

Submission on Proposal for National Policy Statement for Freshwater Management on behalf of the Oil Industry Environmental Working Group.

Section 49 of the Resource Management Act 1991.

**To: The Chairperson
Board of Inquiry**

1.0 This is a submission on the following proposed national policy statement (the proposal):

Proposed National Policy Statement for Freshwater Management.

2.0 The specific provisions of the proposal that the submission relates to are:

The National Policy Statement for Freshwater Management (hereafter referred to as "the NPS") in its entirety.

3.0 The submission is:

This submission is made by the Oil Industry Environmental Working Group (OIEWG) currently representing membership from Shell New Zealand Limited, Mobil Oil New Zealand Limited, BP Oil New Zealand Limited and Chevron New Zealand. OIEWG is not opposed to the intent to provide some national direction in relation to freshwater management but is opposed to the NPS in its current form and seeks its withdrawal.

In summary OIEWG are concerned that the NPS has not been well drafted, the logic not tested and its effect and implementation not well thought out. It lacks clarity on what problems it is trying to solve. It will lead to uncertainty. The NPS is very general and can mean all things to all people. It will likely result in the relitigation of existing plans and consents which in turn will involve significant transaction costs. It will likely result in a management regime that will likely be at odds with other centralised initiatives (e.g. energy strategy and contaminated land management). It is effectively ascribing a further function to District Councils, who are not necessarily equipped or resourced to accept it. Its scope is too broad, the objectives are not appropriate to apply to all freshwater resources in all situations. The implementation of the NPS is too narrow (through Plan changes and consents) and confirms a lack of understanding of the problem trying to be

solved. The objective for all land use developments and discharges to avoid degradation is too absolute, the consequence of which will be that it is unlikely to result in any measurable environmental improvement without disproportionately impacting on the wellbeing of people, the community and functioning of businesses.

If there is to be a NPS for freshwater management, then OIEWG submits that its provisions need to be far more detailed and targeted.

4.0 The reasons for the submission are:

Since the implementation of the Resource Management Act the OIEWG participants have been proactive in targeting and addressing the key environmental issues that arise from their operations. They have also been proactive in the submission and appeal process relating to the development of regional and district plans. OIEWG has been instrumental in the development of the following industry guidelines that have particular relevance to water quality:

- Environmental guidelines for water discharges from petroleum industry sites in New Zealand: Ministry for the Environment 1998.
- Above-Ground Bulk Tank Containment Systems - environmental guidelines for the Petroleum Marketing Companies: Ministry for the Environment 1995.
- Guidelines for assessing and managing petroleum hydrocarbon contaminated sites in New Zealand: Ministry for the Environment 1999.

These Guidelines represent industry best practice. The industry has been endeavouring to ensure all new development complies with the relevant guidelines. It has also been undertaking a progressive programme of retrospective upgrades (in relation to cost, sensitivity of receiving environment, regulatory imperative) to ensure its existing facilities comply, overtime, with the above guidelines. In addition, OIEWG has been and continues to be involved extensively with the Ministry for the Environment's contaminated land programme with a forthcoming review of the 1999 guideline like to be initiated in the near future. OIEWG is presently inputting into the review of ANZECC guidelines.

OIEWG is very concerned with the NPS and its potential to result in significant and unnecessary costs on its member companies, the community and the environment. OIEWG's primary concerns with the NPS relate to issues relating to water quality rather than allocation. OIEWG's principal concerns are identified under the following headings:

- 4.1 Generic nature of the NPS
- 4.2 Lack of identification of the issue (problem).

- 4.3 Implication of the inclusion of groundwater and avoidance of degradation.
- 4.4 Need for reinterpretation and potential relitigation.
- 4.5 Potential duplication of functions.
- 4.6 Industry good practice as a minimum.
- 4.7 Definitions.
- 4.8 Some specific comments in relation to each objective and policy.

A brief discussion of the concerns relating to each heading follows.

4.1 Generic nature of the NPS

The objectives and policies are very generic. In many ways they do not take anyone much further than the words in the RMA and indeed in most cases the words in existing regional plans already takes matters further than is proposed here. The identified purpose of the NPS is to reaffirm the “management of Freshwater Resources as a matter of national significance that is relevant to achieving the purpose of the Act”. One of the reasons cited in the s32 analysis for rejecting an amendment to Section 6 of the Act as a preferred approach was that an NPS can be more detailed (and presumably directive). Ironically, the NPS lacks both detail and direction, and at this stage does not provide any benefit in terms of meeting its purpose, that would not be gained by amending section 6. To some extent this is not surprising when the s32 evaluation criteria has been based primarily on s5 and therefore the objectives, to some extent, represent various restructures of s5 in relation to water resources..

The generic level at which the wording of the NPS is pitched means that it also has the potential to host, and become a vehicle for, a whole array of other unintended agendas. This in turn leads to potential uncertainty and impacts upon business investment. The generic nature of the wording appears to be the result of a lack of clear focus on what issues need to be addressed and resolved at the NPS level (as opposed to currently being addressed at the regional/district level in relation to the resource issues of the area concerned). In other words, the case for and articulation of the national imperatives relating to water quality and allocation (as opposed to each region getting on and dealing with its unique set of issues, as currently happens) in terms of the RMA framework), has not been made. Consequently, seeking to implement these generic national objectives and policies through changes to RPS's, and subsequent regional plan and district plan change/variation and resource consent process is likely to obfuscate the basis for any national imperative still further. Allowing for the associated increased information requirements and extra work involved in translating new national objectives and policies

into the local context, will cause considerable additional and unnecessary transaction costs for all parties involved in the process.

4.2 Lack of identification of the issue (problem)

The preamble provides a brief insight into what the issues or problems are that require addressing through an NPS. The nationally significant issues (as per the preamble) and the basis for which intervention (i.e. NPS) is argued is as follows:

- insufficient fresh water supply to meet demand;
- a failure to adequately protect the ecology of freshwater systems;
- society is not receiving optimal benefit from present water allocation practice;
- there is a lack of understanding how water can be sustainably allocated;
- there is a lack of understanding of how land use change affects water quality and options for managing adverse effects that arise from that;
- inadequate consideration of climate change in dealing with the above matters.

Unfortunately those are very generic Freshwater Resource issues and they aren't necessarily of national significance in each region. They can and do occur in regions to various degrees and extent and for different reasons and consequently they require different approaches in each Region. It is not as if these issues are not currently being worked upon. This NPS contrasts markedly with the National Policy Statement on Electricity Transmission, which addressed an issue (management of effects in relation to the National Grid) which is consistent across the country.

The NPS is effectively saying anything to do with water allocation or quality is a national issue. It is difficult to believe that this can be the case in every situation. What is not clear is what it is about the existing regime of regional and district plans, resource consents and the Act, that is failing to identify and address these issues and/or is contributing to allowing these problems to continue. This needs clarification as the outcome of the NPS will be to prepare more plans (notwithstanding that the s32 analysis acknowledges that most regional councils already have such plans). For some water quality problems (e.g. groundwater allocation) the issues may arise from a lack of information, in which case the solution may be to fund more resource information collection. Funding may be an issue for other water quality problems where solutions are known or can be applied, e.g. sewage overflows or retrofitting of stormwater catchments.

The scope of real issues to which the NPS applies is prodigious. As a consequence the generic objectives and policies in the NPS apply across a whole range of resource issues

equally and without any great degree of differentiation. The scope of matters covered by this NPS (encompassed by the scope of the definition of Freshwater Resources) includes climate change, sediment control in relation to development and existing runoff, stormwater quality and capacity from all land uses, wetland management and protection, contaminated land management, water allocation of groundwater and surface water, ecological and iwi values of all receiving environments, damming and diversion of all water, hazardous substance management, all liquid discharges. This is far too wide a scope for any NPS, but particularly for one where the identification of the issue (i.e. the basis for the intervention) has not been sufficiently detailed and analysed.

The lack of clearly identified issues in relation to specific resource matters means that the subsequent objectives and policies remain codified in generalities and ambiguities. It is recognised that there are potentially significant issues that could benefit from the development of a NPS. For example, water demand arising from the growth of the dairy sector has generated very specific issues in Canterbury and Southland. Similarly, where a resource has been over-allocated, defining how reallocation could occur over time to move to a more sustainable basis would be of value. Indeed, OIEWG has advocated to the Ministry for the Environment that there should be a NPS on contaminated land management, because the issues are fundamentally the same across the country; they are technical, complicated and require specific detailed guidance. Such an NPS would be markedly different to this one.

In summary, if there are specific problems or “failures” with the existing planning regime these need to be clearly identified, teased out and targeted rather than addressed via this generic NPS.

4.3 Implication of the inclusion of groundwater and avoidance of degradation.

Groundwater falls within the definition of Freshwater Resources. OIEWG is particularly concerned that water quality issues relating to contaminated land management will effectively need to be addressed, in terms of the proposed NPS, as contaminants in land have the potential to impact on groundwater quality. In other words the NPS effectively becomes the contaminated land NPS. In this regard aspects of the NPS such as objective 5 (avoidance of further degradation of Freshwater) could well result in district and regional planning frameworks that are at odds with each other and with the direction

of the Ministry for the Environment's contaminated land programme and/or result in impracticable and unworkable provisions (as districts, in particular, will have few people on their staff who understand water quality issues).

OIEWG would like to see issues relating to contaminated land management specifically excluded from the NPS. Reference should be made to the Ministry's guidelines or a separate NPS for contaminated land developed.

The objective of "avoidance of degradation in objective 5 will have significant implications and potential costs that one has to consider how well the NPS has been thought out and the logic has been tested. The RMA is about managing adverse effects however the objective demands a zero degradation threshold for all land uses and discharges and irrespective of the nature and quality of receiving environment. This will cause significant issues in implementation and likely to be a significant imposition on all development that is not a permitted activity. For example there are a number of significant sewage schemes around the country that have taken their discharges out of freshwater bodies and applied them to land (e.g. Rotorua and Horowhenua). Under the NPS such a proposal would be contrary to objective 5 in that such discharges can be argued to be degrading the groundwater, irrespective of whether that underlying aquifer is being used. This objective is not realistic and inappropriate. Furthermore imposing such an objective effectively removes concepts of reasonable mixing and assimilative capacity.

4.4 Need for reinterpretation and potential re-litigation.

The NPS introduces a range of objectives and policies that restructure many of the phrases and wording in the RMA, and refers to some specific concepts (e.g. "efficiency, "progressive enhancement", "effective integrated management of the effects of Land Use Development", "notable values"). There is no merit in doing this, especially when, as noted previously, the s32 analysis has already identified that most regional councils have regional plans addressing water quality issues.

OIEWG's experience to date is that the regional councils will have more or less gone through a process where such issues have been examined and the matters required to be addressed in the RMA dealt with through the plan development, submission and appeal process, sometimes at significant cost to the participating parties. The generic nature of the proposed NPS wording will require a significant degree of reinterpretation by Councils' and all other parties involved in the submission process, to identify what it

means in terms of intent and required Council response. There is a risk that there will be inconsistent interpretation and responses made. As already indicated it is possible that many parties (all changes will have to go through the plan change or variation process) will read into the generic NPS statements some form of sanction for their own agenda. This is likely to see a potential re-litigation of issues that have already been worked through the planning and appeal process. This could involve further and significant costs in re-litigation and further delay effective implementation of the existing planning policy frameworks.

The NPS policies strongly focus on the setting of conditions on resource consents. The setting of consent conditions themselves will not necessarily address the issues. This has to go hand in hand with compliance, enforcement and monitoring. However even where those are in place they cannot resolve water quality issues arising from some systemic failure, e.g. lack of funding for infrastructure improvement such as sewage overflows. Water quality issues need to be tackled on many levels (e.g. strategic, planning, political support, infrastructure investment, funding constraints, etc). A consent focus is only one part of the picture. A consent focus could well undermine or deflect appropriate attention from the planning, development and implementation of comprehensive catchment approaches to water quality management. It should be noted that it is the setting of the permitted baseline in district and regional plans that is often the most critical component in determining water quality in a catchment, not the application of consent conditions on individual applications. OIEWG has experience with at least one council where the resource focus on the minutiae has resulted in disproportionate costs in relation to the level of effects generated (e.g. need to treat all impermeable areas irrespective of the level of effect generated) and where staff refuse to accept industry best practice.

Among other things, Policies 2 and 3 specifically require monitoring and reporting conditions on resource consents in relation to the policies. Those policies deal with generic water quality and allocation matters. There is a risk that the NPS may provide a means by which Councils (which are generally short of information) and/or other parties seek to require applicants for resource consents to provide receiving environment data, using the NPS as a mandate for scientific research. This is a particular concern in respect of District Councils given their general lack of experience in water quality matters.

Policy 6 appears to leave the door open to review all existing consents in the light of the NPS. There is no guidance on the circumstances under which it may be appropriate (or inappropriate) to re-litigate existing consents e.g. existing hydro developments. This has

the potential to impose significant costs and create significant (business) uncertainty for little or no environmental benefit. It is of particular concern for land use consents and designations, and what that is likely to mean for existing consents that didn't address those matters at the time they were granted.

4.5 Potential duplication of functions.

The NPS seeks to make Territorial Authorities responsible for water quality by virtue of requiring that rules be established to include conditions on resource consents issued by them. This has the potential to blur the functional separation that currently exists in the RMA between region and districts. It also requires them to impose conditions on matters for which they have a dearth of experience. It is far from clear why this is necessary or why regional plans rules are considered to be inadequate.

4.6 Industry good practice as a minimum

Policies 2, 3, 5 and 6 require achievement of compliance with the relevant policies, as a minimum by the use of industry good practice. There is no definition of "industry good practice" and hence no guidance on how this can be determined or assessed. OIEWG is not opposed to the application of industry good practice as a concept and indeed seeks to ensure that the MfE Guidelines identified earlier in this submission are recognised and accepted as being industry good practice for the oil industry. However, the application of such practice as a minimum can set an extremely high threshold, particularly where existing facilities are being required to be retrofitted with the necessary equipment. In that case, retrofitting needs to occur within realistic timeframes and according to appropriate priorities. The application of the "industry good practice as a minimum" concept really needs to be considered within the framework of the Act's best practicable option (BPO). It is not clear why the NPS should in fact be moving away from the application of the BPO. OIEWG supports reference to achieving industry good practice, particularly if appropriate recognition is given to the MfE guidelines. However, OIEWG wishes to ensure it is not a minimum requirement and that any such policy is applied within (and not instead of or conflict with) the BPO framework of the Act.

4.7 Definitions

“Degraded freshwater resources”: The definition requires the exercise of discretion and is more akin to an objective. One has to go through a process to determine and identify the “notable values” in various water bodies, identify the “inappropriate” land use development and discharges that have occurred and if that is “so degraded” as to trigger a priority requirement for enhancement, it is then deemed to be a degraded freshwater resource. Some clearer thinking and guidance is required on the circumstances under which a resource should be considered to be degraded. It is not clear how this is to be defined nor how priority is to be determined. Consequently, it could well result in leaving any competing interests to define as there is no context given or identification of how that should be done or by whom. Such a definition is highly subjective and unhelpful. If resources are to be defined by a process for enhancement then there should be policy that guides Councils to identify resources that require enhancement.

“Notable Values”: The definition simply lists what these might potentially be. The mere presence of such a value as listed (and the list is not exclusive so leaves an opening to add any values one cares to) does not make it notable. There is no guidance on how one would ascribe the presence of such values as being notable. Every resource may have some values attached to it but that doesn’t mean that the resource in question should then be automatically protected and receive special treatment.

“Outstanding freshwater resources”. The definition refers to those freshwater resources where the values are such that priority be given to protection. This definition provides no guidance on the criteria for determining that. In fact, it appears to substantially lower the threshold of what might be considered outstanding, as it opens up the possible contest for the majority of water bodies, by virtue of the link to water with any of the “notable values” attached to it. This is not acceptable. There needs to be a very high threshold for identifying outstanding freshwater resources. Existing case law on water conservation orders will be of assistance here.

4.8 Some specific comments in relation to each objective and policy.

Objective 1: This provides no added value, and is merely a reiteration of RMA wording.

Objective 2: This objective includes the phrase “the effective integrated management of the effects of discharges of contaminants”. After considering the document as a whole it

is not clear what such a phrase would mean, or what would be required to be put in place to achieve this.

Objective 3: The phrase “progressive enhancement” may detract from investment in bigger picture matters and structured catchment based approaches to water quality management. Provided a Council is adding conditions to consents it is likely to be complying with the NPS. The objective does not require that issues be appropriately identified and prioritised. As a consequence Councils will be likely to tackle the easier matters first (e.g. individual ad hoc consents) rather than the more substantial (e.g. permitted baseline or themselves as primary infrastructure operators, catchment retrofitting), complicated and systemic failures leading to the more substantive water quality issues. Focus on swimmable standards in particular has the potential to cause significant issues when applied to groundwater.

Objective 5: Avoidance of “further degradation” is in-effect a zero tolerance threshold across the country. It has the potential to remove and over-ride the concept of reasonable mixing that is inherent in the RMA. It can be used and interpreted too literally to stifle all forms of economic development, irrespective of the level of effects.

Objective 6: It is impossible to manage “demand” in a sustainable way. In many respects demand can be insatiable. It is the process of allocation that should be undertaken in a sustainable way. Allocation needs to be managed on the basis of effects on the environment, on other users and in terms of efficient and sustainable use (which will include factoring in the effect of climate change).

Objective 7: Avoiding “excessive” contamination of allocated water is rather an ambiguous concept. Once allocated, water is used in industry, domestically and in agriculture for a whole range of purposes. It is uncertain what “excessive” is likely to mean and or what is trying to be targeted. Furthermore it is not clear why the level of contaminants in allocated water should be an issue, except at the point of discharge, in which case it is a discharge issue, it is not an efficiency issue. The degree of contamination of allocated water should not be a basis by which efficiency is offset.

Objective 8: Regional councils’ have gone through this process with their constituent iwi and there is already an obligation under the RMA. The areas where this has not been achieved to date have not been clearly identified. A result the objective is untargeted and unhelpful.

Objective 9: This reiterates the requirements in the Act in terms of s35 and therefore it adds no real value. The subsequent policies appear to provide a basis upon which the obligation on councils for monitoring and reporting can be placed on resource consent holders.

Policy 1: This policy effectively makes optional regional plans compulsory. It is not necessary to set environmental flows and levels for all freshwater resources within a region. There is a risk that the level of detail required to achieve the matters set out in the policy could detract from implementing existing plans and divert resources where there is no real issue to be addressed. Many of the matters covered are already to a greater or lesser extent covered in existing planning documents. Policy 1 (apart from the matters relating to allocation) is primarily process focused and runs the risk of creating a lot of additional work and re-litigation of issues for councils, a process which may not necessarily lead to better environmental outcomes, especially in the context of such generic NPS provisions.

Policy 2, 3 and 5: Issues relating to these policies have already been covered in sections 4.1 to 4.7 above.

Policy 4: It is not clear what “value-added” this policy provides or how it is to be interpreted. It includes a list of “must consider” matters, yet a number of these (e.g. Notable Values) are already explicitly required or provided for by other policies. The list does include some matters not addressed elsewhere (e.g. needs of industry, existing economic investment) or in only one other policy (e.g. transition costs in Policy 6), however, it remains uncertain what one needs to do in considering those matters. It therefore raises matters of interpretation if such matters are not mentioned elsewhere and can only be considered in terms of Policy 4.

Policy 6: This policy requires that conditions be imposed on consents in relation to the matters listed. Presumably the intent is that such conditions achieve the matters listed (in terms of outcomes). It is noted in (b) that management of activities that give rise to stormwater has been specifically identified. The wording is likely to be interpreted by many as implying that all impermeable surfaces need some form of management for quantity and quality. This is not necessarily the case.

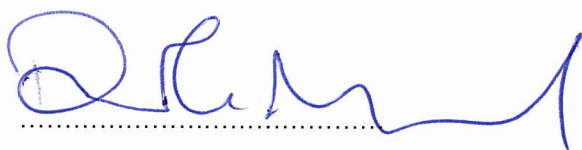
It is noted that in e) the policy seeks conditions relating to monitoring and reporting on what are effectively policy outcomes as opposed to the effects of the activity for which consent is sought. This approach is fundamentally wrong. Councils should only be imposing monitoring of consent conditions in relation to the effects of the activity for which consent is sought. Policy 6 gives considerable scope (and imperative) for Councils to pass on their broader monitoring obligations (including state of the environment monitoring) to individual consent holders. This is inappropriate.

Policy 8: The first part of the policy adds no greater value than that already provided for in section 35A of the RMA. The second part requires Councils to identify the actions and regulatory methods that are giving effect to the NPS. This appears to be the shortcut method by which the review requirements identified in Policy 9 will be implemented. The outcome of this is likely to be a checklist approach to compliance rather than an evaluation of whether the (as yet unclarified) national imperatives are being achieved.

5.0 OIEWG seeks the following changes to the proposal:

Withdraw the proposed NPS. If there are specific matters that need to be addressed by the use of an NPS, then these need to be appropriately identified, the issues clearly articulated and specific objectives and polices developed to address them.

6.0 OIEWG wishes to be heard in support of its submission.



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23/1/09
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