

SUBMISSION CLEAN WATER CONSULTATION 2017 (DOC: ME1293)

TO: Clean Water Consultation 2017
Ministry for the Environment (MfE)
PO Box 10362
Wellington 6143

BY EMAIL: watercomments@mfe.govt.nz

SUBMITTER: Environmental Defence Society Inc (EDS)

SERVICE: PO Box 91736
Victoria Street West
Auckland 1142
madeleine@eds.org.nz

- 1 EDS is a public interest environmental group, formed in 1971. The focus of its work is on achieving positive environmental outcomes through improving the quality of Aotearoa New Zealand's legal and policy frameworks and statutory decision-making processes.
- 2 EDS welcomes the opportunity to comment on the consultation document *Clean Water 2017 (Consultation Document)*.
- 3 A number of versions of the National Policy Statement Freshwater Management are referred to in this submission. The following abbreviations are used:
 - NPSFM 2014 – referring to the 2014 iteration.
 - NPSFM-CDV – referring to the Consultation Document amended version of the NPSFM 2014.
 - NPSFM – referring to the NPSFM generally, including in future form.

OVERARCHING COMMENTS

- 4 EDS supports many of the underlying concepts/factors in the Consultation Document and NPSFM-CDV, for example: "swimmable" rivers; use and control of MCI; use and control of DIN & DRP; meaning of "maintain or improve"; stock exclusion. It does not support how these concepts/factors are proposed to be incorporated. The Consultation Document has taken the LWF's recommendations, manipulated them, and watered them down. This is not acceptable. The Consultation Document's proposed reforms also leave significant gaps.
- 5 For limits-based water management central government needs to install clear, directive policy at a national level. It has a critical role as system describer. Freshwater objective setting and regulation of water body nutrients has become one of New Zealand's most contentious issues. The recently published freshwater domain report reveals very serious ecological degradation of freshwater systems that need urgent remedial attention. Failure by central government to implement the LWF's recommendations, which are based on

robust science and a collaborative process, undermines public confidence and results in sub-optimal policy.

- 6 EDS continues to hold many of the concerns set out in its submission on the 2016 reform package (**Attachment A**), including its overarching comments at paragraphs 1-2 addressing:
- The need for urgency of action and for the freshwater management system to be reenergised.
 - The need to address the lacuna in s104 RMA that consent authorities are only required to “have regard to” environmental bottom lines in superior planning instruments when deciding whether to grant resource consents and on what terms.
 - Prioritisation of high-risk waterbodies.
 - Water pricing. The time is right for central government to put a price on freshwater, in terms of both water takes and nutrient discharges. This does not equate to vesting ‘ownership’ in the person paying for water use or pollution. It vests ownership in the public through controlling the ability to use a public resource for personal gain.

NATIONAL OBJECTIVES FRAMEWORK

Macroinvertebrate Community Index

- 7 Policy CB1 NPSFM-CDV requires regional councils to monitor *inter alia* macroinvertebrate communities. The proposed provision is weak and not sufficiently directive. It does not accord with or implement the LWF’s recommendations that (in summary)¹:
- a. Plans be required to have a trigger for action if there is a downward trend in MCI, or it is below 80.
 - b. The required action is to investigate and develop an action plan to either maintain or improve MCI scores in the waterbody. The key points in this process are:
 - i. If the natural state is below an MCI score of 80, then the requirement is to maintain MCI at that level.
 - ii. If the MCI score is below 80 for human-induced reasons, then the requirement is to develop an action plan to improve the MCI score.
 - iii. If there is a downward trend in MCI then the requirement is to develop an action plan to reverse the trend.
- 8 The LWF’s recommendations are based on advice from an independent science panel that MCI is scientifically robust and fit for purpose.

¹ LWF letter to Ministers 19 August 2016.

Relief

- MCI be incorporated into the NPSFM as per the LWF's recommendations.

Dissolved inorganic nitrogen & dissolved reactive phosphorus

- 9 The NPSFM-CDV incorporates setting of maximum concentrations of DIN and DRP through a "note" attached to the ecosystem health periphyton attribute table. This requirement is not sufficiently directive, and its legality and enforceability is unclear. It does not accord with or implement the LWF's recommendations that (in summary)²:
- a. The NPSFM include a requirement to set instream concentrations for DIN and DRP as objectives in regional plans.
 - b. A mandatory decision support tool be developed to be used by regional councils to derive and set DIN and DRP concentrations.
 - c. A multivariate "look-up" table for DIN and DRP concentrations be researched and developed.

Relief

- That the NPSFM be amended to include setting of DIN and DRP concentrations in the NOF.
- That a decision support tool (as per the flow chart attached to the LWF's letter to Ministers Smith & Guy of 19 August 2016) be confirmed and appended to the NPSFM. The text of the NPSFM must make clear that setting of DIN and DRP concentrations is to follow that process.
- Research effort be put into developed of a multivariate "look up" table for DIN and DRP concentrations.

Gaps

- 10 The NPSFM-CDV does not reflect the full range of attributes that need to be managed. The most important missing parameters are:
- Sediment.
 - Copper.
 - Zinc.
- 11 Sediment is one of Aotearoa's biggest water quality issues but it is not addressed in the NPSFM 2014 or NPSFM-CDV. The 4 modes of impact from sediment are visual clarity, light penetration, suspended sediment concentrations, and deposited sediment. These are all potentially capable of being included as attributes in the NOF.
- 12 Zinc and copper are heavy metal contaminants commonly found in urban storm water and so affecting urban waterbodies. Controlling sources of these contaminants is difficult because:

² LWF letter to Ministers 19 August 2016.

- The most common source of copper is motor vehicle brake-pads over which local government has no control.
- The most common source of zinc is building materials, in particular roofing, over which local government control is not clear due to ambiguities of overlap with the Building Act and regulations.

13 Inadequate focus on urban water issues has been evident at all stages of the freshwater reform process. This needs to change.

Relief:

- Include sediment attributes in the NOF or signal intention to investigate and include a sediment attribute(s) in the NOF and, in the interim, include a requirement for councils to address sediment in regional policy.
- Include copper and zinc attributes in the NOF.
- National regulation for vehicle brake-pads should be investigated and developed.
- Control of heavy metals from building materials should be investigated and legislative amendments/guidance/regulation ensuring effective local government control for NPSFM purposes developed.

SWIMMING

14 EDS supports the underlying concept of a time-based approach to achieving water quality suitable for “swimming”. However the detail underpinning this concept and providing the course of action for its achievement need significant work.

Terminology

15 The Consultation Document refers to improving water quality to enable “swimming”. The NPSFM-CDV refers to a target of 90% of rivers and lakes being “swimmable”³. This is not defined and not referred to elsewhere in the NPSFM-CDV. Instead the concept of “suitable for immersion” is applied.

16 Lack of consistency in terminology is confusing and unclear. Reference solely to “swimming” is misleading as swimming is only one of many activities involving immersion or primary contact.

17 The objective that water quality is “suitable for immersion more often” is not sufficiently directive. As defined, any reduction in frequency and magnitude of *E.coli* exceedances over any time frame would qualify as achieving the NPSFM-CDV’s proposed new objectives and policies⁴.

18 Consistent and clear terminology should be used. The NPSFM should set a clear and definitive goal that water quality be suitable for primary contact recreation.

³ NPSFM-CDV pg 5 preamble.

⁴ NPSFM-CDV 1 pg 10 interpretation, pg 23 Objective A3, pg 14 Policy A5.

Relief:

- Replace references to “swimming”, “swimmable”, “suitable for immersion” in the NPSFM-CDV preamble, Objective A3, Policy A5, Policy CA2(f) with “primary contact recreation”.
- Delete definitions of “suitable for immersion” and “suitable for immersion more often” and insert the LWF definition of “primary contact recreation”.

Qualifying as swimmable

- 19 It appears that amended Appendix 2 is inaccurate. It does not reflect the categories, attribute states, and defining metrics set out by MfE on its website as being proposed to be inserted in the NPSFM⁵. It is unfortunate that the table was not included in the NPSFM-CDV.
- 20 Those parameters should not be left to a “readers’ note”. The legality and enforceability of a “readers’ note” in national policy is unclear.

Relief:

- That the *E.coli* attribute table in the NPSFM-CDV be amended to incorporate in full the tables as set out on MfE’s website.

Waterbodies to which the target applies

- 21 The Consultation Document’s “swimming” proposals only apply to “large rivers and lakes” which are defined to capture 4th order rivers or above and lakes larger than 1.5km in perimeter on average⁶. This excludes the vast majority of waterbodies⁷. Because the current *E.coli* attribute table is deleted in the NPSFM-CDV to make way for that applying to “swimming” there is now no *E.coli* attribute table or bottom line applying to those other smaller waterways. This is a serious oversight⁸.
- 22 The “swimming” proposal is also inconsistent with the interconnectedness of freshwater bodies and the ocean. Failure to appropriately control contaminants in smaller streams that may themselves not necessarily be frequently used for swimming can result in significant pollution of the coastal environment into which they flow. This is a significant issue for Auckland City.
- 23 EDS understands the logic behind focusing on 4th order rivers is that management of those water bodies will require management of smaller tributaries, and so “swimmable” water quality in the 4th order rivers will necessitate “swimmable” water quality in tributaries. This logic is incorrect. Some tributaries will have high recreational values but will be of a size that

⁵ <http://www.mfe.govt.nz/fresh-water/freshwater-management-reforms/water-quality-swimming-categories-attribute-states-detail>. See Table 1.

⁶ NPSFM-CDV pg 10.

⁷ The proposed approach only captures around 45,000km of 450,000km.

⁸ It is noted that under the NPSFM-CDV limits/targets would set that achieve the narrative human health attributes Objective A1 but no numerical *E.coli* parameters would apply. However this is not clear and if a different approach is to be applied to waterbodies not qualifying as “large rivers or lakes” the NPSFM should make it clear that freshwater objective for those waterbodies must be set to achieve the human health national value and that maintenance of current water quality is the minimum standard.

their contribution to the 4th order river does not impact the 4th order river's water quality levels. This risks management intervention not being applied to those smaller tributaries.

Relief:

- That the new primary contact *E.coli* attribute table apply to all waterbodies. Primary contact recreation targets should be set for all regions.

Monitoring

- 24 EDS supports the inclusion of monitoring requirements for *E.coli* in Policy CB1 and Appendix 5 in principle. As drafted Appendix 5 is not sufficiently clear. It fails to identify that there are 2 separate monitoring requirements:
- a. Monitoring for meeting *E.coli* freshwater objectives in the long term.
 - b. Monitoring for surveillance to inform the public on suitability for primary contact recreation at various times and locations.
- 25 Appendix 5's monitoring guidelines are based on the 2003 microbiological guidelines which are outdated. Many councils are employing more sophisticated methods.

Relief:

- Amendments to ensure the 2 separate monitoring requirements are clear.
- Urgent review of the 2003 microbiological guidelines.

Overarching Goal

- 26 The preamble to the NPSFM-CDV sets an overarching goal that 90% of rivers and lakes will be swimmable by 2040 and an interim goal of 80% to be swimmable by 2030. This goal is supported in principle. However it is undermined by 4 issues:
- The dates do not reflect the urgency for action that should be applied.
 - The rivers and lakes to which this goal will apply have not been defined⁹. It is not clear whether only large rivers and lakes will be relevant or a broader group.
 - The goal is not legally enforceable. It is only set out in the NPSFM-CDV preamble. No relevant objectives or policies are proposed. Instead EDS understands it is proposed that a letter from the Minister to regional councils outlining the goal is distributed. This lacks regulatory compulsion¹⁰.
 - It is not clear how this goal is intended to be worked into existing plan processes/plans recently amended to give effect to the NPSFM 2014.

⁹ NPSFM-CDV pg 5 preamble.

¹⁰ The lack of regard for the letter from MfE to regional councils regarding control of animal excrement discharges under s15 RMA is a case in point.

Relief

- Incorporate the goal of 90% of rivers and lakes to be suitable for primary contact recreation into the NPSFM provisions. This should apply to all rivers and lakes.
- Provide policy direction on how this goal is to be incorporated into plans at different stages of the planning process.
- The year by which 90% of rivers and lakes by suitable for primary contact recreation be changed to 2030 and for 80% of rivers and lakes by 2025.

NPSFM-CDV TEXT

- 27 Comments and relief relating to the NPSFM-CDV text in relation to the issues discussed above are not repeated.

Timeframes

- 28 Freshwater objectives need to be set, and they need to be set fast. Implementation needs to be accelerated for public confidence in the freshwater reforms to be retained. This is particularly so given the controversy subsequent to release of the Consultation Document. The timeframes in the NPSFM-CDV are too drawn out to impress any urgency on regional councils or on land users to change. They need to be revisited¹¹.

Relief:

- The NPSFM be amended to set minimum timeframes for when regional freshwater objectives are to be met¹².
- The date for implementation of the NPSFM in Policy E1 be brought forward to 31 December 2020. Any extension should be limited to 2025.

Objectives A2 and B1 – economic wellbeing

- 29 The NPSFM-CDV amends Objectives A2 and B1 to refer to providing for economic wellbeing and opportunities. It is not clear why this is necessary or why the amendment to each objective is different. If the intention is to clarify that use of water for *inter alia* economic purposes can only occur within environmental limits then this should be specifically stated¹³.
- 30 Of particular concern is the amendment to B1 which requires economic wellbeing to be provided for “while” (meaning “at the same time as”¹⁴) safeguarding the life supporting capacity of freshwater. This is inconsistent with s5(2) RMA and an environmental limits approach to water management based on providing for use within the capacity of the environment to sustain itself.

¹¹ EDS expressed the same concern in its submission on the Next Steps for Freshwater Consultation Document 2016.

¹² Amendments to the NPSFM-CDV preamble would also be required. E.g. pg 4 para 3.

¹³ E.g. new objectives could be included such as: Provide for economic wellbeing and productive opportunities only within environmental limits.

¹⁴ *EDS v NZ King Salmon Company Ltd* [2014] NZSC 38.

Relief:

- Delete the proposed amendments to Objective A2 and B1 referring to provision for economic wellbeing.
- If references or new provisions are to be included these must be drafted to ensure that water quality based on ecosystem and human health is the first priority. Promotion of and provision for economic opportunities must be within environmental limits.

Objective A2 – maintain or improve

- 31 The clarification of the “maintain or improve” requirement in Objective A2 needs further work. EDS supports the requirement that water quality be maintained or improved within a FMU in principle. It allows for natural fluctuations and is consistent with the scale at which freshwater objectives are set. However for that approach to work the “bandwidth” of each of level of contaminant (i.e ‘A’, ‘B’) needs to be confirmed as fit for purpose for the size of the FMU. Fluctuations within a “bandwidth” that is set to widely will allow for unacceptable reductions in water quality.
- 32 However, the adequacy of that requirement turns on the definition of FMU. Currently that definition is extremely broad and affords regional councils unfettered discretion to identify FMUs at as large or small a scale as they please. Setting of large FMUs allows for gaming of the system and an ‘unders and overs’ calculation due to power imbalances. It also risks creation of power imbalances with 1 community benefiting from water quality gains at the expense of another.
- 33 The ‘unders and overs’ approach has been rejected by the Parliamentary Commissioner for the Environment¹⁵ and the Environment Court¹⁶ as inconsistent with s6 and s30 RMA. It is unworkable because of the practical implications of assessing what beneficial effects would counterbalance any adverse effect. A desire to avoid these outcomes was one of the drivers behind the proposed amendments.

Relief:

- That the NPSFM include guidance on appropriate minimum scale/scale-setting process for FMUs, including analysis of appropriate contaminant level “bandwidths”. Consequential amendments to the FMU definition will be required.

Policy A3 and Appendix 3

- 34 Appendix 3 has not been populated. This should occur. Policy CA3 only applies to infrastructure listed in the Appendix.
- 35 The NPSFM-CDV includes amendments attempting to define “benefits provided by listed infrastructure”. This singles out renewable electricity generation and then lists employment and economic wellbeing as “benefits”. This is unhelpful. First, there are many different types of hydrological modification that may qualify as significant infrastructure. It is not necessary

¹⁵ PCE Report, *Managing water quality: Examining the 2014 National Policy Statement*, June 2015, pages 6-8.

¹⁶ *Ngati Kahungunu Iwi v Hawkes Bay Regional Council* [2015] NZEnvC 50.

to single out electricity generation. Secondly, a general statement that employment and economic wellbeing are sufficient benefits to trigger application of the exception in Policy A3 is too broad. Almost any activity will have employment and economic outcomes. A higher threshold should be applied in the context of freshwater limits. Care needs to be taken in determining criteria allowing infrastructure to qualify for an exception. In some instances poor water quality results from infrastructure that may be regionally significant but which is outdated and should be upgraded. For example, the combined sewer system in central Auckland, the storm water component of which requires action by Auckland Council.

- 36 The amendment clarifying that Appendix 3 only applies to infrastructure existing prior to the date on which the NPSFM 2014 came into effect is supported.

Relief:

- Appendix 3 be populated. This should include the infrastructure title, location, size and components, and specific benefits.
- The final paragraph to Policy CA3 be deleted.
- Appendix 3 include specific, detailed criteria that must be considered when determining whether an Appendix 3 exception is appropriate.

STOCK EXCLUSION

- 37 The stock exclusion proposals are broadly in line with the LWF's recommendations. 4 crucial elements are missing:
- a. A workable scheme for deciding what slope class a parcel of land falls within.
 - b. Integrating stock exclusion fencing requirements with riparian management. This is a significant omission, ignores recommendation 31 of the LWF's 4th Report, and is not consistent with integrated and strategic resource management. 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 LWF's view that the Government commissions a review of existing riparian management and setback assessment tools to produce a new consolidated tool with mandatory national application.
 - c. A default minimum set back should apply until a new consolidated setback assessment tool is developed and installed. As currently worded the default would be 0m. That risks undermining the outcomes sought to be achieved by exclusion due to deleterious impacts from stock on riparian margins and run off directly at the water margin.

- d. Sheep are not subject to the proposed stock exclusion regulations. Research by Cawthron has shown that sheep, in particular in lowland areas, can have significant adverse effects on water quality and water body natural character.

Relief:

- The Consultation Document's stock exclusion proposal and any subsequent regulation(s) include a scheme for consistent slope class assessment and a requirement that fencing erected to exclude stock be placed at an appropriate distance from the waterbody, with appropriateness being determined by reference to a nationally applicable assessment tool as outlined above. This should be developed urgently.
- A 5m default minimum setback distance for stock exclusion fencing be inserted until the above mentioned assessment tool is developed and installed.
- Sheep by included in the stock exclusion regulations subject to the same requirements as beef cattle.

STOCK NUMBERS AND LAND USE

- 38 It's clear from the freshwater domain report that we need to reduce stock numbers in sensitive catchments. There should therefore be a requirement for farms to obtain land use consents in such areas¹⁷. Arguably this is already the case but the law should be clarified to specify where such a requirement should be applied. Consent conditions should set maximum stock numbers, with reductions over time if required.

¹⁷ Also noting for completeness that resource consent for farming may also be necessary to ensure protection/management of other values.