

## FEEDBACK ON FRESHWATER REFORM 2013 AND BEYOND

### ENVIRONMENTAL DEFENCE SOCIETY

#### Introduction

1. The Environmental Defence Society (“EDS”) welcomes the opportunity to comment on *Freshwater reform 2013 and beyond* (“the Discussion Document”).
2. EDS is a public interest environmental law group, formed in 1971. It has a membership that consists largely of resource management professionals. The focus of EDS’s work is on achieving good environmental outcomes through improving the quality of New Zealand’s legal and policy frameworks and statutory decision-making processes.
3. The Land and Water Forum (“LAWF”) came about as a result of EDS’s 2008 annual conference. EDS was a member of the Small Group of the LAWF. EDS supports the recommendations of the LAWF.
4. This submission has been set out in accordance with the “planned package of reforms” set out at pages 10-11 of the Discussion Document. We are concerned that “Reform 5: Improving the process for Water Conservation Orders” does not appear to be included in the summary of the reform package. We have addressed this but note that it is likely that this will have caused the proposed change to have been missed by some commentators.

#### Planning as a community

##### Immediate Reforms

*Include an optional collaborative planning process in the RMA, covering plan development, independent hearing panels, and limited appeal rights\* (Reform 1)*

5. The LAWF recommended that regional councils be given the option of utilising the Schedule 1 plan making process or utilising a collaborative approach (Report 1, Recommendation 40 and 44). This proposal would give effect to that recommendation.
6. Collaborative processes are an alternative to traditional adversarial approaches and require communities to engage in a dialogue about their values and interests and give them responsibility for resolving them. There are many benefits to the use of a collaborative process including increased ‘buy in’ to the resulting decision. EDS supports the establishment of a collaborative planning process.
7. The proposed collaborative planning process departs from the LAWF recommendations in a number of respects (or does not provide a level of detail to assess consistency):

- a. The proposal suggests that councils will have a choice to use either the Schedule 1 process or the collaborative approach. It does not detail how this choice will be made. The LAWF addressed this issue in report 2, recommendation 18. It suggested that regional councils should publicly notify which process they intend to use, seek comment from interested parties, and then publicly notify which process will be used including reasons for the process chosen. This recommended process would be fair and transparent.
- b. The proposal suggests that councils will appoint at least one collaborative stakeholder group involving representative(s) of the community and parties that have a major interest in the water body. Stakeholder group(s) will represent the broad range of interests affected by the plan change. It does not provide further detail. The LAWF suggested that the regional council should publicly call for expressions of interest for participation in the collaborative stakeholder group (report 2, recommendation 22).
- c. The proposal is unclear regarding the role of the collaborative group or groups. The Discussion Document states that they will “give advice as the plan is developed.” Their role may differ according to the terms of reference “but could involve advice to council on desired values, freshwater objectives and limits for particular freshwater bodies and/or a role working alongside a council to draft plan provisions.” Furthermore, Discussion Document states the council should “reflect” the consensus view of the collaborative group, but the council “will retain responsibility for approving a plan for notification.” This seems to be inconsistent with the LAWF recommendations that the collaborative group develop policy and work with regional council *experts* to translate policy resolutions into plan provisions and that the council’s task should be making necessary additions and notifying the plan (report 2, recommendation 23).
- d. It is unclear without further information how closely the proposal reflects the LAWF recommendations in respect of the composition of the Hearing Panel reflect ours. The total numbers, qualification of panel members and the role of councilors who sit on the panel in subsequent decision-making is not indicated. The Discussion Document states that the chairperson should be independent, whereas the LAWF recommended that hearing panel appointees should include a chairperson, who must be a current, former, or retired Environment Judge or a retired High Court Judge or senior Barrister with extensive Resource Management Act experience (report 2, recommendation 25). The Discussion Document states that “a member with knowledge of tikanga Maori” should be appointed by the council following consultation with local iwi, whereas the LAWF recommended that iwi should appoint one panel member (report 2, recommendation 16).
- e. The Discussion Document does not suggest that the Hearings Panel will be required to write a draft report so that the collaborators (and others) can see what happened to their recommendations or submissions (report 2, recommendation 23).

- f. The Discussion Document proposed that iwi will be able to offer advice and formal recommendations to a council before it makes its final decision. The LAWF recommended that iwi be a part of the final decision-making process (report 2, recommendation 23).
  - g. The Discussion Document proposes that appeal rights will arise where a council decision deviates from the recommendations of the hearings panel. The LAWF recommended that appeal rights arise where the council's decision does not give effect to the consensus position of the collaborative group (report 2, recommendation 23). In order for the collaborative process to be worthwhile for participants and effective it is particularly important that appeal rights arise when a council departs from the collaborative agreement, not from the hearings panel recommendations.
  - h. The Discussion Document fails to pick up on the LAWF recommendation that appeals to the Environment Court should be available in respect of matters of national significance (report 2, recommendation 23).
8. EDS requests that the LAWF recommendations on the collaborative planning process are adopted in their entirety.

*Formalise a role for iwi in providing advice and formal recommendations, with a requirement for a council to consider that advice before making decisions on submissions, both for the new collaborative process and on Schedule 1 decisions relating to fresh water in a proposed plan\* (Reform 2)*

- 9. LAWF recommended a greater role for iwi participation throughout the freshwater objective- and limit-setting process, including allocation of members of the hearing panel and participation in the final decision of the statutory decision-making authority (Report 2, Recommendation 16).
- 10. EDS supports this reform, including its application to the Schedule 1 decision making process.

#### Next Step Reforms

*Provide national guidance and a support package on implementing the collaborative planning process*

- 11. The LAWF recommended that an implementation package should be prepared, including guidance on the attributes of successful collaborative processes in New Zealand and simple user manuals and training programmes on collaborative processes (Report 2, Recommendation 33).

12. EDS supports the proposal to carry out further work on national guidance and a support package for implementing the collaborative planning process. However, we believe that this should be undertaken immediately so that it can be provided to councils as soon as the collaborative planning process becomes available.
13. We note that the LAWF also recommended that the government should establish an openly accessible online library of practical experiences with collaborative processes to facilitate shared learning (Report 2, Recommendation 34).

## **A National Objectives Framework**

### Immediate Reforms

*Make consequential changes to the National Policy Statement and/or other regulation making powers to facilitate a National Objectives Framework and consequential amendments to section 69 and schedule 3 of the RMA\* (Reform 3)*

14. The LAWF recommended that in preparing a national instrument, the government should review and, where appropriate, amend relevant legislation, including Schedule 3 and s[ection] 69 of the RMA, to ensure consistency (Report 2, Recommendation 3).
15. EDS supports *consequential* amendments to section 69 and schedule 3 of the RMA to ensure consistency.

*Develop regulation to implement the National Objectives Framework including national bottom lines (Reform 3)*

16. The LAWF recommended that the government should, through a national instrument, establish a national framework under which regional councils set freshwater state objectives to give effect to the objectives in the NPSFM (Report 2, Recommendation 4). EDS supports the establishment of a National Objectives Framework.
17. EDS supports the National Objectives Framework including two values which will apply to all water bodies (ecosystem health and human health for secondary contact). These will set environmental bottom lines for all water bodies in order to safeguard the life-supporting capacity of freshwater and sustain the potential of freshwater to meet the foreseeable needs of future generations.
18. We are concerned that there does not appear to be an intention to set an overall timeframe within which national objectives will be met. We support allowing regional councils to set timeframes for management, however there needs to be a national 'backstop' timeframe. Without an overall timeframe the requirement to meet national objectives may not in practice act as a hard requirement. EDS considers that the national timeframe should

require all water bodies to achieve a 'fair' or 'C' level by 2030 (with a requirement for 5-yearly interim targets), unless they have sought a specific exemption.

19. EDS notes that the particular requirements for ecosystem health and human health for secondary contact will be particularly important. The 'fair' or 'C' band must provide for waters which are 'swimmable, fishable and safe for food gathering'. For example, standards which would only require water bodies to be marginally above toxicity for aquatic organisms would be inappropriate.
20. The LAWF recommended that the meaning of "maintained or improved" should be further defined. It suggested that "maintained" could be defined to mean that, within the national banded framework, a freshwater state objective for any parameter cannot be set in a band lower than that of its current state. "Improved" means setting a state objective higher than the existing state, and setting a limit based on that objective (Report 2, Recommendation 6).
21. A National Objectives Framework will assist regional councils setting freshwater objectives and limits in plans. It is likely to increase certainty (and therefore decrease costs and delays) and result in better quality outcomes. This is good for all involved.
22. EDS recommends that the Government engages with the New Zealand Freshwater Sciences Society (the key professional society for freshwater science in New Zealand) to enable professional, collective and independent science peer review of the national objectives framework.
23. EDS looks forward to further engagement later in 2013 on the content of the National Objectives Framework.

#### Reform 5: Improving the process for Water Conservation Orders:

*Providing clear circumstances in which the responsible Minister might refer an application to a regional council or unitary authority, or put it on hold.*

24. EDS has two concerns about how it appears this proposal would work:
25. The decision-maker would be the regional council, instead of a Special Tribunal or Court. This is inappropriate as decisions on nationally important values are more appropriately made at national level. Furthermore, this would likely be a death knell for the process, given that regional councils have only ever supported one Water Conservation Order application.
26. The decision would not be made under Part 9 of the RMA, but under the general provisions of the RMA that apply to all regional planning processes. It is appropriate that Water Conservation Orders are considered through a separate process that recognises their national values. This proposal would effectively spell the end for Water Conservation Orders as there would be nothing to differentiate them from regional plans.

27. EDS would not support any proposal that would transfer decision making to regional councils and/or remove decision making from Part 9 of the RMA.
28. The Minister for the Environment has confirmed to EDS (*pers com*) that there is no intention to take Water Conservation Orders out of Part 9 of the RMA. She has advised us that the discussion paper is misleading and ambiguous in the narrative about Water Conservation Orders.
29. If a regional council opts to use a collaborative planning process it is EDS's contention that there should be a power for all outstanding matters (including applications for Water Conservation Orders and applications for water takes and use) to be put on hold by way of a moratorium. After the plan-making process was complete, the moratorium would expire and parties would be free to proceed or not (and this decision might be influenced by the outcome of the collaborative process).
30. EDS requests that this proposed reform is rejected.

*Aligning the process with Board of Inquiry processes for matters of national significance.*

31. EDS notes that case law has clearly established that Water Conservation Orders are to protect matters that are "outstanding" at a national level. They are therefore by definition "matters of national significance" and should always be considered at an appropriate national forum.
32. EDS supports improvements to the process for the hearing of water conservation orders, in terms of total timeframes and time and cost spent at hearing. Currently, a water conservation order is heard first by a Special Tribunal appointed by the Minister. That hearing allows no cross examination and can take some weeks. Appeals are then heard by the Environment Court where there is full cross-examination and appropriate testing of the evidence. If the process is instead similar to the Board of Inquiry process there will be one main hearing which is equivalent to an Environment Court hearing, and then any appeals would be to the High Court on points of law. The latter process is less user-friendly for lay submitters as it will move faster and will move straight into a more formal court process. However, this has to be weighed against the cost and time involved for parties preparing and attending two full hearings.

*Requiring a clear scope for the application to be established at the beginning of the process and prevent changes to that scope once consideration is underway.*

33. This proposal stems from the current ability for a Special Tribunal or Court to inquire into additional areas which were not raised in the original application nor raised in submissions.

34. EDS would not support restricting the scope of the Water Conservation Order inquiry to the scope of the application only. This is too restrictive.
35. EDS would support a framework that would allow submissions to extend the scope of the inquiry to additional values or additional related water bodies or adjacent land. This would ensure greater certainty, without being overly restrictive. In order for this framework to be fair it should require notification of submissions that seek to extend the scope of the inquiry to ensure newly affected people have the opportunity to submit on the new matters.

*Requiring Water Conservation Order processes to involve iwi and ensure that tangata whenua values and interests are considered in the decision making.*

36. EDS supports involvement of iwi and consideration of tangata whenua values and interests in decision making processes.

#### Next Step Reforms

*Provide guidance and regulations to set clear national expectations and support limit setting under the National Objectives Framework, including managing outstanding water bodies and wetlands (Reform 4)*

37. The LAWF recommended that the National Objectives Framework be combined with guidance and options for regional councils to set numeric objectives within the fair, good and excellent bands for particular water body types and situations (Report 2, Recommendation 4).
38. EDS supports this proposal and looks forward to further engagement on the content of the guidance and direction.

#### **Managing within quantity and quality limits**

##### Immediate Reforms

*Amend the RMA to ensure that councils can obtain information needed for accounting systems\**

*To account for all freshwater takes: make amendments to ensure the Government can require councils to collect data from all water users and share data with central government; use any standard accounting system developed; and adopt defined methods for estimating water takes\**

*To account for all contaminants (for regional decision-making): make amendments to ensure the Government can require councils to collect data on all sources of contaminants and share data with central government; and adopt defined methods for estimating discharges\* (Reform 6)*

39. The LAWF recommended that the new water allocation regime should be underpinned by a transparent accounting and registry system that: is consistent across regions, publicly identifies location of takes and any transfer of takes from place to place or person to person, and includes data management protocols that provide suitable protection for intellectual property and proprietary information (Report 3, Recommendation 27).
40. EDS supports improvements to freshwater accounting. As the Discussion Document states, it is vital to account for all different types of freshwater takes to allow for the best decisions to be made about how freshwater is used.

*Provide national guidance and direction on the setting of allocation limits covering all water takes*

41. The LAWF recommended that the government provide uniform technical processes for defining freshwater state objectives and setting limits in the regional planning process, including providing guidance on limit-setting methodologies, how catchments should be divided for the setting of limits, and the definition of mixing zones (Report 2, Recommendation 12).
42. EDS supports greater national guidance and direction on the setting of allocation limits and looks forward to further engagement on the content of the guidance and direction.

*Develop sector good management practice toolkits (Reform 7)*

43. The LAWF recommended that good management practice in land and water use be encouraged by regulators, industry and others as an essential tool for improving and maintaining water quality, quantity, and water use efficiency (Report 1, Recommendation 8).
44. EDS supports the development of sector good management practice toolkits. It is important that they cover both efficient use and freshwater quality.
45. EDS notes that the Discussion Document refers to 'self regulation'. The LAWF recommended used of 'audited self management' (report 1, recommendation 13). The key difference is the requirement for auditing. This is essential to ensure the robustness of the management.
46. Furthermore, the LAWF mandated the use of good management practice within the limits and standards framework (report 1, recommendation 9). This is because good management practice is a means to achieve limits and standards, it is not an end in itself.
47. We look forward to working with government in the development of sector good management practice toolkits.

*Develop national guidance on implementing the national policy statement provisions on water efficiency (Reform 7)*

48. As above, EDS supports the development of national guidance on water efficiency. We look forward to working with government in the development of this guidance.

*Develop national guidance on the specification of water permits (Reform 8)*

*a. Specifying water permits*

*b. Ensuring permit durations are not unnecessarily short*

49. EDS supports the development of national guidance on the specification of water permits. Consistency in the specification of water permits will assist with accounting and monitoring.
50. We agree that freshwater management is best achieved through plan making, not through *ad hoc* resource consenting. The water reform package will reduce the need to use short term permits. We would not support restricting the use of short term permits before the water reform package has been put in place and effective plans have been put in place.
51. We look forward to working with government in the development of this guidance.

*Review the Water Research Strategy (Reform 9)*

52. The LAWF recommended that the existing Water Research Strategy should be reviewed, in light of priorities arising from government water policy reform, and the resultant updated strategy subsequently implemented (Report 3, Recommendation 62).
53. EDS supports the review of the Water Research Strategy. We are particularly concerned that it is not currently possible to fully populate a National Objectives Framework due to a lack of scientific data. This needs to be a top priority. Intermim measures should be used where science is uncertain that would at least ensure no deterioration in water quality.
54. As for the National Objectives Framework, we recommend that the Government engages with the New Zealand Freshwater Sciences Society to enable professional, collective and independent science peer review of the Water Research Strategy.

*Provide national direction on accounting for sources of contaminants (Reform 10)*

*a. Identifying and accounting for all sources of the contaminants to be managed*

*b. Monitoring and reporting*

*c. Regional council and unitary authority approaches*

55. This will involve the identification of good practice and provision of good practice guidance to councils on freshwater management. EDS supports the provision of good practice guidance. It is important that this is developed through a thorough process with the involvement of key stakeholders and experts in the field.

*Provide national guidance on the use of models for managing freshwater quality (Reform 10)*

56. The LAWF recommended that all parties, central and local government, industry and science providers should continue investment in the development of models (including development and prioritisation of a limited number of interoperable models) and measurement-based monitoring systems for practical application to water quality management. This should include clear guidance and protocols on how models, monitoring systems and their output data, should be used in the development, implementation and enforcement of water quality policy (Report 3, Recommendation 63).
57. EDS supports the production of national guidance on the use of models for managing freshwater quality. This should improve consistency and quality of management outcomes.

Next Step Reforms

*Provide national guidance on dealing with over-allocation*

*Provide national guidance and/or direction on dealing with transition issues (quantity)*

*Provide national guidance and/or direction on managing takes that do not need consents*

*Provide national guidance and/or regulation on compliance and enforcement (quantity)*

*Provide national guidance and/or direction on the choice of methods and tools to manage water quality*

*Review the duration of permits*

*Develop alternative tools for initial allocation of fresh water*

*Develop options for allocating permits on expiry*

*Facilitate transfer and trade for quantity*

*Develop new transfer or offsetting mechanisms for water quality*

*Develop incentives for efficient water use (both for quality and quantity): for example, pricing and standards*

58. These next step reforms will be an opportunity to implement a number of the LAWF recommendations, including: 1/25, 1/26, 3/20, 3/32, 3/49, 3/28, 3/58, 1/36, 3/43, 3/44, 1/23, 2/13, 3/17, 3/19, 3/45, 1/25, 3/44, 1/27, 2/13, 3/42, 3/47, 1/27, 3/25, 1/7, 1/10, 1/19, 3/59 (references to LAWF recommendations are in the format: report/recommendation).
59. The Discussion Document provides very little detail as to the direction of these next step reforms, but rather foreshadows future proposals. EDS contends that there should be a full implementation timetable for the balance of the reforms established by the Ministry for the Environment.

### **Implementation of the LAWF package**

60. There are a number of LAWF recommendations that have not been picked up by the Discussion Document. These include:
- a. no explicit reference to setting thresholds in under-allocated catchments which, when they are triggered, require a shift in management techniques (report 3, recommendation 34),
  - b. no reference to prioritizing effective riparian management (report 1, recommendation 12),
  - c. no reference to regional councils or holders of consents in cooperative rural infrastructure schemes being able to withhold water in circumstances where environmental conditions of the consent are not being met (report 1, recommendation 34),
  - d. no reference to a role for the Parliamentary Commissioner for the Environment in two-yearly reporting on the effectiveness of each regional council in achieving water management goals and objectives, and a five yearly review on the effectiveness of the system of land and water management (report 1, recommendation 47).
61. It is unclear whether the Government is not proposing to adopt these recommendations, or whether it is intending to consider such matters further down the track.
62. The LAWF recommendations form a package. It is important that they are implemented faithfully and in a coherent and balance package. Any 'cherry picking' of recommendations is opposed. We accept that the recommendations will need to be implemented over time however we consider that it would be useful for the Government to document the LAWF recommendations which are not addressed in the Discussion Document and detail when and how these will be pursued.

### **Resource Management Act reforms**

63. EDS notes that consultation is also occurring on proposed changes to the Resource Management Act. Freshwater management occurs under the RMA. Despite this, the two packages of reforms have been presented and consulted upon separately and are, we believe, inconsistent. We contend that the proposed changes to Part 2 of the Resource Management Act would lead to poorer environmental outcomes for freshwater, as well as undermining the promotion of collaborative decision-making as outlined in this discussion paper.
64. Our submission on that discussion paper is available online<sup>1</sup> and should be read as part of this submission. We request that the proposed changes to the Resource Management Act which we oppose in our submission should be rejected.

### **Conclusion**

65. In general, EDS supports the proposed reforms included in the Discussion Document.
66. In particular we support the establishment of a collaborative planning process and a National Objectives Framework. We look forward to further consultation on the content of the National Objectives Framework later in 2013.
67. We also look forward to further development of the “Next Step Reforms”. These are essential components of the LAWF recommendations and it is important that we continue to move forward with improvements to our freshwater management systems.

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