into the Fresh Water Improvement Fund.*

CONCLUSION

38. EDS appreciates the opportunity to comment on the Consultation Document.
39. The NPSFM introduced a water management system based on environmental bottom lines; on limits/targets that must be respected or realised. What is required now is a framework for how to operate within that system. That framework is needed fast. Water quality in New Zealand is steadily declining and the slower we respond the more difficult that decline will be to halt and to reverse.
40. The Government needs to show greater leadership. It needs to place urgency on getting the FO (limit/target) setting process into gear across the country. It needs to provide strong direction on how to operate within that system. The Consultation Document shows insufficient urgency or direction. It does not implement the Land and Water Forum's many relevant recommendations. It does not send a message that in order to halt the degradation of New Zealand's fresh water things are going to need to change.

Yours sincerely



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