



Submission on Proposal for National Policy Statement for Freshwater Management

Section 49 of the Resource Management Act 1991

To: The Chairperson
Board of Inquiry

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

Proposed national policy statement for freshwater management (hereinafter "NPS")

This submission relates to the entire NPS.

This submission is on behalf of the Resource Management Law Association of New Zealand Inc. (hereinafter "RMLA").

Introduction

1. The submission on behalf of the RMLA focuses on the following factors:
 - a. Whether or not the NPS clearly identifies matters of national significance relevant to achieving the purpose of the Act.
 - b. Whether or not the NPS is likely to assist in our interpretation of matters relevant to achieving the purpose of the Act.

2. The RMLA does not take a policy position on specific values, targets or positions of policy, therefore where it sees a gap or inconsistency that may weaken the

effectiveness of the NPS, it will highlight that gap or inconsistency. However the RMLA is of the view that it is the role of the Board of Inquiry and ultimately the Minister to determine the appropriate substantive, policy or value based detail in the NPS.

3. In general terms, the RMLA supports the emphasis in the NPS on integrated management of water, required identification and protection of instream values, improvement of water quality, more strategic management of the use of water and more emphasis on efficiency of use of water as being matters of national significance relevant to achieving the purpose of the Act. However, in order for the NPS to be effective at clarifying how these matters of national significance are to be achieved, and improving our ability to give effect to the purpose of the Act, the RMLA submits that more clarity is required, and more specific, measureable thresholds and targets should be set. Without clear thresholds and targets, the NPS does not provide the any substantive additional direction over and above existing provisions in the Act.

Consistency and workability with National Environmental Standard on Ecological Flows and Water Levels (“NES”).

4. The RMLA submits that there needs to be consistency with the terminology, concepts and objectives used in both the NES, and this NPS. The NES is in proposed form, and the submission process is complete, but there has been no hearing or final decision, therefore its final form is not set. The NPS and the NES will have a significant degree of overlap and commonality; therefore it will be essential for there to be a process whereby this consistency is achieved.
5. As the NES is in a different stage in the process to the NPS, and could change from its current form, the RMLA has not sought at this stage to highlight the differences

and inconsistencies between the two instruments, but instead submits that the Board of Inquiry ensures a process is put in place to address this concern.

Objectives

6. This section will evaluate the objectives of the proposed NPS. The objectives are intended to identify matters of national significance relevant to achieving the purpose of the Act (section 45 (1)). Note that matters of national significance are not limited to the matters of national importance in section 6. Having said that it is submitted that an NPS cannot elevate a section 7 matter above a section 6 matter in terms or relative importance, should there be a conflict between the two sections.

Objective 1 – Enabling well-being of people and communities

To ensure that Freshwater Resources are managed in a way that enables the people and communities of New Zealand to provide for their social, economic and cultural well-being and their health and safety

7. This objective mirrors part of section 5, therefore it is difficult to see what value it adds. Effectively it is stating that the Freshwater Resources should be sustainably managed in accordance with section 5, which is a given. The sustainable management of freshwater is not so much a matter of national significance relevant to achieving the purpose of the Act, as it is completely embodied in the purpose of the Act. Unless it can be clarified how this objective adds to the interpretation of matters of national significance relevant to achieving the purpose of the Act, the RMLA submits this objective be deleted.

Objective 2 – Ensuring integrated management of effects on fresh water

To ensure effective integrated management (including by the co-ordination and sequencing of Land-use development with investment in infrastructure for supply, storage and distribution of fresh water) of the effects of Land-use development and discharges of contaminants on the quality and available quantity of fresh water.

8. This objective identifies that integrated management is a matter of national significance relevant to achieving the purpose of the Act. It is submitted that integrated management, as a stand alone concept, has the potential to be a clear objective signalling a specific type of emphasis that could assist in achieving the sustainable management of fresh water.

9. However, the expansion on what "effective integrated management" is in the objective is effectively duplicated in Policy 1 (j). In the context of the RPS objective it is submitted that a higher level expression/definition of integrated management is required, and the details about co-ordination and sequencing, and other effects can be left for addressing at the policy level. It is submitted that Objective 2 be amended to the following effect:

"To ensure effective integrated management by requiring strategic planning of future Land-use Development, discharges of contaminants, damming, diversion and taking, and requiring that any decisions made in respect of Land-use Development, discharges of contaminants, damming, diversion and taking of water all have particular regard to the effects on Freshwater Resources."

Objective 3 – Improving the quality of freshwater

To ensure the progressive enhancement of the overall quality of Freshwater Resources including actions to ensure appropriate Freshwater Resources can reach or exceed a swimmable standard.

10. This objective is relevant to section 7 matters and adds to our interpretation of those sections. Relevant Part II matters are to be read in the light of objective 3's identification of the enhancement of water quality as a matter of national significance relevant to achieving sustainable management. In this sense, the objective aids in our interpretation of Part II, and the relevance of the values identified in Part II.
11. However, it uses terms that result in some lack of clarity as to its true intent. The statement "progressive enhancement of overall quality of Freshwater Resources" could be read as allowing for some Freshwater Resources to be progressively degraded, while others are enhanced, as long as there is an overall enhancement.
12. Furthermore, neither in Objective 3, nor at the Policy level, is there any guidance as to the timeframe by which the standard is to be achieved. It is submitted that such guidance is desirable as it provides certainty, and removes a contentious, ambiguous issue that will otherwise likely be subject to debate and litigation in each region. It is submitted that the NPS should set a deadline by which Freshwater Resources reach or exceed the swimmable standard (or whatever alternative standard is ultimately deemed the appropriate target).

Objective 4 – Recognising and protecting life supporting capacity and ecological values

To ensure the life supporting capacity and ecological values of Freshwater Resources are recognised and protected from inappropriate –

- (a) *taking, use, damming or diverting of fresh water; and*

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- (b) *Land-use Development; and*
- (c) *discharges of contaminants*

13. There is an inconsistency between the values that this Objective, together with Objective 3, aim to protect, and the definition of "Notable Values", which is included at the policy level, presumably to give effect to these objectives. "Notable Values" is currently defined as:

In relation to any Freshwater Resource includes:

- (a) Scientific, ecological and biodiversity values;*
- (b) Cultural values;*
- (c) Recreational (including contact recreational eg swimming)*

14. However, at the objective level, not all the types of "notable values" are included – i.e. there are no objectives that specifically relate to scientific values, or recreational values that are not entirely dependent on swimmable water quality. It is submitted that this could be remedied by amending Objective 4 as follows:

Recognising and protecting life supporting capacity and ~~ecological~~ Notable Values

To ensure the life supporting capacity and ~~ecological~~ Notable Values of Freshwater Resources are recognised and protected from inappropriate –

- (a) taking, use, damming or diverting of fresh water; and*
- (b) Land-use Development; and*
- (c) discharges of contaminants*

Objective 5 – Addressing fresh water degradation

To control the effects of Land-use development and discharges of contaminants to avoid further degradation of Freshwater Resources.

15. The Objective effectively states it is a matter of national significance to halt the degradation of Freshwater Resources. If read in conjunction with Objective 3, the duty extends beyond just halting degradation, to enhancing water quality to a certain extent.
16. It needs to be considered whether controlling future Land-use development, and further discharge of contaminants, is sufficient to achieve the objective of halting degradation. If there are on-going activities that are contributing to degradation of water quality, then the NPS should provide direction in respect of these existing activities, not just future activities, if it is to be effective in halting existing degradation, caused by existing, currently lawful activities. This could be achieved with amendments to the following effect:

Objective 5 – Addressing fresh water degradation

To control the effects of Land-use development, land use activities and present and future discharges of contaminants to avoid further degradation of Freshwater Resources.

Objective 6 – Managing demand for freshwater

To ensure that demands (including social, economic and cultural demands) for fresh water are sustainably managed in a manner that has regard to the following:

- (a) *available supply of freshwater*
- (b) *the need to provide for resilience against the biophysical effects of climate change (such as through infrastructure of supply, storage and distribution of fresh water);*

(c) *the adverse effects that arise from those demands*

17. It is submitted that this objective adds little to our understanding of how to apply Part II of the Act. It also does not seem to clearly identify a matter of national significance relevant to the purpose of the Act, in a way which adds to our understanding of how the Act is to be applied.
18. The use of the term "demand" rather than "use" is also unusual, and inconsistent with the terminology applied elsewhere in the proposed NPS, and the RMA, in relation to water.
19. Additional guidance could be provided if this objective specified that additional regard be had to the priority that be given to competing demands, so that demands for uses that are superior in terms of efficiency, or domestic supply, or regional or national need, be given priority.
20. It is unclear whether this Objective is aimed just at Consumptive Uses, or all uses that come under the term "social, economic and cultural" that rely on the water remaining instream/in the water body, such as recreation, Mahinga kai, commercial tourist operations etc. If this objective is aimed at Consumptive Use, this should be clarified
21. It is submitted that changes to the following effect would address this:

Objective 6 – Managing demand for Consumptive Use of freshwater

To ensure that demands (including social, economic and cultural demands) for Consumptive Use of fresh water are sustainably managed in a manner that has regard to the following:

(a) available supply of freshwater

(b) the comparative efficiency of use between competing demands

(c) the need that gives rise to the demand

~~(b)~~ (d) the need to provide for resilience against the biophysical effects of climate change (such as through infrastructure of supply, storage and distribution of fresh water);

~~(e)~~ (e) the adverse effects that arise from those demands

Objective 7 – efficient use of fresh water

To ensure that allocated fresh water is used efficiently particularly in terms of the following:

- (a) avoiding wastage*
- (b) avoiding excessive contamination*
- (c) facilitating opportunities to increase benefits from the use of freshwater*

22. This objective makes a start at defining efficient use, at the level where it is a matter of national significance relevant to the purpose of the Act. It focuses on ensuring water is used efficiently, once it has been allocated, rather than setting as an objective that water be allocated to the most efficient users.

23. It is submitted that if the ultimate objective is the efficient use of freshwater, then consideration of efficiency has to occur both at the allocation stage, as well as each individual end-use:

Objective 7 – efficient allocation and use of fresh water

When allocating to Consumptive Uses ensure that water is allocated to the most efficient use, and that allocated fresh water is used efficiently particularly in terms of the following:

- (a) avoiding wastage*
- (b) avoiding excessive contamination*

(c) facilitating opportunities to increase benefits from the use of freshwater

Objective 8 – Iwi and Hapu roles and Tangata Whenua Values and Interests

To ensure that iwi and hapu are involved, and Tangata Whenua Values and Interests are identified and reflected, in the management of Freshwater Resources including the matters identified in Objectives 1 – 7.

24. It is submitted that the requirement to "identify and reflect" in this objective, is weaker than the requirement in objective 4 to "recognise and protect" life supporting capacity and ecological values, and query whether or not there should be this disparity.

Objective 9 – Ensuring effective monitoring and reporting

To ensure that regional councils and territorial authorities undertake effective monitoring and reporting of the matters specified in Objectives 1 – 8.

25. It is agreed that it is a matter of national significance to ensure the effective monitoring and reporting of the objectives of the NPS.

Key terms defined

26. "Land-use development" is defined as "includes land-use intensification, land-use change and subdivision of land".

27. The RMLA supports this definition. The potential weakness in reference to land-use development in the NPS comes not from the definition, but from the failure to mention existing land-use activities, and the ongoing effect of that use on water quality and quantity. The RMLA submits that if the NPS is to comprehensively address the

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range of activities that are having an ongoing adverse effect on freshwater resources, and continue to cause degradation of those resources, then the NPS needs to address existing land-use activities, as well as future land-use development. Accordingly a definition for “land-use activities” in the context of effects on freshwater is required, as is a corresponding objective and policy. However, as such objectives and policies go far beyond the scope of the current draft of the NPS, the RMLA does not wish to submit particular objectives and policies in this regard. It is submitted instead that the effectiveness of the NPS in its current form, in the absence of addressing the ongoing effects of existing land-use activities be reviewed, and the Board of Inquiry introduce objectives and policies to address the ongoing adverse effects of existing land-use activities on the quality and quantity of freshwater resources.

28. *“Freshwater Resources” is defined as “the fresh water of New Zealand’s rivers, lakes, wetlands and groundwater systems [but does not include fresh water of any ephemeral stream or artificial watercourse]”.*
29. This definition is inconsistent with the definition of water body in the RMA, which does not exclude ephemeral streams. There is no explanation in the section 32 report explaining the difference. The RMLA objects to the omission of ephemeral streams without justification. On the face of it, ephemeral water bodies could sustain, or contribute to the sustaining of the natural values the NPS has been established to address. The RMLA seeks that the exclusion of ephemeral streams be removed.
30. *“Degraded Freshwater Resources” is defined as “those Freshwater Resources of a region whose Notable Values have been so degraded by inappropriate Land-use development, discharges of contaminants and/or the taking, use, damming or*

diverting of fresh water as to require that priority be given to enhancement or restoration in order to achieved the purpose of the Act”.

31. The RMLA submits that this definition does not set an identifiable threshold that assists in the interpretation and application of the Act. Similar to the definition of "Outstanding Freshwater Resources" addressed below. The definition currently just states that a resource is considered degraded if it is degraded to such an extent that it should be enhanced as a matter of priority. This does not assist at all in understanding what the threshold is for a resource to be actually considered degraded in this context. No national guidance is provided for the regional councils to proceed with the assessment of this matter. It is submitted that for this term to be of assistance, it should refer to an identifiable, unambiguous threshold test.
32. The definition currently refers to “Land-use development”, which is defined as future changes to land use. By implication this excludes existing land uses, which may be having ongoing adverse effects. It is submitted that existing land-use be included also.
33. The RMLA does not support the reference to “priority” as it is currently drafted, as it is unclear. It could be read that the enhancement or restoration of degraded freshwater resources be given priority over the protection of other freshwater resources. The RMLA does not believe this is the intention of the drafting.
34. It therefore submitted that the following changes be made to the definition:
35. “Degraded Freshwater Resources” is defined as “those Freshwater Resources of a region whose ~~Notable Values have been so degraded~~ [insert defined threshold test for degradation] by inappropriate land use activities, Land-use development,

discharges of contaminants and/or the taking, use, damming or diverting of fresh water as to require (that priority be given to) those Freshwater Resources be enhanced or restored as soon as practicable in order to achieve the purpose of the Act”.

36. *“Consumptive Use” is defined as “any use of freshwater that alters the flows and or levels in a Freshwater Resource on either a temporary or permanent basis, including:*
- storage and later release downstream of fresh water;*
 - permitted activities*
 - takes under section 14 (3) (b) and (e) of the Act*
- but excludes any water that is returned to the same Freshwater Resource at or about the same location and which does not affect the spatial or temporal availability, or the physical, chemical or biological quality of fresh water.”*
37. The RMLA generally supports this definition.
38. *“Environmental Flows and Water Levels” is defined as “a regional rule to prevent the allocation for Consumptive Use of Freshwater Resources necessary for the purposes of protecting, maintaining, enhancing or restoring Notable Values of the relevant Freshwater Resource.”*
39. The RMLA supports this definition.
40. *“Freshwater Quality Standard” is defined as “a regional rule of freshwater quality which gives effect to this National Policy Statement”.*
41. The RMLA supports this definition.

42. *"Notable Values" are defined as "in relation to any Freshwater Resource includes:*
- (a) scientific, ecological and biodiversity values*
 - (b) Cultural values*
 - (c) Recreational (including contact recreational eg swimming) values."*
43. The RMLA is concerned that this definition is inconsistent with the similar terms contained in Part II, and is also potentially inconsistent with the concept of outstanding characteristics and features of water bodies that can be recognised and protected pursuant to Water Conservation Orders under Part 9 of the Act. This definition potentially sets up a third category of features and characteristics of Freshwater Resources that will be subject to different tests and emphasis than is currently given in Part 2 and Part 9 of the Act.
44. While the RMLA generally supports the need to define the values that are to be protected, restored or enhanced as a matter of national importance pursuant to this NPS, it is submitted that this particular definition requires amendment to ensure its meaning and place in the context of relevant sections of Part 2, and Part 9, is clear and unambiguous.
45. Furthermore, as submitted in respect of Objective 4, not all the types of "notable values" are specifically addressed at the Objective level – i.e. there are no objectives that specifically relate to scientific values, or recreational values that are not entirely dependent on swimmable water quality. It is submitted that this could be remedied by amending Objective 4 so that it includes reference to "Notable Values", or alternatively so that it specifically refers to all the types of values encapsulated under the Notable Value definition.

46. *“Outstanding Freshwater Resources” is defined as “those Freshwater Resources of a region whose Notable Values and/or Tangata Whenua Values and Interests are such as to require that priority be given to protection in order to achieve the purpose of the Act.”*

47. The RMLA objects to this definition, as similar to the definition of “Notable Values”, it is inconsistent with the use of the same terminology in Part 2 of the Act, and unclear how it sits with the use of the same terminology under Part 9 of the Act. Both these parts of the Act refer to “outstanding” and apply specific tests in that regard. It seems that this NPS definition of “outstanding” is potentially different again. The definition does not set a threshold or comparative requirement for a resource to be considered outstanding. The definition currently just states that a resource is considered outstanding if it has values that are such as to require priority be given to protection. This does not assist at all in understanding what the threshold is for a resource to be actually considered outstanding in this context. No national guidance is provided for the regional councils to proceed with the assessment of national resources. It may be that some reference to the water quality classes Schedule 3 of the RMA is appropriate.

48. It is not the RMLA’s place to suggest what this threshold should be. It is simply submitted that this definition be reviewed, bearing in mind the current uses of the term “outstanding” in Parts 2 and 9, and that a clear threshold and comparative test be established in the NPS to guide regional councils in the subsequent assessment of the region’s freshwater resources.

Time for implementation

49. In general terms, the RMLA submit that the timeframes contained in the NPS for implementation are too generous, and too loose. For the attaining of critical objectives, such as restoring water to a swimmable standard, there is no set deadline. There is no deadline by when Regional Councils must have notified Freshwater Quality Standards and Environmental Flows and Levels. In the RMLA's submission the absence of deadlines for such critical objectives will weaken the effectiveness of the NPS, as there will be significantly less impetus and motivation for those objectives to be achieved.
50. There is no use made in the NPS of section 55 (2A) (b) which enables a national policy statement to direct that specific provisions be included in statutory planning documents without notification or hearing. It is submitted that it is appropriate for the NPS to be reviewed in light of this power, and its key objectives redrafted for direct inclusion into regional policy statements.
51. The requirements for changes to be made to regional plans do not take effect until the RPS changes have become operative. Given the emphasis on integrated management, it seems unnecessarily artificial for there to be a separation between the two regional planning instruments.

Policy 1

52. As noted in the section of the submission above on timing the RMLA opposes Policy 1 (a) that requires the RPS to timetable priorities for setting freshwater quality standards and environmental flows and levels. There is no mandatory deadline or date by which these freshwater quality standards and environmental flows and levels

be set. The RMLA submits that such a deadline would improve the effectiveness of the NPS.

53. In respect of Policy 1 (b) please refer to the RMLA's submission on the definitions of Notable Values, Outstanding Freshwater Resources and Degraded Freshwater Resources.
54. In respect of Policy 1(c) as noted in the submission on timing above, the RMLA is of the view that the changes to regional policy statements and regional plans could be undertaken contemporaneously in order to achieve in a more timely and integrated fashion the important objectives that this NPS sets out to address. Accordingly the RMLA opposes the staggered process proposed in the NPS which requires that first the RPS variation or change is notified and becomes operative before any change is required to regional plans.
55. Policy 1 (g) requires the RPS to guide and direct regional plans to restrict takes, uses, damming and diversion of freshwater at times of low flow in order to sustain notable values and non consumptive Tangata Whenua values and interests. The RMLA queries what this policy adds to the powers Regional Councils already have pursuant to section 329:

329 *Water shortage direction*

(1) Where a regional council considers that at any time there is a serious temporary shortage of water in its region or any part of its region, the regional council may issue a direction for either or both of the following:

(a) That the taking, use, damming, or diversion of water:

(b) That the discharge of any contaminant into water,—

is to be apportioned, restricted, or suspended to the extent and in the manner set out in the direction.

(2) A direction may relate to any specified water, to water in any specified area, or to water in any specified water body.

56. If it is intended that the restriction referred to in Policy 1 (g) is distinct from the powers in section 329, it is submitted that this distinction be clarified.
57. Policy 1(h) requires guidance to regional and district plans for the management of land-use development and discharges of contaminants to "control" the adverse effects of the discharge. The RMLA supports this policy as it stands, however as noted previously, the RMLA submits there should also be objectives and policies addressing the adverse effects of existing activities also.
58. Policy 1(i) requires that guidance be given to regional and district plans for managing the demands of freshwater including demands arising from land-use developments and discharge of contaminants. It is noted that this policy does not explicitly refer to managing demands arising from Consumptive Use of freshwater. This appears to be a gap in the activities which are to be managed. There are activities that qualify as Consumptive Use that may not be land-use development or discharge of contaminants, but which will have adverse effects on Freshwater Resources. The RMLA submits that the term "Consumptive Use" be included in Policy 1(i.).
59. Also, as previously submitted, the RMLA objects to consideration only being given to future land-use development and its effects on freshwater resources, and not existing land-use activities and submits that there should be a separate policy thread that addresses methods, whether they be rules or otherwise to address the existing effects of land-use activities on freshwater resources.

60. The RMLA particularly supports the requirement for regional and district plans to specifically promote efficient freshwater use as noted in Policy 1(i)(iii), which the NPS notes as including the transferability of resource consents where appropriate.
61. The RMLA supports the priority given in Policy 1(i)(ii) to provide priority for reasonably foreseeable domestic water supply over other competing demands. The RMLA submits that it will be desirable for the word "efficiency" to also be added into this sub-clause so that it reads as follows:

"Provides priority for reasonably foreseeable efficient domestic water supply..., over competing demands, provided that appropriate demand strategies are established for such supply".

62. Policy 1(j), as submitted previously in respect of Objective 2, does not add anything to the wording currently contained in Objective 2. The policy is aimed at ensuring integrated management of the effects of land-use development but does not require that special consideration be given to land-use development or its appropriateness in the context of its long term impact of freshwater resources. The way the policy reads as drafted assumes that land-use development will continue and simply seeks to mitigate the effects of that continuation by addressing sequencing of infrastructure for supply storage and distribution of freshwater and controlling adverse effects. It is submitted that this is not the most effective way of controlling the effects of land-use development on freshwater resources. At times land-use development itself may be inappropriate and this policy provides no guidance for how to make that decision. It is submitted that the NPS address in more detail what considerations be given at the decision making stage of land-use development itself with a long terms of its effects on freshwater resources.

Policy 2

63. Policy 2(a). As submitted previously the RMLA objects to the staggered/staged approach between the regional policy statements and regional plans and also objects to the absence of a deadline by which freshwater quality standards and environmental flows and levels be imposed. The RMLA submits that these timing issues be addressed.
64. Policy 2 (c) sets out a requirement to notify a proposed regional plan change or variation to include rules addressing various matters. None of the matters listed are directly linked to the issues addressed in Policy 1 in respect of regional policy statements therefore the RMLA submits that it is not necessary that these rules need not be notified until 40 working days after the Regional Policy Statement is made operative. It is submitted that there is no need for a staged approach in this instance as the rules relate to matters such as efficient consumptive use, industry good practise, return of freshwater to freshwater resources, conditions on discharge permits and effective monitoring and reporting. These are not matters that are specifically addressed in Policy 1 in respect of Regional Policy Statements and could be addressed contemporaneously to the change to Regional Policy Statements.
65. Policy 2(c)(i) refers to the use of "industry good practise and technology to achieve efficient use". The RMLA objects to the use of the term "industry good practise" without a related definition as it is open to a range of interpretations. One could assume that current practise equates to industry good practise, and it is that current practise that has led to the degradation of existing freshwater resources. It is submitted that a much clearer, and higher benchmark or threshold should be set when requiring attainment of efficient use.

66. Policy 2(c)(ii) requires that all water permits for the Consumptive Use of freshwater granted after date of commencement of the NPS include conditions for the return of fresh water to the freshwater resources. As previously submitted, the RMLA objects to the absence in this NPS of policies and methods relating to existing consented uses, both land use and Consumptive Use, and the effects of those existing uses on freshwater resources. While the RMLA is not submitting that existing consented uses be subject to the same policy and methods currently suggested in the NPS, they should be addressed if there is to be a comprehensive program for the enhancement of degraded resources and protection of existing freshwater resources.
67. Policy 2(c)(iii) requires three types of conditions on discharge permits in paragraphs A, B and C. The RMLA supports that first condition (A), being the protection against degradation of freshwater resources, however notes that discharge permits generally will include such conditions currently and query how this requirement adds value or assist in our interpretation of this matter of national importance.
68. The second condition (B) requires for imposition on discharge permits is a condition relating to "the sustainable management of demands on freshwater in a manner which has regard to available supply of fresh water and adverse effects both individual and cumulative". The RMLA queries whether or not this is able to be translated into a condition in a resource consent as this is more a matter for consideration when deciding to grant or refuse a consent than a matter that can be given effect to as a condition.
69. Likewise the third requirement for conditions (C) on discharge permits is the "integrated management of the effects of landuse development and discharges of contaminants on the quality and available quantity of freshwater resources". Again

the RMLA queries how such a complex factor can be translated into a condition on a discharge permit and notes again that this is more a matter for the general decision making of whether or not to grant a consent than a specific consent condition.

70. Policy 2(c)(iii) also requires that these conditions be achieved by the use of "industry good practise" which the RMLA objects to as being open to interpretation and not setting a high enough threshold.
71. The RMLA submits that the clause on required conditions be reviewed in light of these comments.

Permitted discharges

72. Policies 1 and 2 do not specifically address discharges of contaminants that are permitted activities. This submission relates to section 70 (1) of the Act, that sets out the conditions in which discharges can be permitted, namely the Council must be satisfied the following effects will not be caused:

- (c) *The production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials:*
- (d) *Any conspicuous change in the colour or visual clarity:*
- (e) *Any emission of objectionable odour:*
- (f) *The rendering of fresh water unsuitable for consumption by farm animals:*
- (g) *Any significant adverse effects on aquatic life.*

73. It is submitted that the NPS should contain provisions that assist in the interpretation of section 70, as currently phrases such as "rendering freshwater unsuitable for

consumption by farm animals" and "significant adverse effects on aquatic life" do not set clear, unambiguous threshold requirements for permitted activity rules. The NPS is well placed to remove some of this ambiguity in respect of permitted activity rules for discharges of contaminants. Currently there is no mention in the NPS of permitted activities in this regards. The RMLA submit that this is a gap in the NPS that potentially weakens its effectiveness.

Policy 3

74. Policy 3 directs District Councils to notify plan changes or variations to give effect to the RPS. It specifies that "relevant land-use and subdivision consents" include conditions for the protection of water quality and related issues. Water quality is not a specified function of a territorial authority under s31. Under s30 water quality is a specified function of a regional council. However the wording in s31(1)(a) is inclusive where it refers to effects on land "and associated natural and physical resources".

"(1) Every territorial authority shall have the following functions for the purpose of giving effect to this act in its district...

(a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

(b) The control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—

(i) The avoidance or mitigation of natural hazards; and

- (ii) *The prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances; and*
- [[*(iia) The prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:]]*
- (iii) *The maintenance of indigenous biological diversity:]*
- (c) *Repealed.*
- (d) *The control of the emission of noise and the mitigation of the effects of noise:*
- (e) *The control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes:*
- (f) *Any other functions specified in this Act.*
- [(2) *The methods used to carry out any functions under subsection (1) may include the control of subdivision.]*

75. The question arising from Policy 3 is whether territorial authorities have jurisdiction to control land use to protect water quality. The RMLA considers that it is important this jurisdictional issue be considered to avoid future challenges.

76. In *Canterbury RC v Banks Peninsula DC* [1995] 3 NZLR 189; [1995] NZRMA 452 (CA), noted [1995] BRM Gazette 97; NZCLD, 4th Series, R—218, the Court of Appeal declared that:

“A regional council may, to the extent allowed under s 68 of the Resource Management Act, include in a regional plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under s 30(1)(c) to (h). A territorial authority may, to the extent allowed under s 76, include in a district plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under s 31. Neither a regional council nor a territorial authority has the power to make rules for purposes falling within the functions of the other, except to

the extent that they fall within its own functions and for the purpose of carrying out its own functions. To that extent only both have overlapping rule making powers, but the powers of a territorial authority are also subject to s 75(2)."

77. At page 9 of its decision the Court noted that despite there being a hierarchy of instruments there can be overlap between the functions of regional and territorial authorities and that the functions of territorial authorities are:

"... set out in section 31, and there is no need to read that section in any restricted way. To the extent that matters have been dealt with by an instrument of higher authority, the territorial authority's plan must not be inconsistent with the instrument. Beyond that, the territorial authority has full authority in respect of the matters set out in section 31. Reliance was placed on the wording of section 31(b), which refers to control only of "the effects" of use of land, but it is difficult to see how a territorial authority could control the effects of use without regulating the use itself... The control of the effects of land use must involve some degree of control of the use itself."

78. The decision of the Court of Appeal accepts some crossover but there is certainly a grey area relating to overlapping functions. For a territorial authority to have functions relating to water quality a broad interpretation of s31(1) is required. Arguably surface water and biodiversity issues would relate to water quality. Counsel for the territorial authority in the Court of Appeal case accepted that a territorial authority could not control the use of the land for the purpose of soil conservation, a function of the regional council (pg 10).

79. Policy 3(a) requires the District Plan to "give effect to Regional Policy Statement" which will effectively relate to:
- a. The RPS provisions guiding recognition of tangata whenua values and interests (Policy 1(f)) and

- b. Considerations for determination of resource consent applications and notices of requirement to effectively manage land-use development and discharges of contaminant (Policy 1(h)) and
 - c. Policy 1(i) - the direction that determination of resource consent applications manage demands for freshwater including demands arising from landuse development and discharges of contaminants.
80. However as previously submitted the RMLA is of the view that the NPS as currently drafted proceeds on the assumption that land-use developments will continue to be granted in the same manner as currently with no additional consideration given to the grant or refusal of consent, taking into account effects of freshwater resources. Instead the NPS only focuses on conditions to be imposed on land-use developments and in respect of these conditions Policy 3(b) refers to the same 3 conditions as previously submitted on in respect of Policy 2(c)(iii). The first condition is the "protection against degradation of quality of freshwater". This requirement does not add value or assist in our interpretation when addressing this matter of national importance.
81. The second and third conditions are the sustainable management of demands on freshwater and integrated management of effects of land-use development. These are not, in the RMLA's submission, matters for conditions on landuse consent and subdivision consents, but are matters that should instead be considered more substantively and strategically when deciding in the first instance whether the proposed development is appropriate in the first place. By referring to these matters as only being relevant in terms of conditions the NPS reduces the weight that can be given to these matters when considering the appropriateness of the activities at all. It is submitted that the second and third conditions are more relevant to the giving

effect to the Regional Policy Statement than imposition of conditions on consents that are granted.

Policy 4

82. The RMLA generally supports Policy 4 but notes that there is duplication between paragraphs (a), (f) and (h) as (f) Tangata Whenua Values and Interest and (h) the value of swimmability to the community are both in themselves "Notable Values" of freshwater resources and do not therefore need to be repeated.

Policy 5

83. The RMLA supports Policy 5(a).
84. Policy 5(b) refers to the importance of applying industry good practise in order to minimise adverse effects and maximise efficiency and use. The RMLA objects to the term "industry good practise" as it is currently used as there is no definition and it is open to a range of interpretations that do not necessarily set the required threshold to achieve minimisation of adverse effects and maximisation of efficiency and use. It is submitted that a definition of industry good practise would assist and clarify the threshold that is being set. Such clarification would be consistent with the purpose of this NPS which is to assist in our interpretation of how to address these matters of national importance.

Policy 6

85. Policy 6 enables Councils to impose conditions on resource consents granted to give effect to certain key things in the NPS namely efficient consumptive use, protection

against water quality degradation, sustainable management of demands and integrated management of effects. As previously submitted the last 2 matters, sustainable management of demand and integrated management of effects seem unsuitable for actual resource consent conditions and go more to the merits of an application and whether or not consent should be granted. The first 2 matters, efficient consumptive use and protection against degradation of water quality, while valid conditions do not seem to add anything to powers that currently exist explicitly in the Act and do not really aid decision makers' interpretations of how to give effect to these issues of national importance. The RMLA therefore queries the value of Policy 6.

Policy 9

86. This Policy requires that there should be an independent review of the effectiveness of the NPS no later than 10 years after it comes into force. Taking into account the current timeframes imposed in the NPS for its implementation this 10 year review is appropriate as it will take several years before any of the NPS actions are implemented in plans and therefore able to have effect "on the ground".
87. However the RMLA has submitted that it considers the timeframes imposed in the NPS are either too long or non-existent and has submitted that those timeframes should be shortened and deadlines set. If the submission is accepted then it is further submitted that the timeframe for review of the effectiveness of the NPS be shortened also.

88. The RMLA wish to be heard in support of this submission.

A handwritten signature in cursive script, appearing to read "Maree Baker".

Signature of Maree Baker on behalf of the Resource Management Law Association

23 January 2008

Address for Service: C/- 4 Shaw Way, Hillsborough, Auckland 1041

Telephone: (9) 626-6068 or 027 272 3960

Email: karol.helmink@xtra.co.nz

Contact Person: Karol Helmink