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Freshwater Consultation 2016

Ministry for the Environment
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Forest & Bird comments on the Govt's consultation document "Next Steps for Fresh Water"

Introduction

Forest & Bird is New Zealand's largest and longest-serving independent conservation organisation, with over 70,000 members and supporters. Forest & Bird works to preserve New Zealand's natural heritage and native species. Originally formed to protect our native forests and birds, our role has since grown to include protection of all native species and wild places – on land and in our oceans, lakes and rivers.

As part of that mission, Forest & Bird members, branches and staff throughout the country are actively involved in project work and advocacy for the protection of this country's unique freshwater ecosystems and the native species that form part of them.

Context

Freshwater in New Zealand is in crisis. Many waterbodies show a marked and continuing deterioration in water quality, and have no clear trajectory for improvement.

The National Policy Statement for Freshwater Management 2014 was in many respects a step backwards for integrated land and water management in comparison to the 2011 document. The National Objectives Framework set inadequate limits and targets. The lack of any biological indicator, provision for nitrogen to be set at toxic levels, and the unambitious "wadeable" bottom line are all directly contributing to a local authority approach which perpetuates the status quo or routinely provides for greater intensification in over-allocated catchments. This is made worse by the long time frame provided for regional councils to "progressively implement" the NPS, which is being abused by some

councils who are undertake plan changes in the meantime which provide for new irrigation schemes in over-allocated catchments, and fail to set limits that will sustain life-supporting capacity of freshwater, on the basis that they are not yet implementing the NPS.

There is an ongoing conflict with the Government's stated desire to improve water quality, and its lack of acknowledgement of the biophysical limits of our freshwater systems in setting its economic goals for New Zealand. Its commitment to double New Zealand's primary production exports and, as part of that, its financial support for massive irrigation schemes - which invariably result in poorer water quality outcomes - is inconsistent with the stated outcomes of the National Policy Statement.

The consultation document does not reflect the level of urgency that is required to address this crisis. The consultation document says that many of the issues that we face today are a legacy of past poor or uninformed practices. While this is no doubt partly true, it obscures the much bigger issue of ongoing land use intensification in catchments that are already nearing or have already exceeded biophysical limits.

Real leadership is required to overcome regional councils' reluctance to make the changes that are required to achieve meaningful outcomes for freshwater.

Public patience with unambitious freshwater policy implementation is close to exhaustion.

Matters not addressed in the consultation document

Nitrogen and phosphorus

Nitrogen is a nutrient which degrades water quality including by impacting on macro-invertebrate health, fish communities and algal growth. This occurs well before nitrogen reaches levels at which it is directly toxic to fish. The National Objectives Framework sets a nitrogen toxicity limit only. Although we understand the Government's position to be that nitrogen must also be controlled to achieve ecosystem health, the NOF is not being applied in this way by many local authorities. The nitrate toxicity bottom line exceeds current nitrogen concentrations for many water bodies, and is being treated as a "pollute up to" limit by some regional councils. The National Policy Statement must be amended to provide direction on appropriate limits for nitrogen and also phosphorus in order to safeguard life-supporting capacity and achieve good ecosystem health.

Limit-setting and allocation within limits

The consultation document needs to include a clear statement that in water quality planning, allocation of assimilative capacity (nutrient loads) need to occur in the context of effective environmental limits that are set to protect ecological health, not the reverse.

That is; limits are not to be set with a view to providing sufficient headroom for existing activities to continue and intensification to occur.

At present there is a disconnect between the requirement in the National Policy Statement to avoid over allocation and achieve targets within a defined timeframe, and the manner in which this is incorporated into regional plans, which often treat limits as a permitted activity standard or a matter for discretion on a discretionary activity rule. The result is that the limits become merely matters to which regard must be had, and consents may legitimately be granted which are not consistent with limits and targets. There are two potential options to address this:

- A change to the Resource Management Act to provide that consents to take and use water or discharge contaminants to water or to land in a manner that will result in contaminants entering water may only be granted where they would comply with freshwater limits in Plans (or, where a water body is already over-allocated, that granting the consent would be consistent with achievement of a freshwater target).
- Further direction in the NPS as to how limits and targets must be incorporated into Plans. This would need to specify that activities that do not comply with a limit or are not consistent with achievement of a target are to be treated as non-complying or prohibited activities.

Swimmable water bodies

We believe that the target for all waterbodies should be swimmability. A national standard of swimmability can be crafted which addresses the issues described in the consultation document (eg that some water bodies naturally breach swimmable water standards during high rainfall events). The key issue for swimmability is setting attribute states for pathogens like *E.coli* that make water safe for people. We do not accept that it is not practical to craft a nationally applicable swimmability standard in the NPS.

Comments on the consultation document provisions

Parts of the consultation document seek feedback on the Government's intention to implement some of the outstanding recommendations of the Land and Water Forum. For seven years the many stakeholders who make up the Land & Water Forum have invested a lot of resources into developing a comprehensive proposal for an integrated freshwater management system to address the many pressing issues created by land and water use in New Zealand. Despite this work the consultation document fails to clearly articulate the sort of freshwater management system that the government intends the proposals to be part of.

Much of what is proposed is general in nature, so while there may be general support for various proposals, the ‘devil will be in the detail’ of how the government finally decides to implement those proposals.

‘Maintain or improve overall’ water quality

Proposals

- 1.1 Amend Objective A2 of the National Policy Statement for Freshwater Management so that it applies within a freshwater management unit, rather than across a region.

This “clarification” is presented as an improvement on the NPS-FM’s requirement to maintain “overall” water quality now only applies to a Freshwater Management Unit (usually a catchment or part of a catchment), rather than a whole region. However, the proposed change takes an unlawful approach to the requirement to maintain water quality. The Environment Court has held that an “unders and overs” approach to maintaining water quality is inconsistent with the unqualified function in section 30(2)(c)(iii) to maintain water quality.¹ The Government cannot change this requirement in subordinate legislation. The Court has also set out the “tangled issues” that would arise in terms of practical application including monitoring and enforcement if such an approach were to be taken.² Moreover, the public expects water quality to be at least maintained everywhere. It is not acceptable to set a policy position of intentionally degrading some water bodies.

Objective A2 would be significantly clarified by the removal of the word ‘overall’. We therefore request that Objective A2 be further amended to remove of the word ‘overall’.

- 1.2 Clarify that councils have flexibility to maintain water quality by ensuring water quality stays within an attribute band, where it is specified in the National Objectives Framework, or demonstrating that the values chosen for a freshwater management unit are not worse off, where an attribute band is not specified in the National Objectives Framework.

Forest & Bird does not agree with the proposed clarification that “councils have flexibility to maintain water quality by ensuring water quality stays within an attribute band, where it is specified in the National Objectives Framework, or demonstrating that the values chosen for a freshwater management unit are not worse off, where an attribute band is not specified in the National Objectives Framework”. This proposal is contrary to the requirement to maintain or enhance water quality. Movement within a band provides for significant degradation. In relation to periphyton, movement within a band equates to moving from

¹ *Ngati Kahungunu v Hawke’s Bay Regional Council* [2015] NZEnvC 50 at [56].

² At [60] – [62].

one trophic state to another (more degraded) trophic state. Similarly, for N toxicity and *E. coli* levels the bands represent significant changes in the health and state of a waterbody. The requirement to “safeguard life-supporting capacity is highly precautionary. In safeguarding life-supporting capacity there must be an active duty to manage water quality in a precautionary way and to prevent potential harm, which could occur as a result of even small degradations in quality. The duty is also to preserve the options of future generations.

In relation to the reference to values being “not worse off”, the approach proposed in the consultation document would result in failure to manage the key habitat, water quality, and quantity drivers for the value, and would fail to halt the ongoing degradation of freshwater. This is due to the temporal and spatial ways in which ecosystems and values respond to environmental drivers, and the pathways by which environmental drivers act on the values (which includes both direct and indirect relationships). It is also unclear by what is meant by “are not worse off”.

Macroinvertebrate Community Index as a measure of water quality

Proposals

- 1.3 Require the use of Macroinvertebrate Community Index as a measure of water quality in the National Policy Statement for Freshwater Management by making it a mandatory method of monitoring ecosystem health.
- 1.4 Work with the Land and Water Forum on the potential benefits of a macroinvertebrate measure for potential inclusion into the National Objectives Framework as an attribute.

We support this proposal as the MCI is an important direct measure of freshwater ecological health, but the caveat that we consider that it should be included now as an attribute. A MCI attribute was recommended by the science group that advised on the NOF but was not taken up. It is disappointing that we are only now at the stage of having MCI included as a measure, and that the consultation document’s language is so tentative around its “potential” use as an attribute. The scientific community clearly supports its inclusion as an attribute, as does the Parliamentary Commissioner for the Environment.

As discussed above, there should be an equivalent proposal for a requirement in the National Objectives Framework that when regional councils set limits for life supporting capacity, and especially periphyton, they must include numbers for nutrients (including Nitrogen and Phosphorous) that are relevant within those catchments.

Significant infrastructure and water quality

Proposal

- 1.5 Provide further direction on providing evidence when councils or infrastructure owners request that the Government include specific significant infrastructure in Appendix 3 of the National Policy Statement for Freshwater Management.

Agree that further direction is required so that any significant infrastructure for listing in Appendix 3 for an exception to the national bottom line for water quality, must be fully justified by providing evidence that the listing request meets a rigorous set of criteria.

Coastal lakes and lagoons

Proposals

- 1.6 Amend the attribute tables in Appendix 2 of the National Policy Statement for Freshwater Management so that attributes clearly apply to intermittently closing and opening lakes and lagoons, with the same band thresholds and national bottom lines as lakes.
- 1.7 Provide direction to councils on how to request that, after meeting evidential thresholds, a freshwater management unit be allowed to use a transitional objective under Appendix 4 of the National Policy Statement for Freshwater Management.

Support both of these proposals as it is important that we deal with water quality issues within whole catchments – literally from the mountains to the sea. Some of the waterbodies with the worst freshwater quality problems are coastal lakes and lagoons such as lake Waihora/Ellesmere and Southland’s lagoons, including the Waituna Lagoon.

Stock exclusion from water bodies

Proposal

1.8 Create a national regulation that requires exclusion of dairy cattle (on milking platforms) from water bodies by 1 July 2017, and other stock types at later dates (see table).

Proposed deadlines for stock to be excluded from water bodies

Farm type	Plains ((0–3°)	Lowland/rolling hills(4–15°)
Dairy cattle on milking platform	1 July 2017	1 July 2017
Dairy support (owned by dairy farmer)	2020	2020
Dairy support (third party grazing)	2025	2025
Beef	2025	2030
Deer	2025	2030*
Pigs	1 July 2017	1 July 2017

*Intensive farms only

We support the creation of a regulation that requires exclusion of dairy cattle on milking platforms from water bodies by July 2017.

The Sustainable Dairying Water Accord (SDWA) which covers nearly all dairy suppliers requires stock to be excluded from “dairy farm” waterways by 1 June 2017. The SDWA definition of “dairy farm” prior to 1 June 2017 is limited to the milking platform and excludes any dairying grazing land that is owned by the same person or entity as the milking platform and/or farmed in association with the milking platform. However, after 1 June 2017 the definition of “dairy farm” in the Accord changes to include not only the milking platform, but also any land regularly used for dairy grazing (whether or not contiguous with the milking platform) that is owned or leased by same entity as the milking platform.

As nearly every dairy support operation (owned by the dairy farmer) has known for many years that they will be required by the Sustainable Dairying Water Accord to exclude stock from waterways on their support land from 1 June 2017, the proposed regulation should also require this to happen from 1 July 2017 rather than 1 July 2020.

We believe that dairy support (third party grazing) should be able to comply by 2020, and that both beef and deer on plains (0–3°) should also be required to comply by 2020 and on lowland/rolling hills (4–15°) by 2025.

We are disappointed that LAWF’s proposals on the role of councils in respect of high country stock exclusion were not addressed in the consultation document. We request that the opportunities for practical high country stock exclusion be addressed in the any national regulations that are created.

We are also disappointed that the linked issue of riparian setbacks has not been adequately addressed, with the discussion document saying that the government does not propose to require a riparian buffer between the fence and the waterway.

Recommendation 31 of LAWF's fourth report stated that "The national stock exclusion regulation should include a requirement that when permanent fences are erected to exclude stock, they should be placed the appropriate distance back from the waterway..."

In this context we would define appropriate to mean an adequate vegetated buffer to protect the life sustaining capacity of water bodies – by preventing sedimentation, stabilise stream banks and prevent bank erosion, intercept non-point source pollutants carried by surface water runoff and remove the excess nitrogen, phosphorus and other substances that can pollute water bodies;

Technical efficiency and good management practice standards

Proposals

- 2.1 Require councils to apply technical efficiency standards in catchments that are at, or approaching, full allocation of water.
- 2.2 Where councils have elected to allocate discharge allowances, require them to apply good management practice standards in catchments that are at, or approaching, full allocation of contaminants.
- 2.3 Require councils to apply these standards at defined times, for example, at initial limit setting, on consent expiry, and/or on application to permanently transfer consents for water or discharge allowances.

Proper limit-setting for ecological health needs to occur before allocation of water is undertaken, so that allocation does not drive limit-setting.

We support the proposals that require good management practice (GMP) and technical efficiency standards for water use and nutrient management and the provisions for defined opportunities for applying these efficiency standards. However, the proposals in the Consultation Document fall far short of the recommendations made by LAWF.

The proposals would require councils to introduce these measures for catchments that are at, or approaching, full allocation of water. The LAWF recommended that such requirements should be mandatory for all catchments so that those that are below full allocation can be better managed to avoid becoming fully allocated. Proposal 2.2 also appears to only apply in situations where a council has elected to allocate discharges

allowances. This is unnecessarily restrictive as GMP should be required in all situations – even those without direct discharge allocations.

The consultation document appears to have a very narrow definition of GMP and does not address the issue of how GMP must be nested within regulation. GMP should apply to the whole range of land and water use practices that impact on the ecological health of freshwater systems. In this respect GMP was envisaged by LAWF as a fundamental requirement for all land and water users that would be implemented in all catchments.

There are a range of land and water use practices to which technical efficiency standards could be applied and it is important that such measures are not narrowly restricted to just water usage as it is defined in the consultation document.

Transferring consents to more efficient, higher valued uses

Proposal

2.4 Investigate a package of measures to better enable transfers between users so allocated water and discharge allowances can move to higher valued uses, such as:

- standardising consent specifications to better enable transfer, such as separating ‘take and use’ components of a consent
- making information available, including public registers of consented and used water and discharge allowances
- model plan provisions specifying where and in what circumstances transfers are permitted
- enabling water user groups and nutrient user groups to provide for low cost transfers.

We do not agree with provisions for management within limits until appropriate limits are in place, otherwise allocation is likely to drive limit setting rather than the reverse. Where water is not over-allocated, there is likely to be limited interest in transfers as water or its assimilative capacity can be obtained via a consent. Where water is over-allocated, any water that is not being used and is available for transfer should be put towards reducing over-allocation in the first instance, i.e. an environmental transfer. Only where water is on track to reach its quality and quantity targets should transfers to other extractive uses be enabled.

Addressing over-allocation and over-use at least cost

Proposal

- 2.5 Develop guidance on different methods of addressing over-allocation of water quality and/or quantity, if technical efficiency standards and good management practice standards are insufficient.

It should first be made clear that the primary response to over-allocation will be a regulatory approach which reduces the allocation of water or discharge allowances to users to the extent necessary to achieve targets in a defined timeframe, consistent with Policy A1(b) of the NPS.

So long as that policy response is clearly set out, we support this proposal to provide guidance on a range of methods, such as technical efficiency standards and good management practice requirements are unlikely to sufficient in themselves to address over-allocation in many of our waterbodies. The Land & Water Forum has made a range of recommendations about different methods for addressing over-allocation, and all of them should be fully developed into guidance or regulation.

Council funding for freshwater management

Proposal

- 2.6 Increase the ability of councils to recover costs from water users for monitoring, enforcement, research and management.

Support this proposal as councils are often significantly out-of-pocket when it comes to water management, research, monitoring and enforcement. This is often a reason that councils do little monitoring and enforcement. These costs should be recovered from water users rather than councils not doing this work, or councils requiring general ratepayers to subsidise these costs of good water management.

Te Mana o te Wai in freshwater management

Proposals

- 3.1 Include a purpose statement in the National Policy Statement for Freshwater Management which provides context about the meaning of Te Mana o te Wai and its status as the underpinning platform for community discussions on freshwater values, objectives and limits.

3.2 Require regional councils to reflect Te Mana o te Wai in their implementation of all relevant policies in the National Policy Statement for Freshwater Management.

We support both proposals as **Te Mana o te Wai** is a core concept for fresh water. It encompasses the integrated and holistic health and well-being of a water body. It represents the innate well-being and vitality (mauri) of a water body and its ability to provide for the health of the water (te hauora o te wai), the health of the environment (te hauora o te taiao), and the health of the people (te hauora o te tangata).

The health and well-being of our water bodies is integral to the health and well-being of our land and other resources (including fisheries, flora and fauna) and to our health and well-being both as communities and as a nation.

When Te Mana o te Wai is given effect, the water body will sustain the full range of environmental, social, cultural and economic values held by iwi and the community. This is a concept that is relevant to all New Zealanders.

Iwi and hapū relationships with, and values for, water bodies

Proposals

3.3 Councils must, at the outset of their freshwater planning process, engage with iwi and hapū to ensure all iwi and hapū relationships with water bodies in the region are identified in regional planning documents.

3.4 Councils must, when identifying values and setting objectives for particular freshwater management units, engage with any iwi and hapū that have relationships with water bodies in the freshwater management unit.

Support both proposals.

Enabling iwi and councils to agree how to work together

Proposal

3.5 The Government will amend the Resource Management Act to establish provisions for a new rohe (region or catchment)-based agreement between iwi and councils for natural resource management – a ‘mana whakahono a rohe’ agreement. The mana whakahono a rohe will:

- be initiated by iwi through notice to the councils

- be available to all iwi but will not override or replace existing arrangements for natural resource management in Treaty of Waitangi settlements nor preclude agreement of different arrangements under a Treaty settlement
- provide for multiple iwi involvement where appropriate and agreed
- set out how iwi and council(s) will work together in relation to plan-making, consenting, appointment of committees, monitoring and enforcement, bylaws, regulations and other council statutory responsibilities
- include review and dispute resolution processes.

We support this proposal.

Water conservation orders

Proposal

3.6 The Government will amend the Resource Management Act to:

- require water conservation order (WCO) applications to provide evidence of consultation with relevant iwi and have one person nominated by the relevant iwi represented on the Special Tribunal convened to hear the application
- require the Special Tribunal for a WCO (and, where relevant, the Environment Court) to consider the needs of iwi/tāngata whenua
- require WCO applications to consider any planning processes already underway
- allow the Minister for the Environment to delay an application if there will be a conflict with a regional planning process
- allow councils to recommend to the Minister for the Environment that a WCO be created over an outstanding water body that has been identified through regional planning, and allow the Minister to consider recommendations under a streamlined procedure.

In our experience, it is entirely usual for a WCO application to include information about current planning provisions including provisions in process, however WCOs are national instruments and we do not support the proposal which requires WCO applications to *consider any planning processes underway* if this means that the WCO process is in any way subordinated to local planning processes.

We oppose the proposal to *allow the Minister for the Environment to delay an application if there will be a conflict with a regional planning process*, for the same reason. This proposal would essentially subordinate WCOs to local planning processes, which is inappropriate as the WCO-related provisions in the RMA are a code for the protection of nationally outstanding water bodies. We are also concerned that this provides too much discretion to the Minister to delay progressing a WCO for political reasons.

We do not support the streamlined planning process for the reasons set out in our submission on the Resource Legislation Amendment Bill. We would not support its use for this purpose.

We otherwise support the WCO-related proposals in the consultation document.

Other WCO proposals that the Government should implement.

In 2011 the New Zealand Conservation Authority produced a report “Protecting New Zealand’s Rivers”³. In the report the NZCA supported the retention of WCOs to provide protection for rivers and other waterbodies with outstanding values as they are achieved through a transparent and robust process requiring a significant investment of time and expertise by applicants, user groups, and submitters, and careful consideration of technical and other evidence by Special Tribunals and testing of evidence by the Environment Court. The NZCA went on to make the following recommendations which the government should implement:

- The RMA should be amended to enable a WCO to include provisions applying to land use that may impact on the effect of a WCO, and to require local authorities to have particular regard to the protection of outstanding values, as recognised by a WCO, in managing land use through plans and consent decisions in catchments where the river is subject to a WCO. This would help implement the recommendation of the Land and Water Forum that the WCO provisions in the RMA be amended to enable them to achieve an integrated management approach.
- The RMA should be amended so that WCOs can provide for enhancement of outstanding characteristics. Case law indicates that enhancement of an outstanding characteristic (e.g. of a threatened species population through an improved flow regime) is beyond the scope of the legislation.

³ See p.45 New Zealand Conservation Authority. 2011: Protecting New Zealand’s Rivers. New Zealand Conservation Authority, Wellington.

- The two year restriction on applications to amend or revoke operative WCOs should be lengthened. Or alternatively, give WCOs greater permanency appropriate to the rigorous process for achieving a WCO.
- Canterbury rivers should be considered under the standard RMA process after October 2013. In Canterbury, the ECan Act means WCO applications are considered against different criteria with Environment Canterbury Commissioners rather than a Special Tribunal making recommendations to the Minister. The Environment Court now has no jurisdiction over WCOs in the Canterbury region.

The different statutory tests for a new WCO or applications to amend an existing WCO in Canterbury mean significantly less weight is given to the requirement to preserve and protect nationally outstanding water bodies, and greater weight is given to potential uses of water.

Implementation support

Proposal

- 3.7 The Ministry for the Environment will facilitate and resource programmes to support councils and iwi/hapū to engage effectively in freshwater planning and decision-making, including collaborative planning.

We support these proposals and consider that similar programmes also need to be developed to support the wider community to engage effectively in freshwater planning and decision-making, including collaborative planning.

Freshwater Improvement Fund

Proposal

4.1 The Government proposes that eligible projects will need to meet the following criteria:

- only projects that support users to move to managing within quality and quantity limits will be considered
- projects will need to demonstrate that they produce environmental benefits
- projects will be considered if the overall public and private benefits are clearly demonstrated to be greater than the public and private costs

- irrigation projects will be eligible for funding only commensurate with any environmental benefits that would not be achieved by the funding available from other sources
- any legal entity will be eligible for funding
- changes in resource use or other business practices, or installed infrastructure, will all need to be sustainable beyond the length of the project without ongoing Government funding
- extension programmes will only be funded where there are clearly public benefits and the barriers to success are about adaption and roll out at scale. These projects must continue to meet the initial objectives after the extension funding has stopped
- if comparable projects achieve similar economic and environmental objectives cost efficiently, preference will be given to projects that achieve co-benefits, such as improvements in ecosystem health, conservation and climate change
- government funding should reflect the public benefits of each project and be limited to a maximum of 50 per cent of the cost of any project. Other sources of government funding will not count towards the co-funding requirement. Priority will be given to projects with funding sourced from either business or philanthropic funds, in addition to funding sources from local government
- the minimum government contribution for projects will be \$250,000. There will be no maximum contribution.

Limited support to these proposals. We have concerns that the original focus of the \$100m funding has moved from direct improvement of water quality by purchase and retirement of selected areas of farmland next to important waterways to create an environmental buffer that helps improve water quality. There are several areas, such as the Waituna lagoon catchment in Southland where this strategy could deliver significant freshwater quality benefits. Instead the consultation document indicates that it is proposed to make this fund available for supporting the 'environmental benefits of irrigation projects that would not be achieved by funding available from other sources'. Such funding could be seen as further subsidisation of irrigation schemes that often have significant environmental impacts.

There could also be a risk that such funding could be used to provide a public subsidy to a project developer for environmental remedies and mitigations that would ordinarily be

required under the RMA consenting, or Conservation Act concession processes. The fund should not be used for activities that councils or government or resource management legislation should already be requiring.

The \$250,000 minimum contribution may exclude worthwhile smaller projects, particularly community projects.

Yours sincerely,

Kevin Hackwell

For Forest & Bird