

BOARD OF INQUIRY

Proposed National Policy Statement
for Freshwater Management

**Report and Recommendations of the
Board of Inquiry into the
Proposed National Policy Statement
for Freshwater Management**

Prepared in January 2010
by the Board of Inquiry into the Proposed National Policy Statement
for Freshwater Management

In the Matter of the Resource Management Act 1991

And

In the matter of the Inquiry into the Proposed National Policy Statement
for Freshwater Management

THE BOARD OF INQUIRY

Judge David Sheppard (Chair)

Associate Professor Jon Harding (Member)

Mr Kevin Prime (Member)

Mrs Jenni Vernon (Member)

**REPORT AND RECOMMENDATIONS
OF THE BOARD OF INQUIRY**

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INTRODUCTION

Preparation of the proposed national policy statement and appointment of Board of Inquiry

[1] In November 2006, the Minister for the Environment (“the Minister”) determined that it is desirable to issue a national policy statement on freshwater management. Having sought and considered comments from the relevant iwi authorities and the persons and organisations that he considered appropriate,¹ the Minister prepared a national policy statement on management of fresh water. The Minister chose to use the process set out in sections 47 to 52 of the Resource Management Act 1991 (“RMA”, or “the Act”), and appointed a board of inquiry to inquire into, and report on, the proposed national policy statement (“the proposed NPS”).

[2] The role of the Board of Inquiry (“the Board”) has been to:

- inquire into the proposed NPS;
- consider all submissions made and all evidence given on the proposed NPS; and
- report to the Minister on the contents and subject matter of the proposed NPS, including making recommendations about amendments to the content of the proposed NPS so that it will more fully serve its purpose and the purpose of the RMA.²

[3] A copy of the proposed NPS prepared by the Minister is at Appendix A. The Minister provided the Board with terms of reference, a copy of which is at Appendix B.

Public notification and making of submissions

[4] On 21 August 2008, the Board decided to publicly notify the proposed NPS. The Board also decided to invite the making of written submissions on the proposed NPS during a period closing on 23 January 2009; and to allow the making of further submissions supporting or opposing submissions, after a summary of the primary submissions was published. The proposed NPS was publicly notified on 20 September 2008.

[5] The Board received 149 submissions on the proposed NPS; and having published a summary of the primary submissions, invited the lodging of further submissions supporting or opposing primary submissions during a period closing on 14 April 2009. The Board received 30 further submissions.

Hearing and consideration of submissions

[6] On 21 days during the period from 30 June 2009 to 18 September 2009, the Board conducted public hearings of submissions and further submissions, at which 80 submitters took part.

[7] Having completed the inquiry hearing, the Board, in accordance with section 51 of the RMA, considered:

- a) the relevant contents of Part 2 of the RMA;
- b) the proposed NPS;
- c) the submissions and further submissions received;
- d) the evidence presented at the inquiry hearing; and
- e) other relevant matters raised by submitters.

[8] Section 51(1)(ca) of the RMA also requires the Board to consider any additional material provided by the Minister under section 47A(1)(b) of the RMA. No such material was provided to the Board.

Report of the Board of Inquiry

[9] The terms of reference provided to the Board outline matters to be explicitly addressed in its report to the Minister, as follows:

The Board shall provide, in its report:

- recommendations on the wording of the proposed NPS, including the objectives and policies;
- recommendations on how councils should give effect to the proposed NPS pursuant to section 55;
- reasons for the content of its report and recommendations.

The report and recommendations may also address:

- the internal consistency of the proposed NPS as a whole, and ways to address any potential inconsistencies;
- the level of certainty or clarity provided by the proposed NPS, and if this is inadequate, ways to improve it;
- the removal or further refinement of issues, objectives and policies where this is appropriate for achieving the policy approach of the proposed NPS;
- the identification of any unintended or unforeseen, but likely outcomes of the proposed NPS, and ways to address these;
- whether or not some of the changes needed to regional policy statements, district or regional plans would be best achieved via direct insertion into the regional policy statements or plans pursuant to section 55(2A)(b) of the RMA, and if so what those provisions should state.

[10] Having considered the matters outlined in paragraph [7] above, the Board has prepared this report, which contains its recommendations, and which is made to the Minister in terms of section 51(2) of the RMA within the terms of reference set by the Minister.

Endnotes

¹ Invitations to comment were sent to 300 iwi organisations and other stakeholders in freshwater management.

² Terms of reference for board of inquiry on the proposed National Policy Statement for Freshwater Management.

GENERAL TOPICS

Content of national policy statement

[11] The purpose of national policy statements under the RMA is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of the Act.³ A national policy statement can direct⁴ a local authority to amend a document in a class identified in section 55(1) of the RMA⁵ to include specific objectives and policies set out in a national policy statement, or so that objectives and policies specified in a document give effect to objectives and policies specified in a national policy statement. A local authority has to make those amendments without using the notification and hearing process in Schedule 1 of the Act.⁶

[12] A national policy statement may also include transitional provisions for any matter, including its effect on existing matters or proceedings.⁷

[13] Four main matters of national significance for which the proposed NPS states objectives and policies can be inferred from the preamble as being:

- challenges, of varying degrees and causes across regions, in ensuring there is sufficient water in lakes, rivers and aquifers; and
- ensuring that society gains the greatest benefit from the allocation of available water; and
- limiting and remediating degradation of water quality; and
- improved integrated management of freshwater resources.

[14] The preamble also records the Crown's recognition of a particular need for clear central government policy that directs local government to implement measures necessary to achieve stated goals. Those goals are embraced by the matters of national significance outlined in paragraph [13].

[15] A fifth matter of national significance that became evident during the Board's hearing of the inquiry was the protection of wetlands from further degradation and loss as a result of human activities.

[16] The objectives and policies of the NPS are to be relevant to achieving the purpose of the Act. That purpose is to promote the sustainable management of natural and physical resources. In that context, sustainable management is given the meaning identified by section 5(2) of the RMA:

In this Act, sustainable management means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[17] In this context *natural and physical resources* include fresh water;⁸ *effect* is to be given a broad meaning that includes positive and adverse effects, cumulative effects, and potential effects of low probability which have a high potential impact;⁹ and *environment* is given a broad meaning that includes ecosystems and their constituent parts, including people and communities; amenity values; and social, economic, aesthetic, and cultural conditions which affect them.¹⁰

[18] Application of section 5 involves a broad judgement as to whether a proposal promotes sustainable management of natural and physical resources, recognising that the Act has a single purpose and allowing for comparison of conflicting considerations, their scale and degree, and their relative significance or proportion.¹¹

[19] Therefore, the Board's consideration of the submissions on the proposed NPS is not a broad review of the management of fresh water. It is to be guided and constrained by the RMA, and to lead to decisions specifically for the promoting of sustainable management of natural and physical resources, including fresh water.

[20] Those who made and presented submissions on the proposed NPS differed on the application of the purpose of the Act to the instrument.

[21] Many wanted positive direction or guidance, placing particular focus on the elements described in paragraphs (a), (b) and (c) of section (5)(2). They contended that the NPS should not avoid making hard decisions between competing values and goals, but should articulate national priorities. They argued that favouring economic well-being, at the cost of declining quality and quantity of fresh water in the environment, would not be balanced; and urged that a national policy statement should focus on the elements in paragraphs (a) to (c) because of their particular relevance to the subject matter of freshwater management.

[22] Other submitters disagreed, arguing that this would displace or downgrade the enabling of people and communities to provide for their economic well-being.

[23] The scope of sustainable management described in section 5(2) identifies several goals and values reflecting aspirations and interests of different sections of the public. In applying the concept of any particular subject matter, some of the identified elements may be inconsistent or even in conflict with others. In general, a decision-maker has to come to a judgement that reflects all the identified aspirations and values that are relevant.

[24] The Board considers that, to be effective in giving positive direction to local authorities so as to achieve goals identified as being of national importance, a national policy statement may need to place emphasis on particular elements of sustainable management. That would not be to subdue, let alone evade, other elements of the given meaning of sustainable management, such as those enabling economic activity. Rather, in the circumstances of a national policy statement it would give effect to the word *while*, by which the managing of resources for the enabling elements of

sustainable management is constrained by the sustaining, safeguarding, and effects-based elements in paragraphs (a), (b) and (c).¹²

Freshwater resources

[25] Throughout the proposed NPS reference is made to the management of *freshwater resources*, the meaning of which includes fresh water in rivers, lakes, wetlands and groundwater, but excludes water in ephemeral streams and artificial watercourses. The exclusion of ephemeral streams and artificial watercourses was a subject of many submissions, and a number of submitters also requested that the meaning of the term reflect the RMA definition of fresh water. Reference to *freshwater resources* was seen by some submitters as weighting the proposed NPS towards the enabling elements of sustainable management.

[26] The Board accepts that the NPS should use terms that are clear in meaning, and (when practicable) consistent with meanings given to them by the RMA.

[27] The use of *resources* throughout the proposed NPS implies that fresh water is something to be used for economic gain, which the Board does not consider appropriate in the context of the matters of national significance that have been identified. However, the Board recommends that the policy on setting environmental flows and levels not apply to ponds and naturally ephemeral water bodies.

[28] The Board uses the term *fresh water* as defined in the RMA, and uses *freshwater ecosystems* and *freshwater processes* where appropriate in the objectives and policies in the NPS.

Need for positive direction

[29] A number of submitters requested the NPS be outcome-oriented rather than process-oriented. Submitters identified problems with a process-based approach, including:

- lack of clarity and understanding of, and clear guidance on, the issues that need to be addressed;
- limited flexibility for councils to deal with regional issues and to determine the most appropriate methods for addressing them;
- a lack of recognition of the progress that has already been made in freshwater management around the country;
- a 'one-size-fits-all' approach that would impede strategic and innovative freshwater management approaches, and would not allow approaches other than regulation that may be more suitable and effective;
- a lack of clarity of intent or meaning, leading to lengthy interpretive debate.

[30] Other submitters noted that difficulties have been identified with existing planning processes, but that the proposed NPS continues to rely on these processes to achieve its aims.

[31] A common theme of many of the submissions was that the NPS should provide national direction by identifying national issues and national goals.

[32] As a national policy statement is a subordinate instrument under the RMA, its objectives and policies have to be relevant to achieving the purpose of the RMA, that is, the sustainable management of natural and physical resources.

[33] Requests by submitters for national guidance recognised that, for a variety of reasons, issues relating to freshwater management are not being fully addressed by local government. Requests for positive direction were driven by a desire for guidance on how those issues are to be addressed, combined with a request that national priorities be set for the most important issues.

[34] The Board agrees with submitters that the NPS should make a difference to freshwater management. The focus should be on improving outcomes for fresh water. The management process to achieve this should be included, but should not be the focus of the NPS.

[35] The Board acknowledges some councils are making notable advances in managing fresh water, but it considers that nationally there is a need to phase out over-allocation and contamination of fresh water. The RMA processes for the management of water are already being followed, but the NPS needs to state objectives as goals for these processes to achieve.

[36] Improvements in fresh water by phasing out over-allocation and contamination require that fresh water is used for enabling economic well-being only while, and to the extent that, the life-supporting capacity of water and its associated ecosystems is fully safeguarded, and the potential to meet reasonably foreseeable needs of future generations is fully sustained. In this way the requests for setting national priorities for the most important issues would be met.

Key national values of fresh water

[37] A number of submitters requested the NPS identify key national values with respect to management of fresh water, and provide clear national direction about the values to be given additional weighting in freshwater management.

[38] The Board agrees that identifying national values of fresh water in the NPS would be useful. The Board recommends that the NPS identify issues of national significance that are to be addressed, and sets national objectives and policies for achieving sustainable management.

[39] The Board has identified specific values from the RMA itself, the proposed NPS, and submissions and evidence presented to the Board.

[40] The national values of fresh water can usefully be classified in two groups:

1. values for which people and communities make use of water for their own well-being and amenity, for example:
 - a) domestic drinking and washing water;
 - b) animal drinking water;
 - c) community water supply;
 - d) fire fighting;
 - e) hydro-electricity generation;
 - f) commercial and industrial processes;
 - g) irrigation;
 - h) recreational activities (including waka ama);
 - i) food production and harvesting, e.g. fish farms and mahinga kai;
 - j) transport and access (including tauranga waka);
 - k) cleaning, dilution and disposal of waste.
2. values that relate to recognising and respecting fresh water's intrinsic values for safeguarding the life-supporting capacity of water and associated ecosystems; and sustaining its potential to meet the reasonably foreseeable needs of future generations. These are instances of intrinsic values of fresh water:
 - a) the interdependency of the elements of the freshwater cycle;
 - b) the natural form, character, functioning and natural processes of water bodies and margins, including natural flows, velocities, levels, variability and connections;
 - c) the natural conditions of fresh water, free from biological or chemical alterations resulting from human activity, so that it is fit for all aspects of its intrinsic values;
 - d) healthy ecosystem processes functioning naturally;
 - e) healthy ecosystems supporting the diversity of indigenous species in sustainable populations;
 - f) cultural and traditional relationships of Māori with fresh water, including mauri, waahi tapu, wai taonga, recognised customary activities and spiritual values;
 - g) historic heritage associations with fresh water;
 - h) providing a sense of place for people and communities.

[41] Intrinsic values of fresh water are substantial in themselves. Maintenance, restoration and enhancement of them is not subordinate to economic values of fresh water for potential use for people and communities' well-being.

[42] The national issues that the Board has identified are:

1. over-allocation of fresh water;
2. contamination of fresh water;
3. loss of wetlands;
4. incompletely integrated management.

[43] The Board recommends these goals to address those issues so that the national values of fresh water are safeguarded:

1. to phase out over-allocation of fresh water;
2. to phase out contamination;
3. to protect wetlands;
4. to improve the integration of management of fresh water.

Withdrawal of national policy statement

[44] A number of submitters made requests to the effect that the proposed NPS should be withdrawn entirely, and a new national policy statement on freshwater management prepared. Reasons given for this request included that the proposed NPS is unworkable, unnecessarily complex, and would be time-consuming and costly to implement. Submitters asserted the proposed NPS would not contribute in any meaningful way to managing increased demand for water, and would provide little direction beyond restating section 5 of the RMA.

[45] Other submitters contended a national policy statement on freshwater management is needed, some said urgently.

[46] Those submitters seeking withdrawal of the proposed NPS generally supported the intent of a national policy statement and requested that it be substantially redrafted. Few submitters suggested a national policy statement on freshwater management is unnecessary.

[47] The Board did not hear from submitters that the proposed NPS is so fundamentally flawed that it should be withdrawn and not replaced.

[48] The RMA confers on the Minister responsibility for deciding whether it is desirable for there to be a national policy statement; whether to make any recommended changes; and whether to recommend to the Governor-General in Council approval of the national policy statement. None of those decisions is within the scope of the duties of a board of inquiry.

[49] The Board accepts the content of the proposed NPS is capable of improvement. Its core task is considering the content of the proposed NPS, and making recommendations on changes to it.

[50] The interests of various sections of the community on the content of the proposed NPS, and on the recommended changes, may conflict. By this report, the Board recommends a number of changes to the proposed NPS to give effect to submissions on it. The Board judges that, amended as recommended, the NPS would more fully state objectives and policies for

matters of national significance for achieving sustainable management; and by doing so, give effective direction on the resolution of potential conflicts.

[51] Therefore, the Board does not accept requests by submitters that the proposed NPS be withdrawn.

Relationship between NPS and RMA

[52] Some submitters strongly supported objectives and policies in the proposed NPS that closely match provisions of the RMA, on the basis that the provisions are consistent with the definition of sustainable management and in keeping with the enabling focus of the RMA.

[53] Other submitters considered that, unless an objective or policy added further to the provisions of the RMA, it did not need to be stated.

[54] A document prepared under the RMA, such as the NPS, is subordinate to its parent statute. The Board acknowledges that the NPS needs to be consistent with the RMA provisions, but considers that for the NPS to make a difference it needs to do more than just mirror the words in the RMA.

Local authority functions, boundaries, flexibility and resources

[55] Many submitters raised questions about local authority functions, boundaries, and resources and about the need for flexibility in ways of managing fresh water in different regions.

Functions

[56] Many submitters protested the proposed NPS does not clearly distinguish the functions of regional councils (identified by section 30 of the RMA) from those of territorial authorities (identified by section 31). Some sought amendments to clarify which objectives and policies are directed to which class of local authority, to avoid unnecessary duplication and cost.

[57] By section 30 of the RMA, the relevant functions of regional councils include control of the taking, use, damming and diversion of water, and control of the quantity, level, and flow of water in any water body; the control of discharges of contaminants into or onto land or water, and discharges of water into water; the control of the use of land for the purpose of maintenance and enhancement of the quality of water in water bodies, maintenance of the quantity of water in water bodies, and maintenance and enhancement of ecosystems in water bodies; and achieving integrated management of the natural and physical resources of the region. Additional functions include maintaining indigenous biodiversity, and strategic integration of infrastructure with land use.

[58] Regional councils also have other functions specified in the Act, including considering and deciding resource consent applications.

[59] By section 31, the functions of territorial authorities include integrated management of the effects of the use, development and protection of land and associated natural and physical resources; and also control of actual or potential effects of activities in relation to the surface of water in rivers and lakes. Territorial authorities also have other functions specified in the Act.

[60] It has been established that there might be an overlap between the functions of regional councils and those of territorial authorities. What is limited is not so much what can be controlled, but the purpose for which it can be controlled.¹³

[61] The Board accepts that the NPS should identify, where practicable, a class of local authority that is expected to apply a policy. That is desirable to avoid duplication, and so that the policy is applied by local authorities of the class that is more likely to have the knowledge, skills and capability of taking the action indicated.

[62] By section 35(2) of the RMA, every local authority has a duty to monitor the state of the whole or any part of the environment of its region or district to the extent that is appropriate to enable the local authority to effectively carry out its functions under that Act.

[63] Consistent with that, the Board accepts that responsibility for monitoring and reporting on particular objectives should also be entrusted to the class of local authorities having the relevant functions. The functions of regional councils identified in section 30(1) generally embrace the purpose of monitoring freshwater management.

[64] One submitter asked who would be responsible for collation of monitoring data. The Board expects that the body that collects data would have to collate it so that a report could be prepared.

[65] A number of urban local authorities sought clarification of roles and responsibilities in respect of urban stormwater and water supply infrastructure. There is no dispute that the monitoring of compliance with the RMA and instruments under it by operators of such infrastructure is generally the responsibility of regional councils.

[66] Submitters also commented on the order in which local authority planning documents should be amended to be consistent with the NPS, with some favouring amendments to regional policy statements first and some requesting a process to reach consistency and agreement about changes to regional and district plans.

[67] Although the former would generally be a logical sequence, the variety of circumstances existing around the country may preclude making following that sequence mandatory. With respect to the latter request, while consistency and agreement with respect to regional and district plans may generally be sensible, a territorial authority operating infrastructure cannot expect to be able effectively to veto regional plan provisions regulating activities of that type. The RMA provides procedures for resolving differences on such matters.

[68] A few submitters raised points about local authorities deciding resource consent applications. One was that protection against degradation of resources should be adequately addressed when applications are received. Another was that the proposed NPS would not provide a mandate for refusing resource consent applications on grounds of cumulative effects. A third was that, in small communities, those sitting on hearing panels are often compromised by association with those causing degradation.

[69] The Board considers those to be points of general practice that are not specific to freshwater management. The NPS should confine itself to matters of national significance in relation to the management of fresh water, and not stray into points of general practice.

[70] Two submitters urged that the NPS encourage stricter enforcement action against those whose activities result in degradation of water quality.

[71] By section 84(1) of the RMA a local authority has a legal duty to enforce observance of its planning instruments. It has a discretion as to how it does so, and should be left free to decide the means and courses of action to be adopted in particular situations.¹⁴ The Board considers it inappropriate for the NPS to direct local authorities about the methods and strictness of their enforcement action.

[72] One submitter protested that the proposed NPS does not address institutional reform, and contended that an alternative model to the current fragmented situation would result in more effective, efficient and sustainable outcomes. Models in parts of Australia where water management is more centralised (although local political structures and representation remain) were cited, and commended to the Board.

[73] A national policy statement is an instrument under the RMA. Reform of the institutional regime for managing water would involve amendments to that Act, and perhaps also to the Local Government Act. That is beyond the scope of a subordinate instrument such as a national policy statement, and is not an appropriate topic for this Board of Inquiry to consider.

[74] Additional points of practice raised by submitters were that regional councils should work together to develop a combined marine and freshwater plan to save costs and provide consistency; encouragement of better communication between divisions of council administration; increased use of qualified experts, and keeping up-to-date with overseas research; ensuring that monitoring responsibilities are not impeded by reporting duties; and lack of capacity of local authorities to deal with many complex technical problems such as cumulative effects, uncertainty, and application of the precautionary approach.

[75] The Board considers that those are general issues, not specific to freshwater management, that would be better followed up in other contexts than the NPS.

Boundaries

[76] A few submitters criticised patterns of local authority boundaries as hindering the effective performance of duties under the RMA. They desired that the Board recommend a new pattern, particularly for boundaries of regions.

[77] The Board is satisfied that alterations of local authority boundaries are governed under the Local Government Act 2002, and are beyond the competence and remit of a board of inquiry under the RMA.

Flexibility

[78] Several submitters contended that the proposed NPS would not allow local authorities the appropriate flexibility in applying its policies. These particular respects were cited:

- regional variation in the intensity of issues;
- existing instruments to similar effect;
- potential for undermining a local authority's strategic initiatives;
- application of general policies where there are site-specific solutions; and
- the burden on smaller authorities with limited staff in meeting time limits.

[79] Submitters asked that the NPS allow local authorities to choose policies that, taking into account existing instruments, allow regional adaptation and innovation, and best suit their present and future needs, having regard to their capabilities and resources.

[80] The Board accepts that, in principle, the Act contemplates that local authorities have some flexibility in applying national policies according to regional circumstances. The extent of that flexibility is limited by the imperative that a national policy statement is to be given full effect. Flexibility in application is not intended to be so broad as to excuse any failure to give effect, or any prolonged delay in doing so.

[81] Existing regional instruments, let alone strategic initiatives, are expected to be altered if necessary, so that it is apparent that they conform to, and give effect to, a national policy statement. To the extent that a local authority's capability and resources preclude them doing so immediately, it should at least make a public commitment to a firm programme of staged compliance, identifying the timing and content of each stage, and publicly reporting progress to show faithful adherence to the programme.

Implementation costs and local authority resources

[82] Numerous submitters contended that implementation of the proposed NPS would result in significant additional work for local authorities having limited financial and staff resources, and impact on current budgets and priorities, at considerable cost to ratepayers that would be unaffordable

and unsustainable. One submitter stated that lack of funding would have a negative impact on the ability to address freshwater management issues, another that implementation of the proposed NPS should not be at the expense of local authorities or ratepayers. Submitters remarked that smaller authorities lack the resources, capability and professional staff required to deal with technical issues such as cumulative effects, uncertainty, application of the precautionary approach, and determination of flows and levels.

[83] Many local authority submitters urged that the costs of implementing the proposed NPS should be addressed and provided for in it. They contended that central government funding (or subsidising) of the costs incurred by local authorities would ensure that its goals would be able to be achieved. Some argued that the costs of achieving national benefits (monitoring, reporting, improving degraded water resources to attain water quality standards and protecting outstanding ones) should be borne nationally, rather than central government continuously 'cost-shifting' to local government. Another submitter contended that where financial benefit accrues, a levy should be placed on water abstraction to fund freshwater management; another also contended that costs should be borne directly by the user; another urged allocation of costs depending on where the benefits would fall.

[84] Some of the submissions on costs of implementation of the proposed NPS relate to the costs of monitoring and reporting required by it. The Board has already acknowledged that responsibility for monitoring and reporting should be entrusted to the class of local authorities having the relevant functions. To that extent, the duties of monitoring and reporting are imposed on the appropriate local authorities by section 35 of the RMA; and the effect of the NPS would largely be to emphasise the effective execution of those duties. The Board is therefore not persuaded by the submissions to the effect that the proposed NPS would impose a costly burden on local authorities, because the duty has, in substance, been imposed by Parliament since 1991.

[85] Consideration of other submissions calls for distinguishing between functions of local authorities under the RMA and executive functions they may have under other legislation, for example, as owners and operators of water supply networks. The primary effect of the NPS would directly fall on the functions of local authorities under the RMA. It is possible that a local authority exercising functions under the RMA may require a local authority owner or operator of a water supply or wastewater disposal network to take action to avoid, remedy or mitigate adverse effects of its operation on fresh water. The cost of doing so cannot sensibly be described as central government 'cost-shifting' to local government; and the Board is not persuaded that it should be borne by taxpayers rather than by those who benefit from the network operation.

[86] To the extent that implementing the NPS more generally would fall on local authorities in respect of their functions under the RMA, the submitters may have a case for arguing for recovery, or at least subsidising of their costs. However, the Board is not persuaded that this is a question for the content of the NPS itself; nor one for the Board to decide. If the NPS is approved, local authorities would be free to take up the matter of implementation costs with the Minister.

Māori issues

[87] For many Māori submitters, issues of rights and interests in fresh water, and questions of ownership of the resources, were of key importance. A number of iwi submitters deliberately set aside the question of rights and interests, noting that it is an issue to be addressed between iwi and the Crown separately from the proposed NPS. Other submitters noted that the NPS should not compromise the ability for the Crown and Māori to settle future claims for fresh water.

[88] The Board agrees with those submitters who stated that the ownership of water cannot be addressed in the NPS. It is up to the Crown and iwi to decide how this issue will be addressed.

[89] A number of submitters called for specific recognition of the role of iwi as Treaty partners, rather than 'stakeholders' in freshwater management. They argued that by not acknowledging the Treaty, the proposed NPS does not provide a meaningful role for Māori within water management at the local level, due to the dilution of their status as Treaty partners and kaitiaki that resulted from grouping them as part of the 'stakeholder' community. Many of these submitters requested strengthening of the proposed NPS provisions by providing a specific Treaty objective and associated policies.

[90] By section 6(e) of the RMA, the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga is to be recognised and provided for. Section 6(g) has a similar requirement with respect to the protection of recognised customary activities. Section 7 of the RMA requires particular regard to be had to kaitiakitanga and the ethic of stewardship. Section 8 of the RMA requires all persons exercising functions and powers under it to take into account the principles of the Treaty of Waitangi.

[91] The NPS is subject to the RMA, including those sections relating to Māori and the Treaty of Waitangi. The Board sees little value in repeating in the NPS what is already stated within the RMA. This is consistent with the Board's general principle (outlined at paragraph [54]) of not repeating RMA provisions in the NPS.

[92] The Board is satisfied that Māori and their interests are already specially acknowledged in the objectives and policies of the proposed NPS.

[93] Consideration of how the Treaty is incorporated into the proposed NPS led to requests from submitters relating to management of fresh water, with many of the iwi submitters citing co-management regimes as an appropriate way forward (with particular reference to the establishment of co-management relationships for the Waikato River and Rotorua Lakes). There were also requests for full partnership in freshwater management. Some iwi submitters argued that the proposed NPS falls short of stating that central government considers a primary Treaty partnership between Māori and local government as the most effective and efficient means of achieving the purpose of the RMA in relation to fresh water.

[94] Many iwi submitters considered that recognition of the Treaty relationship and provision for new management approaches would allow

them to more fully carry out their kaitiaki responsibilities, and that the proposed NPS does not empower kaitiakitanga. The role of kaitiaki was seen as paramount in freshwater management.

[95] Co-management is a technique that has developed out of a relationship between central government and iwi organisations in relation to the management of particular bodies of fresh water. The Board does not consider that a blanket prescription of this approach over the whole country would be appropriate. Bearing in mind local circumstances, the type of relationship that develops between Māori and local government for management of fresh water is a matter for the parties to establish between themselves, rather than for the NPS to dictate.

Existing uses and activities

[96] There were differences among submitters on the application of the proposed NPS to existing land uses and activities, including those authorised by resource consents.

[97] Some submitters asked for certainty that existing takes and uses of fresh water would not be restricted, so the NPS would only apply to activities authorised by consents granted after the NPS comes into effect.

[98] Some cited particular instances relating to hydro-electricity generation, to irrigation, and to harvesting of existing forests. Submitters raising concerns in those respects stressed that hydro generation is a valid and nationally significant use of fresh water; and urged that there should be no additional restrictions on continuation of existing activities except for robust reason, and if the benefits outweighed the costs to other aspects of the environment.

[99] Other submitters urged that recognition of existing investment would help existing consent holders to have confidence to invest; and that those consent holders had a legitimate expectation that, provided any effects were appropriately managed, their existing uses would not be undermined. The principle of non-derogation of grants of consent was cited too. Another submitter was concerned that the proposed NPS would allow local authorities to control harvesting of existing forests on the basis that discharges of contaminants require continued existence of forestry as a means of providing environmental benefits to downstream waterways and users.

[100] Other submitters contended that the proposed NPS misses an opportunity to require that existing consents be reviewed to ensure they align with current best practice. That was supported on grounds that existing consent conditions have been too lenient or have allowed abstraction for too long a term, resulting in existing land-use practices (including agricultural intensification) causing unsustainable major decline in water quantity and quality. They urged that the NPS should mandate local authorities to tackle pre-existing problems.

[101] Another related issue concerns the distinction between considering an application for replacement of an existing resource consent held by the applicant, and an application for a new consent. It was submitted that the

proposed NPS makes no distinction between them in recognising an applicant's existing investment in infrastructure.

[102] The Board considers a national policy statement has to be read as subordinate to the RMA under which it is made; and as conforming to the regime under that Act.

[103] The RMA contains express provisions about the conditions in which, and extents to which, existing uses of land¹⁵ and surfaces of water bodies¹⁶ are protected; about the circumstances in which existing lawful activities may continue;¹⁷ about consent authorities having regard to the value of investments of holders of existing consents;¹⁸ and about the exercise of resource consents while existing holders are applying for new consents.¹⁹

[104] A national policy statement cannot alter those provisions; nor can it extend them. To the extent the Act does not give some submitters the certainty they ask for, it is beyond the Board's remit to consider that. Conversely, to the extent the Act does not give local authorities power to review existing uses, activities or consents during their terms, as other submitters asked for, that is also beyond the Board's remit to consider.

[105] In particular, the Board understands that to the extent to which the non-derogation principle applies to grants of resource consent, it gives no basis for any expectation that consent authorities would grant replacement consents without having regard to any national policy statements current at the time.²⁰ A consent authority having regard to a national policy statement may lead to the imposition of new restrictions, or even to refusal of consent for continuation of an existing activity for which previous consent has expired. Despite their value, the Act gives no special immunity from national policies for particular activities such as hydro generation, agricultural irrigation or intensification, or forestry.

Cumulative effects

[106] A number of submitters specifically raised the issue of cumulative effects and their management within the proposed NPS. Submitters requested assistance by inclusion in the NPS of a policy on the management of cumulative effects. Inclusion of a policy was seen as: supporting and reinforcing councils' efforts to address cumulative effects; providing clearer direction to avoid the impact on water quality and quantity of cumulative effects; and, allowing councils to proactively manage cumulative effects. Submitters also urged inclusion of a policy as a way of providing the detailed guidance needed to allow councils to ascertain the point in time and space at which the accumulation of insignificant effects becomes significant.

[107] The Board acknowledges the importance of having regard to the issue of cumulative effects in the exercise of all functions, powers and duties under the RMA. However, authoritative court precedent about identification of cumulative effects exists,²¹ and it is not within the scope of the NPS to expand or explain what has been stated in case law, nor to instruct councils on their duties under the RMA.

[108] The Board also notes that the meaning of *effect* outlined in section 3 of the RMA includes *any cumulative effect which arises over time or in combination with other effects*, so cumulative effects are addressed comprehensively in the proposed NPS by reference in objectives and policies to *effect*.

[109] The recommended policy on integrated management specifically invokes cumulative effects. However, the NPS cannot address requests for detailed guidance, as consideration of cumulative effects needs to be undertaken on a case-by-case basis.

Precautionary approach

[110] A variety of submitters commented on the difficulty of decision-making in an environment of scientific uncertainty or lack of information, and the possibilities of adaptive management. A number of different policy approaches were suggested to address this within the proposed NPS.

[111] Issues of scientific uncertainty, lack of information and implementation of adaptive management approaches are not unique to the management of fresh water. A number of matters being requested by submitters for inclusion in the NPS are already contained in the RMA. For example, the concept of a precautionary approach is already integrated in the meaning of *effect* which includes *any potential effect of low probability which has a high potential impact*.

[112] The Board considers it is not the role of the NPS to prescribe how decisions can be made by consent authorities, and that codifying the precautionary approach in a policy could be limiting and restrictive to its application to the management of natural and physical resources.

[113] Decisions about resource use have to be made on the information that is presented. In some cases, relatively little information is available, but there are considerable difficulties in writing a policy to address this. In these circumstances, the RMA already requires that decision-makers adopt a precautionary approach.

[114] The Board also notes that while there is some common ground in the precautionary provisions that submitters have sought, there was no true agreement on what should be put into the proposed NPS.

Use of RMA terminology and expressions

[115] Many submitters asked that the terminology used in the proposed NPS be consistent with that in the RMA. Submitters were concerned that the introduction of new terms, or terms that were inconsistent with the RMA, would lead to litigation to resolve questions of interpretation during regional policy statement and regional/district plan processes. There was also comment about terms contained in the proposed NPS that require some form of judgement to implement, with some submitters urging that terms in the proposed NPS either be defined or deleted.

[116] Submitters also raised questions about consistency between the proposed NPS and various RMA expressions. A commonly cited example was the use in Objective 8 of a new phrase *identify and reflect*.

[117] The RMA gives meanings to many terms, and these are mostly clear and well understood. Terms such as *inappropriate*, *significant* and *life-supporting capacity* are used in the RMA without their meanings being defined in the interpretation section.

[118] The Board considers the NPS would be improved by using RMA terms wherever possible. The terms used in the NPS should, as far as practicable, be free from any requirement for judgement to be exercised in implementation, although some judgement will still be needed for implementation of the NPS at the regional level.

Scope of the Board's duties/considerations

[119] Submissions were received on a wide variety of topics that are not directly related to the provisions of the proposed NPS.

[120] Submitters sought that the Board recommend to the Minister a number of courses of action relating to central government responsibilities with respect to freshwater management. Some submitters favoured a 'whole of government' approach. These requests do not fall within the scope of the duties of a board of inquiry on a national policy statement. Likewise, it is not within the scope of the Board's task to recommend that central government adopt a 'whole of government' approach to freshwater management.

[121] Many submitters raised issues about integration and linkages between the proposed NPS and other national documents such as:

- the Proposed National Policy Statement for Renewable Energy Generation;
- the revision of the New Zealand Coastal Policy Statement;
- the Vision and Strategy for the Waikato River;
- the proposed National Environmental Standard on Ecological Flows and Water Levels; and
- the National Environmental Standard for Sources of Human Drinking Water.

[122] The Board accepts that, ideally, it would be desirable if the content of the NPS was consistent with that of other instruments under the Act on related subjects. However, by the end of the hearing of submissions on the proposed NPS, and by the time this report was prepared, the report of the Board of Inquiry on the review of the New Zealand Coastal Policy Statement had not been published; the report of the Board of Inquiry into the proposed National Policy Statement on Renewable Electricity Generation had not been published; the legislation to adopt the Vision and Strategy for the Waikato River had not been passed; and the processes on the proposed National Environmental Standard on Ecological Flows and Water Levels had not been completed. Therefore, the Board has kept its focus on the content of the

proposed NPS, leaving to others the task of moderating any inconsistencies among those instruments.

[123] Submitters also requested that the proposed NPS provide guidance on good practice in strategic planning, setting of environmental bottom lines and allocation limits. The Board does not consider that these matters are appropriate for national policy statements, whose purpose is to state objectives and policies in relation to matters of national significance. If the Ministry for the Environment sees a need for good practice advice to be disseminated, that is part of its function.

[124] Submitters suggested that the proposed NPS should provide national policies on governance, including implementation or clarification of the intent of collaborative governance processes and assistance in achieving them, and inclusion of provisions relating to co-management. Some submitters expressed concern about the impact of the proposed NPS on existing governance arrangements. The Board notes that these matters extend beyond freshwater management, and considers that a national policy statement would not be an appropriate instrument for addressing governance arrangements.

[125] In conjunction with submissions relating to demand management and efficient use of water, some submitters requested that the proposed NPS encourage or require widespread adoption of water measuring devices. Water measuring devices are one of a number of methods of managing demand for fresh water, and the Board considers that prescribing their use is too specific for inclusion in a national policy statement.

[126] Some submitters suggested that commercial users of water should be required to pay levies on abstraction of fresh water, with the resultant funds being used for freshwater management initiatives or to fund stakeholder involvement. This is beyond the scope of the Board's functions.

[127] The work of the Land and Water Forum was also the subject of comment by submitters, who suggested a need for consistency between the two processes, or that the proposed NPS should be delayed until the work of the Forum is complete. The main role of the Board is to consider and report on the submissions on the proposed NPS in terms of the RMA. The Board understands that, by comparison, the role of the Forum is much broader and at a higher order of generality. The Board, having heard the submitters, is obliged to complete its report without unnecessary delay. Because the Forum's work has broader scope, it does not justify the Board delaying its report. This report should be available to the Forum well before it is due to report.

[128] Many submitters commented on matters contained in the section 32 report on the proposed NPS, criticising its analysis of costs and benefits. By section 32(1)(a) of the RMA, prior to public notification of any national policy statement, the Minister has the responsibility for evaluating the appropriateness of objectives, and the efficiency, effectiveness and appropriateness of policies in achieving the objectives. By section 32(2)(b) the Minister has to carry out a further evaluation prior to issuing a national policy statement. The preparation, contents and sufficiency of any section 32 analysis are not matters for a board of inquiry to consider.

[129] The Board received many requests from submitters (from all sectors of interests in freshwater management) about the costs of implementation of the proposed NPS, and the provision of funding from central government. As the Board explained in paragraph [86], it considers that the extent to which costs of implementing the NPS should be met by local authorities, and the extent of any subsidy from central government, are outside the ambit of the Board's functions.

Endnotes

- ³ Section 45(1) RMA.
- ⁴ Section 55(2) RMA.
- ⁵ Documents in that class are planning instruments such as regional policy statements and regional and district plans.
- ⁶ Section 55(2A)(a)
- ⁷ Section 55(4) RMA.
- ⁸ See meanings given in RMA, s2(1) for *water* and *natural and physical resources*.
- ⁹ RMA, s3.
- ¹⁰ RMA, s2(1).
- ¹¹ *New Zealand Rail v Marlborough District Council* [1993] 2 NZLR 641; [1994] NZRMA 70 (HC).
- ¹² Resources may be used, but only in a sustainable way: *Auckland City Council v John Woolley Trust* [2008] NZRMA 160 (HC), per Randerson J, para [47].
- ¹³ *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189, 194; [1995] NZRMA 452, 458 (CA).
- ¹⁴ *Manukau Shopping Centre Merchants Association v Manukau City Council* HC Auckland CP2721/99 01/12/88, Wylie J; *Gunson v Waikato Regional Council* Env C A198/05, para [88].
- ¹⁵ RMA, s10.
- ¹⁶ RMA, s10A.
- ¹⁷ RMA, s20A.
- ¹⁸ RMA, s104(2A).
- ¹⁹ RMA, ss124–124B.
- ²⁰ See RMA, s104(1)(b)(iii).
- ²¹ *Dye v Auckland Regional Council* [2002] 1 NZLR 337; (2001) 7 ELRNZ 209; [2001] NZRMA 513 (CA).

NPS PROVISIONS

Preamble

[130] Many submitters were critical of the Preamble to the proposed NPS, highlighting inconsistencies between the Preamble and the objectives and policies of the proposed NPS, and between the Preamble and the provisions of the Act. A number of submitters requested amendments to the Preamble, including changing its focus and rewriting it to provide what was considered by submitters to be the necessary guidance and direction for freshwater management.

[131] During the inquiry, the Board requested an explanation of the status of the Preamble from the Ministry for the Environment. The Board was advised the Preamble had been drafted on the understanding that, because it is not formally part of a national policy statement as dictated by statute, its legal status would be minimal. The Preamble functions as an additional piece of guidance to help clarify the Government's intention as reflected in the proposed NPS and is intended to provide some context to the objectives and policies of the proposed NPS, to assist interpretation.

[132] The Board accepts that, in principle, there is value in stating, in a preamble, the circumstances in which the NPS is considered desirable. The Board also accepts submissions to the effect that some of the content of the Preamble to the proposed NPS is inappropriate.

[133] The Board recommends replacement of the proposed Preamble with a statement of the national values of fresh water, the national issues about freshwater management, and national goals in respect of those issues. They are drawn from the Act, the proposed NPS, the submissions, and the evidence presented by submitters. Taken together, those issues and goals are the circumstances in which the NPS is desirable.

Purpose

[134] Some submitters argued that the purpose of the proposed NPS does not add significantly to the document, nor clearly state the reasons why the proposed NPS has been prepared.

[135] As noted earlier, the Board considers that the NPS should be outcome focussed. However, a purpose statement should only be included if it helps the reader to understand the intention of having the NPS.

[136] The national values, the national issues, and the national goals, together provide a clear statement of the intention of the NPS. Therefore, the Board considers that a separate statement of the purpose of the NPS is unnecessary.

Objectives and policies

[137] The RMA treats the words *objective* and *policy* as having different meanings. From section 62(1)(c) of the RMA the Board understands that an objective is something sought to be achieved. The Court of Appeal has held²² that a policy is a course of action, and may be a mandatory direction having a restraining effect. The Board infers from that case that a policy is intended to be a course of action for the achievement of an objective.

[138] So, to the extent relevant in deciding submissions on the proposed NPS, the Board will assort the content as objectives or policies accordingly.

[139] Some submitters asked for the stating of an *overarching* objective of the proposed NPS. The RMA does not provide for a category of *overarching* objectives. However, it can be helpful to identify as such a broad objective having general application. The Board prefers to call it a general objective.

[140] Objective 1 in the proposed NPS, by restating enabling elements of the meaning given to sustainable management, focuses on the utilising of fresh water for human benefit. As many submitters urged, that would not respond to the main matters of national significance identified. They may be briefly restated as over-allocation, contamination of water, loss of wetlands, and incompletely integrated management.

[141] The general objective of the NPS can be drawn from the matters of national significance, and national issues and goals identified by the Board, and restated as follows:

To manage fresh water in a way and at a rate that –

- 1) maintains, and to the extent practicable, restores and enhances the intrinsic values of fresh water:
 - a) in the interdependence of the elements of the freshwater cycle; and
 - b) in the natural form, character, functioning and natural processes of water bodies; and
 - c) in natural and healthy conditions free from alterations resulting from human activity; and
 - d) in healthy ecosystem processes functioning naturally; and
 - e) for safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
 - f) for providing healthy ecosystems supporting the diversity of indigenous species in sustainable populations; and
 - g) for sustaining cultural and traditional relationships of Māori with fresh water; and
 - h) for sustaining the potential for fresh water to meet the reasonably foreseeable needs of future generations; and
- 2) (while not detracting from attaining clause 1), enables people and communities to provide for their social, economic and cultural well-being, and for their health and safety.

Freshwater intrinsic values

[142] The proposed NPS contains an objective to recognise and protect life-supporting capacity and ecological values (Objective 4).

[143] Although the link between the policies of the proposed NPS and Objective 4 is not entirely clear, it appears that Objective 4 is to be achieved by:

- identifying notable values (including potential values) of outstanding and degraded freshwater resources; and
- setting freshwater quality standards and environmental flows and levels for all freshwater resources of a region, with a particular focus on protecting outstanding freshwater resources and enhancing or restoring degraded freshwater resources.

[144] Submitters proposed a variety of amendments to Objective 4. Most of them sought to narrow the terms *life-supporting capacity* and *ecological values* by insertion of qualifiers such as 'net' life-supporting capacity and 'significant' ecological values. One submitter proposed a much more detailed objective, specifying the methods by which the life-supporting capacity of fresh water would be safeguarded. Another submitter requested that groundwater which is unconnected to surface water be omitted from the objective.

[145] Many submitters commented that the link between the objective and policies is not clear, and that it is not easy to discern how life-supporting capacity and ecological values are to be *recognised and protected*.

[146] These submitters generally suggested that values of some type (be they 'notable', 'natural' or 'significant') should be identified for all freshwater resources, although submitters differed on who should be responsible for that identification.

[147] Many submitters commented on the requirement for freshwater quality standards and environmental flows and levels to be established for freshwater resources. These submissions are addressed later in this report, in the Board's considerations of water quantity and water quality.

[148] The Board approaches those submissions for alteration of the proposed NPS by considering what would more fully achieve sustainable management of fresh water. As mentioned earlier in the report, the Board considers that fresh water should be managed so that the enabling elements do not prevail over, but are constrained by, the sustaining, safeguarding and effects-based elements of sustainable management. In that way the intrinsic values of fresh water should not be sacrificed to its values for well-being and amenity of people and communities.

[149] Objective 4 of the proposed NPS would be restricted in achieving that goal. By being limited to significant values, it would allow for minor and de minimis effects on the environment to be ignored. Cumulative effects of doing so have contributed to the national issues that called for the NPS. There are other intrinsic values that have also to be safeguarded and sustained.

[150] Likewise, the Board considers that introducing the concept of ‘net’ life-supporting capacity would narrow the objective too much, and would imply that compensation and trade-offs can be used as the first choice when addressing adverse effects of inappropriate activities on fresh water.

[151] In the Board’s opinion, making an exception for the specific situation where groundwater is not connected to surface water would not be warranted. The case advanced for this exemption was that a deep aquifer may have no life-supporting capacity or ecological values. In those circumstances, the objective would not on its terms apply to that water.

[152] The detailed objective (noted in paragraph [144]) that was suggested to the Board would outline relatively narrow values for fresh water (only relating to biodiversity) and then set standards and outline details of implementation. The Board considers that the setting of standards and provision of details on implementation are laudable aims, but an objective of that nature would raise questions about how practicable it would be to implement. When an objective is seen as too difficult to implement, this can lead to inaction.

[153] However, the suggestion about values of fresh water has led the Board to consider what the focus of Objective 4 should be. Earlier in this report, the Board noted that values of fresh water are wider than just ecological values. As suggested by some submitters, the Board recommends that Objective 4 should be widened to include ecosystem processes and indigenous species and their associated ecosystems.

[154] Policies for achieving the objective should apply to all the values of fresh water, not just those classified as notable. Identifying national values of fresh water in the NPS can help regional councils in preparing policy statements and plans, especially in the range of intrinsic values. That should lead to an improvement in managing fresh water, and in controlling activities that can affect full realisation of its values.

[155] Policies for achieving the objectives in respect of water quantity and quality are discussed below. They do not require carrying forward the concepts in the proposed NPS of *outstanding* and *degraded* fresh water.

Water quantity

Environmental flows and levels

[156] Policies 1(a) and 1(c) of the proposed NPS would require environmental flows and levels to be set for all freshwater resources of a region. The purposes of setting environmental flows and levels are to protect the notable values of outstanding freshwater resources and to enhance or restore the notable values of any degraded freshwater resources.

[157] Some submitters asked that the requirement to set environmental flows and levels should be removed altogether, or that they should only be set for outstanding water bodies or those at risk of degradation. One submitter urged the Board to require setting of environmental flows and levels in order to ensure security of supply to domestic and municipal water supplies.

[158] A number of submitters also commented that the definition of environmental flows and levels should be consistent with the definition contained in the proposed National Environmental Standard on Ecological Flows and Levels.

[159] Submitters questioned who should be responsible for setting environmental flows and levels, with suggestions including: central government through the NPS; regional councils; or that a case-by-case approach should be adopted, where flows and levels are set if a community has decided that the values of, or demands on, the water resource make setting standards appropriate and where freshwater resources are affected by discharges or abstractive use.

[160] The Board considers the NPS should contain a policy of setting environmental flows and levels, and that regional councils should be responsible for doing this. The Board accepts that many regional councils have already made significant progress in setting flows and levels for some water bodies in their regions. The setting of these flows and levels needs to be done over time for all water bodies, not just those that are outstanding or at risk of contamination. However, there is no need to do so in respect of ponds and naturally ephemeral water bodies.

[161] So the Board recommends that regional councils should adopt programmes for setting flows and levels for all water bodies in the region. If need be, it could be done over a period by adopting a progressive programme. This programme should be publicly stated and should be publicly reported annually, so that the community can see the progress being made.

[162] When setting environmental flows and levels, the range of values to be considered needs to be wider than notable values. Security of supply for domestic and municipal supplies is only one of many values (including intrinsic values) that should be considered.

[163] The proposed National Environmental Standard on Ecological Flows and Levels is not in its final form, so the Board cannot rely on any of its contents for consistency between the documents.

[164] The Board was asked to prescribe default flows and levels in the NPS. The Board understands that there is a divergence of expert opinion about how to set flows and levels, so choosing any one method for setting interim defaults would be controversial. The Board also understands that the appropriateness of different ways of setting flows and levels is being considered as part of the process of developing the National Environmental Standard on Ecological Flows and Levels, so this is not required in the NPS. The Board does not wish to parallel the NES process, nor recommend a policy that may be inconsistent with it.

[165] Because some councils may need to take a protracted period to set flows and levels for all water bodies in their regions, a transitional provision is needed in the meantime. The Board recommends that the NPS direct immediate inclusion in regional plans (without using the Schedule 1 process) of a policy requiring resource consent for certain changes in activities involving taking, using, damming or diverting of fresh water, or draining of

any wetland or in the natural variability of flows or level. The policy would state assessment criteria to be applied to consent applications.

Allocation of water

[166] A number of submissions related to allocation of water. Many submitters contended that the application of the 'first-in, first-served' approach to allocating fresh water is an approach that would not promote healthy fresh water in the long term. That may be, but even though some may doubt whether the 'first-in, first-served' approach serves the promotion of the sustainable management purpose of the Act, that approach has authoritatively been declared to be the law.²³

[167] Where a resource has been fully allocated, applying the principle of non-derogation of grants can also limit further grants that may be justifiable for promoting sustainable management, but that principle has also been authoritatively declared to be the law.²⁴

[168] The Board's duties are to make recommendations about the content of the NPS stating objectives and policies, and methods for including them in planning instruments. Its duties do not extend to making recommendations about changes to the law; and a national policy statement itself could not be effective to alter the law. Therefore, the Board does not accept submissions that, directly or indirectly, seek alteration of the 'first-in, first-served' approach to allocation of fresh water, nor of the application to water allocation of the principle of non-derogation of grants.

[169] A wide variety of submitters also commented on the prioritisation of water supply to various uses. Although the proposed NPS envisages management of demand for fresh water in such a way that priority is provided to reasonably foreseeable domestic water supply, many submitters sought the prioritisation of 'domestic and municipal' supply, with various methods suggested by which this could be done.

[170] The RMA confers on regional councils the function of establishing rules in regional plans to allocate the taking or use of water,²⁵ including allocating the resource to types of activities.²⁶ So the NPS might contain an objective or policies on how, in general, that function is exercised by regional councils. However, the relevant conditions in regions and catchments may vary, and the Act entrusts to regional councils the function of specific allocations of water to types of activity. That is to be done by provisions in regional plans, and by decisions on consent applications giving effect to those provisions.

[171] Therefore, the NPS may include a policy of allocating fresh water to intrinsic values, and of allocations to other types of activity being prescribed as absolute limits that are not to be exceeded, so the allocation to intrinsic values is not vulnerable to being diminished by over-allocation to types of activities for taking and use.

[172] The Board considers that the NPS should contain a policy of regional councils setting priorities for allocations of fresh water to intrinsic values and to types of activity for achieving sustainable management and the objectives of the NPS, according to the particular conditions in their regions and

catchments. The Board considers it inappropriate for the NPS to direct specific priorities or amounts for allocation to types of activity, beyond the policy of giving primacy to the needs of intrinsic values over the needs of types of activity. The policy should also include the regional councils' duties to have regard to the potential for climate change.

[173] The Board sees no national justification for giving priority to domestic and municipal supply, bearing in mind the regional differences in water availability, and the complexity of existing consents for the allocation of water to domestic and municipal supplies in cities and towns.

Addressing over-allocation

[174] In some regions, water has been over-allocated, leaving insufficient water for sustaining intrinsic values and the health of water bodies, and for various classes of needs. Some allocations are for greater amounts than are needed, and some exceed what is actually used.

[175] Many submitters contended that this outcome has arisen from an imbalance between the enabling elements of sustainable management as described in section 5(2) of the RMA and the counterpoint goals in paragraphs (a) to (c) of that subsection. Submitters asked that the NPS give firm direction to those carrying out functions under the RMA so that over-allocation of water is reversed, and efficient use of water required.

[176] The Board supports the concepts for managing over-allocation suggested by a number of submitters, and considers that if this type of approach assists in better management of fresh water, it should be included in the NPS.

[177] Policies in the proposed NPS would require regional councils to restrict existing taking, using, damming and diverting of fresh water in order to sustain notable values and tangata whenua interests and values in times of low flow.

[178] A number of submitters requested that conditions in which restrictions can be applied be expanded. Some requested that restrictions be able to be applied throughout the full flow regime, indicating that it is not only in times of low flow that values need to be sustained. Others proposed restrictions as a method for addressing the issue of over-allocation. They suggested that the policy be extended to provide for restrictions in over-allocated catchments at all times and in all catchments in times of low flow. Some submitters have sought exceptions to restrictions.

[179] In general, restrictions on taking, using, damming and diverting of fresh water may be needed to ensure the life-supporting capacity of water bodies is sustained. The sustaining of that capacity may be imperilled at times of low flow or level. It may also be imperilled in other conditions too, such as in over-allocated catchments. In alignment with recommended general Objective A1, restrictions on taking, using, damming and diverting of fresh water may be needed in periods of low flow or level, or in other circumstances to protect the intrinsic values of fresh water described in the second list in paragraph [40].

[180] The Board does not accept that there are types of activity that should be exempt from restrictions on taking, using, damming or diverting of fresh water. For instance, it does not support an exception for community water supplies. They provide water for more than domestic drinking and washing needs. Rather, the Board considers that all consent holders should bear their share of restrictions on a pro rata basis.

[181] The Board agrees with the submitters' suggestions that the restrictions policy be extended to provide for restrictions to be imposed in over-allocated catchments at all times and in all catchments in times of low flow or level. The Board acknowledges there are limitations on what can be done to change the exercise of existing consents until they expire or are reviewed in terms of section 128 of the RMA.

Managing demand and avoiding wastage

[182] Many submitters commented on the policies in the proposed NPS that require councils to manage demand for fresh water and ensure water that is taken is used efficiently.

[183] The Board considers that regional plans should manage demand according to efficient use of water and local and regional circumstances. It is not appropriate for the NPS to go to the detail of specifying types of demand management.

[184] The Board further considers that a number of the suggestions made by submitters about efficient use of water are either not within the scope of a national policy statement (such as directing that water that is 'fit for purpose' is used, and directing territorial authorities to address potential impacts on water quantity and quality) or have been reflected in different ways in other recommendations of the Board (such as those relating to integrated management).

[185] The Board has concluded that the proposed Objective 7 is really a policy and can be omitted. The general intent of it is met by other objectives and policies the Board has recommended for inclusion in the NPS.

Transfer of water permits

[186] Policy 1(i)(iii) of the proposed NPS would require that regional policy statements guide and direct regional and district plans to manage demands for fresh water in a manner which promotes efficient water use, including (where appropriate) through the transferability of resource consents.

[187] Some submitters have stated that increased guidance for implementing a transferable water permit regime would be helpful. Others have noted that there still needs to be a full discretionary assessment of the effects of any transfer, and that councils should ensure that existing allocation regimes are sustainable before allowing any transfers.

[188] The Board considers that the NPS does not need to state policies for markets for water. However, there would be merit in a policy stating criteria for assessing applications for transfer of water permits, including the extent

to which the transfer would result in maintaining quantities of fresh water; in enhancing the quality of fresh water; and in enhancing the technical efficiency of the use of water.

Water quality

Enhancement of water quality

[189] Objective 3 of the proposed NPS refers to the concept of *progressive enhancement of the overall quality* of fresh water, including by ensuring that appropriate freshwater resources can reach or exceed a *swimmable* standard.

[190] Some submitters raised questions about the meanings of the terms *progressive enhancement* and *overall quality* in the proposed NPS, and whether this would mean that the water quality of some water bodies could be allowed to degrade while that of others are improved, in order that *overall quality* is enhanced.

[191] Many submitters questioned the inclusion of the goal that appropriate water bodies reach or exceed a swimmable standard. Some submitters requested that the reference to *swimmable* either be removed or better defined. Other submitters urged the Board to set the bar higher than ‘swimmability’, commonly requesting that fresh water be improved to drinkable standard. Some submitters also requested that a standard to aspire to should apply to all fresh water, not just those water bodies seen as *appropriate*.

[192] Submitters also noted that the link between objectives and policies relating to water quality is not clear, and sought that the NPS include a policy framework that would require that:

- outstanding freshwater resources be protected;
- degraded freshwater resources be enhanced or restored (with the exception of those deemed to be ‘naturally degraded’);
- catchments considered to be ‘at risk’ of degradation be managed, or prioritised for pre-emptive action; and
- the quality of all other freshwater resources be maintained.

[193] The Board considers that the NPS should state a national goal of phasing out contamination of fresh water. So progressive enhancement of water quality is necessary. However, with a national goal of phasing out contamination, the Board does not consider it necessary to include a standard such as ‘swimmability’ in objectives or policies of the NPS.

[194] The Board acknowledges concerns expressed by submitters about reference to *overall* water quality in the proposed NPS. The Board considers it would be appropriate to include the following objective in the NPS to recognise the need to differentiate between different types of water bodies:

To protect the quality of outstanding fresh water, to enhance the quality of all fresh water contaminated as a result of human activities, and to maintain the quality of all other fresh water.

This objective would also provide the exception sought by many submitters for 'naturally degraded' water bodies.

[195] The suggestion to focus on 'at risk' catchments is considered to be an example of good practice when establishing a programme for enhancing and maintaining the quality of fresh water. That level of detail is not needed in the NPS.

[196] In the same way that the Board indicated that environmental flows and levels could be set progressively, the Board recommends that regional councils could adopt a programme of progressive implementation of defined, time-limited stages that protects or enhances the water quality of all water bodies in a region, with annual public reporting of progress.

Further degradation of water quality

[197] Many submitters commented on the need to improve water quality and to recognise that water is a finite resource. These submissions have informed the Board's development of recommended Objective A1. Equally, many submitters protested that the reference in Objective 5 of the proposed NPS to avoiding *further degradation* of freshwater resources would implement a zero-tolerance threshold for contamination that is not appropriate or consistent with the concept of reasonable mixing contained in the RMA.

[198] Some submitters saw the capacity of water bodies to assimilate discharges as a 'value' that should be provided for. A number of submitters in metropolitan areas urged the Board to look differently at urban streams, with their perceived values for conveyance of stormwater and sewage overflows. Some urged that a 'polluter pays' approach should be adopted when existing or potential discharges are being considered, in order to ensure that effects are avoided, remedied or mitigated. Other submitters asked that the NPS make allowance for temporary or short-term effects on water quality as an exception to the requirement to avoid further degradation, based on the perceived minor extent of these effects.

[199] The Board considers that a change in attitude to, and management of, contamination of fresh water is needed. Fresh water should only be used for cleaning, diluting and disposing of waste if there is a positive assurance that the life-supporting capacity of the water and associated ecosystems, and the potential of the water to meet reasonably foreseeable needs, will not be diminished, and will, where practicable and necessary, be enhanced.

[200] The RMA entrusts to regional councils a function of making rules to allocate the capacity of water to assimilate a discharge of a contaminant. The concept of assimilative capacity assumes that it is possible to calculate the capability of fresh water to receive contaminated discharges without resulting in adverse effects on the quality of the water, or on ecosystems that it supports.

[201] However, in many parts of the country, cumulative effects of contaminants discharged into water bodies have resulted in fresh water having unacceptably degraded conditions. That leaves doubt about the soundness of assumptions about assimilative capacity.

[202] The Board considers that a national policy should not recognise any right to contaminate fresh water, nor to use its supposed assimilative capacity. Nor does it support the concept of 'polluter pays' if it implies that a polluter is free to buy or trade off contaminating fresh water in order to gain consent. Compensation for a truly unavoidable effect may be acceptable, but only where there is a causal link between the compensation and the unavoidable effect.

[203] The Board is not persuaded that differences between streams in urban and rural environments are of such significance that the NPS should differentiate in how they are to be managed. Urban streams still have values, and these need to be sustained. The Board acknowledges the imperative of disposing of stormwater. However, contaminants carried by stormwater can be intercepted and removed before they reach a water body, and progressive enhancements to stormwater systems to do so should be continued.

[204] The Board also considers that no allowance should be offered by the NPS to either councils or resource users by explicitly allowing temporary or short-term degradation, as this would not be consistent with the national goal of phasing out contamination of fresh water.

Diffuse source discharges

[205] Submitters urged the Board to ensure that the NPS contains policy to address diffuse source discharges. Most of these submitters considered the proposed NPS does not deal explicitly with diffuse source discharges when considering water quality.

[206] The objective is that life-supporting capacity, ecosystems processes and indigenous species and their associated ecosystems will be sustained. The Board accepts that this cannot be achieved without accounting fully for all sources of contaminant from natural sources and human activity, including diffuse long-term leaching from deposits on land.

[207] The Board recommends a general objective of restoring and enhancing the intrinsic values of fresh water; and objectives of protecting, enhancing and maintaining fresh water and of safeguarding its life-supporting capacity. It also recommends policies that include controlling use of land so as to avoid cumulative effects, setting water quality standards, avoiding future contamination, and consent conditions requiring adoption of best practicable options to protect against contamination.

[208] Although these objectives and policies are not specifically limited to diffuse source discharges of contaminants, they are intended to apply to contamination of fresh water from diffuse sources, including application of pesticides and fertilisers and grazing by livestock. They are also intended to include contamination from discharges to, and deposits onto or into, land, and leaching to groundwater or surface water.

Freshwater quality standards

[209] Many of the points raised by submitters in relation to environmental flows and levels also applied to the requirement in the proposed NPS that freshwater quality standards be set for all freshwater resources in a region.

[210] Consistent with the discussion at paragraphs [160] and [162], freshwater quality standards should be set for all water bodies in a region, and for the full range of intrinsic values, rather than just notable values. Where early implementation is not practicable, this work could be carried out progressively as part of a staged programme of implementation.

[211] There were also requests by submitters for a transitional regime for managing fresh water until quality standards are established. The Board agrees that this would be appropriate. To that end, the Board recommends a transitional policy be included in the NPS for direct insertion into regional plans. The policy would require that any change or increase in the intensity of a land use or activity involving a discharge of contaminants would require resource consent. It would also set assessment criteria for deciding consent applications.

District plan provisions

[212] Many submitters commented on the provisions of the proposed NPS that require territorial authorities to undertake functions in relation to the management of effects of activities on water quantity and water quality. A number of submitters requested that these provisions be removed, because they do not fall within the scope of territorial authorities' responsibilities under the RMA.

[213] As discussed earlier, the Board accepts the points made by these submitters, and considers that references to functions of territorial authorities in the proposed NPS should be amended to ensure that the NPS is consistent with the RMA.

Wetlands

[214] Some submitters sought that the NPS make provision for wetlands and the indigenous biodiversity of their ecosystems. They asked for a national policy that councils protect wetlands from invasion by, or expansion of, exotic plant and animal species.

[215] The Board understands that the main issues relating to wetlands are draining and other activities affecting water quantity, and maintaining indigenous biological communities. A healthy functioning wetland provides habitat for essential ecosystem processes.

[216] The Board accepts that protection of wetlands is a national issue, and that changes in wetland ecosystem processes allow invasive species to become established. To the extent relevant to the subject-matter of the NPS, that is addressed by the recommended objectives and policies. However, invasive species that are pests are managed under the Biosecurity Act 1993, not under the RMA.

Integrated management

[217] Submitters urged that the NPS provide more fully for the two major aspects of integrated management:

- the interconnected nature of freshwater resources (e.g. surface water and groundwater) spatially, temporally and within catchments; and
- adoption by councils of management methods that respond to the nature of the resource and the diversity of effects that can occur.

[218] Various objectives and policies were suggested by submitters to address these requests on integrated management. Some would relate to connections between natural features, others to interactions between institutions.

[219] The Board considers that it would be inappropriate for the NPS to require councils to adopt particular institutional arrangements. It would be more pertinent and effective for the NPS to state a policy for integration of the management of effects of activities on water quantity and quality. Incomplete integration in management of these effects is leading to cumulative adverse effects.

[220] The Board recommends that this issue is addressed by an objective of managing catchments in an integrated manner, as follows:

To improve integrated management of fresh water, associated ecosystems and use of land in whole catchments.

[221] The Board also recommends the following policy to give effect to this objective:

By every regional council managing fresh water and freshwater ecosystems, and controlling activities and use of land, in whole catchments, so as to avoid adverse cumulative effects anywhere in the catchment.

[222] The Board considered whether to recommend an integrated management policy for district councils as well. However, the functions conferred on territorial authorities by section 31 of the RMA do not extend to the management of the quantity or quality of fresh water, as those conferred on regional councils by section 30 do. So the Board infers that achieving integrated management of fresh water is a responsibility of regional councils, but not of territorial authorities.

Tāngata whenua roles and Māori values and interests

Involvement in freshwater management

[223] Many submitters questioned the reference in Objective 8 and Policy 1(d) of the proposed NPS to the involvement of iwi and hapū in the management of, and decision-making regarding, freshwater resources. As

noted in paragraphs [93] and [94], some iwi submitters requested full partnership in management of fresh water, and some requested new management approaches to allow them to more fully give effect to their kaitiaki responsibilities.

[224] Other submitters were opposed to the increased involvement of iwi and hapū in decision-making that the proposed NPS would provide for.

[225] The Board considers that the use of the term *involvement* in Objective 8 deliberately allows for different approaches to iwi and hapū roles in the management of fresh water. This reflects the different ways in which involvement currently occurs around the country. The difference in approach reflects different relationships between Māori and local government. The NPS can state the objective of involvement, but should not dictate details of the kind of relationship. The type of relationship is something for the parties to establish, develop and take responsibility for, together.

Iwi and hapū

[226] A number of submitters were concerned at the requirement of Objective 8 and Policy 1(d) to involve *iwi and hapū* in freshwater management. They pointed out this would change the existing presumption about consultation with *tāngata whenua* in some parts of the country. Other submitters were concerned this would impose a burden, based on the large number of hapū within some regions.

[227] Submitters generally suggested that reference to iwi and hapū in the proposed NPS be replaced with *tāngata whenua*. Many asked that *tāngata whenua* values and interests be defined in the NPS.

[228] Section 6(e) of the RMA refers to the relationship of *Māori* with their ancestral lands, waters and sites. By section 2 of the RMA *tāngata whenua* means *...in relation to a particular area...the iwi, or hapū, that holds mana whenua over that area.*

[229] Consistent with the Board's recommendation to use RMA terms (see paragraph [118]), the word *Māori* should be used instead of *iwi and hapū* or *tāngata whenua* in respect of values; and as generally the term *tāngata whenua* relates to the people of a specific area, that term would be more appropriate in respect of involvement in management and decision-making.

[230] The Board considers that a definition of *tāngata whenua* or Māori values and interests could limit the identification of the values to only those included in the definition. This could restrict the flexibility of the application of the NPS objective around the country.

Identification of values and interests

[231] Many submitters argued the proposed NPS would not provide clear guidance to regional councils on how *tāngata whenua* values and interests are to be identified. Current practice was seen by these submitters as meaning that the use of existing RMA provisions would not achieve the intention of the proposed NPS.

[232] Several of the iwi submitters explained what they expected to see included in a national policy statement on freshwater management for it to be of benefit to Māori. The existing objectives and policies were seen as not being strong enough to protect Māori interests, partly due to the perceived relegation of iwi and hapū interests and the Treaty partnership.

[233] Māori and other submitters also urged the Board to address issues relating to fresh water in the coastal marine area.

[234] Various suggestions were made as to how tāngata whenua values and interests could be identified.

[235] The Board considers that the NPS should be responsive to different understandings about Māori values in different areas. Although this approach may result in variation of practice, it also respects the diverse relationships between tāngata whenua and local government in different parts of the country.

[236] Far from relegating iwi and hapū interests, the NPS expressly provides for the contribution that iwi management plans, statutory acknowledgements and Waitangi Tribunal reports make to decision-making. (The Board acknowledges that Waitangi Tribunal reports are only available for some areas.)

[237] On the submissions about fresh water in the coastal marine area, the subject-matter of the NPS is management of fresh water. At or near the coast, fresh water mixes with coastal water. The NPS applies to fresh water down to the landward boundary of the coastal marine area established under the RMA. Improvements in the quantity and quality of fresh water flowing into the coastal marine area are likely to have positive effects on coastal waters.

Monitoring and reporting

[238] Objectives and policies of the proposed NPS would require that regional councils and territorial authorities undertake *effective monitoring and reporting* of various matters to do with freshwater management. A number of submitters considered that it is unnecessary for the proposed NPS to impose monitoring obligations additional to those required under the RMA, and that the RMA requirements are sufficient in respect of monitoring.

[239] Concerns were also expressed by submitters about the costs of additional monitoring being imposed by the proposed NPS, and the appropriateness of territorial authorities being required to monitor and report on freshwater management issues.

[240] By section 35(2)(b) of the RMA, local authorities are required to monitor the efficiency and effectiveness of policy statements and plans. By section 35(2A), local authorities are required to report on the outcome of that monitoring. Other relevant monitoring and reporting sections in the RMA include:

- section 360(1)(hk) – relating to the Minister’s regulation-making powers in relation to councils supplying information to the Minister

- section 24(f) – relating to the Minister’s monitoring responsibilities
- section 27(3) – relating to the supply of information to the Minister.

[241] The Board considers that it is inappropriate to include a policy in the NPS for local authorities to perform duties already imposed by the RMA. If a legal obligation to monitor and report under the RMA is not being complied with, in future it should be. A policy in the NPS about monitoring and reporting would not make an effective difference to performance of duties imposed by the Act.

[242] Where costs of monitoring and reporting fall is an administrative matter, and there is no need for a policy in the NPS about it.

Non-regulatory methods

[243] Some submitters requested that the policy on non-regulatory methods be broadened by including additional detail on non-RMA methods of achieving the objectives of the proposed NPS, and by referring to the methods that central government will employ to give effect to the proposed NPS.

[244] Other submitters expressed concern about the costs of non-regulatory methods, and requested various restrictions on the policy in the proposed NPS.

[245] The Board considers that Policy 7 as currently written is not strictly a policy, and therefore need not be included in the NPS recommended by the Board. However, the Board notes that the absence of a policy on using non-regulatory methods does not diminish the desirability of using them.

Implementation

[246] The Preamble to the proposed NPS states a goal that, by 2035, the quality of fresh water is to meet the aspirations of all New Zealanders. Policies 1, 2 and 3 of the proposed NPS specify that local authorities are to take stipulated actions by prescribed times. A number of submitters questioned those provisions.

[247] Some submitters argued that the goal of 2035 is too far away, others expressed concern about whether the objectives of the proposed NPS would be able to be achieved within that time. Many submitters requested an extension of the time limit for regional and district planning instruments to give effect to the proposed NPS, particularly the 40-day timeframe for amending regional and district plans. Other submitters requested the time limits be shortened, particularly the two-year time limit for regional policy statement changes to be notified.

[248] In general, the matter of time limits has been considered in more detail in relation to the specific objectives and policies assessed earlier in this report.

[249] The Board doubts whether the 2035 date contained in the Preamble to the proposed NPS would have force and effect, as it is not, itself an objective or policy of the proposed NPS. The Board also accepts there are differences in resourcing and in the extent of work that may be required in various regions. Where considerable cost and effort may have to be applied in a region to achieve the objectives of the NPS fully, a progressive implementation programme may be adopted, and progress reported annually.

[250] On considering the submissions about compliance times, the Board recommends a new policy combining two provisions to give regional councils some flexibility in carrying out the policies, while still setting time limits for full implementation of them.

[251] Many regional councils will, with determination, be able to implement most policies within a short period of years. Allowing for the local authority election cycle, the Board recommends that policies be implemented by the end of 2014.

[252] But where a regional council is satisfied that it will not be practicable for it to complete implementation of a policy by the end of 2014 it may, within 18 months, adopt a programme of progressive implementation of defined and time-limited stages, by which the policy would be fully implemented by an extended time limit, no later than the end of 2030. To engage the public in such a protracted programme, its adoption should be publicly notified, and annual progress reports published.

Existing NPS provisions

[253] To this point of the report, the Board has addressed major topics on which submitters asked for amendments to the proposed NPS. The Board has indicated several provisions which it recommends be replaced. In its terms of reference, the Board has to review the remainder of the proposed NPS to address any potential inconsistencies.

[254] The Board considers that a preamble can provide a useful introduction to the NPS. It should outline in broad terms the challenges for freshwater management, and state national values, issues and goals. But the Board doubts whether the Preamble to the proposed NPS does that clearly and effectively. It recommends a replacement preamble.

[255] As discussed in paragraph [135], a purpose statement should only be included if it helps the reader to understand the intention of having the NPS. The purpose statement in the proposed NPS does not do this, and the Board considers that a separate statement of the purpose of the NPS is unnecessary.

[256] As discussed in paragraph [140], Objective 1 of the proposed NPS focuses on utilising fresh water for human benefit, and does not respond to the main matters of national significance identified. The Board therefore recommends that it be omitted.

[257] An issue of incompletely integrated management of fresh water was identified in the proposed NPS in Objective 2 and was the subject of some submissions. The Board accepts that the NPS should state an objective on that topic. It stated its recommended objective in paragraph [220].

[258] As suggested by some submitters the Board recommends that Objective 3 of the proposed NPS be amended to focus on protecting the quality of outstanding fresh water and enhancing the quality of all fresh water contaminated as a result of human activities. As the Board recommends that the national goal with respect to water quality should be to phase out contamination, this would set a more stringent requirement than the reference in Objective 3 to a swimmable standard of water quality. This national goal would also remove the need for Objective 5 of the proposed NPS.

[259] The Board accepts that the *ecological values* the subject of Objective 4 of the proposed NPS should be clarified to apply to *ecosystem processes and indigenous species and associated ecosystems*. The Board also considers that Objective 4 would be clearer if split into two objectives, one relating to water quality and one to water quantity.

[260] Objectives 6 and 7 of the proposed NPS are considered by the Board to be more in the nature of policies than objectives, and it is therefore recommended that they be omitted. The general intent of both objectives would be met by other objectives and policies that the Board recommends be included in the NPS.

[261] The Board recommends that Objective 8 is retained in the NPS, with amendments to give effect to comments from submitters.

[262] As discussed in paragraph [241], the Board does not consider it appropriate to include an objective or policy relating to monitoring and reporting in the NPS, as these are the subject of requirements of the RMA.

[263] Policies 1(a) to (c) of the proposed NPS address the identification of notable values, and the setting of freshwater quality standards and environmental flows and levels for freshwater resources. The Board sees merit in requiring regional councils to set freshwater quality standards and environmental flows and levels for all bodies of fresh water in their regions (with the exception of environmental flows and levels for ponds and naturally ephemeral water bodies). However, the Board recommends that, when setting freshwater quality standards and environmental flows and levels, all intrinsic values of a particular water body be considered, rather than there being a particular focus on *notable values*. The Board therefore recommends that Policy 1(b) of the proposed NPS be omitted.

[264] Policies 1(d) to (f) of the proposed NPS relate to the involvement of iwi and hapū in management and decision-making in respect of freshwater resources; identifying and recognising tāngata whenua values and interests in those respects. Earlier in this report, the Board addressed submissions on those topics, and stated its conclusions that the NPS should allow for variation in Māori values and interests in different areas, and in the part tāngata whenua have in management and decision-making in respect of fresh water. Therefore, the Board recommends a policy (Policy B1) for achieving the objective (Objective B1).

[265] Policy 1(g) of the proposed NPS relates to restricting certain activities in times of low flow in order to sustain notable values and certain tāngata whenua values and interests. The Board recommends a revised version of the policy that recognises the limits on permissible restrictions on

existing consents, and broadens the scope of the purposes for which restrictions might be imposed.

[266] Policies 1(h) and 1(j) of the proposed NPS are directed towards integrated management. The Board recommends a clearer policy on that topic.

[267] As discussed at paragraph [24], the Board considers that a national policy statement may need to place emphasis on particular elements of sustainable management. It has determined that the emphasis of the NPS should be on the sustaining and safeguarding elements of section 5(2) of the Act. In this context, the Board considers that the matters covered in Policy 1(i) of the proposed NPS are more appropriately addressed in a policy that requires regional councils to manage demand for fresh water so that water bodies are not over-allocated.

[268] Policy 2(a) of the proposed NPS applies to regional councils changing regional plans to set freshwater quality standards and environmental flows and levels. By Policies D2 and E1 the recommended NPS would do so.

[269] Policy 2(c) of the proposed NPS outlines various requirements for regional councils to impose consent conditions. While the Board agrees that efficient use of water, sustainable management of demand, integrated management of the effects of activities on water quality and quantity, and protection against contamination of water quality are important matters for the NPS, the Board prefers simpler and more direct policies. As discussed at paragraphs [241] and [262], the Board considers that the NPS should rely on the RMA provisions for monitoring and reporting, rather than restating those duties as policies.

[270] Policy 3 of the proposed NPS would impose requirements on territorial authorities that would be outside their functions under section 31 of the RMA. The policy should therefore be omitted.

[271] The Board considers that Policies 4 and 5 of the proposed NPS (which outline matters to be considered by councils in the preparation of planning documents) do not add significant value to the contents of the proposed NPS. Regional councils are required to recognise a national policy statement by making amendments to their planning documents. The objectives and policies that the Board recommends for inclusion in the NPS cover, to the extent the Board considers appropriate, the matters contained in Policies 4 and 5.

[272] Policy 6 of the proposed NPS relates to consent and designation conditions. The substance of that is included in Policies C1, D7, D8, E2 and E3 of the recommended NPS.

[273] Policy 7 of the proposed NPS about the use of non-regulatory methods is not a policy. Therefore, the Board recommends that it be omitted.

[274] Policies 8 and 9 of the proposed NPS repeat duties that are imposed by the RMA and the Board considers that unnecessary and recommends they be omitted.

[275] Following omission of objectives and policies using them, the Board recommends omission of definitions used in the proposed NPS.

Endnotes

²² *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18, 22f; [1995] NZRMA 424, 430; 1B ELRNZ 426, 433.

²³ *Fleetwing Farms v Marlborough District Council* [1997] 3 NZLR 257, 264 (CA) and *Central Plains Water Trust v Synlait* [2009] NZCA 609 (CA).

²⁴ *Aoraki Water Trust v Meridian Energy* [2005] 2 NZLR 268; [2005] NZRMA 251; 11 ELRNZ 207 (FC).

²⁵ RMA, s30(1)(fa).

²⁶ RMA, s30(4)(e).

CONCLUSION

[276] In accordance with its terms of reference, the Board reports that it:

- has inquired into the proposed NPS;
- has engaged with Māori submitters;
- has considered all submissions and further submissions made, and all the evidence given;
- has addressed the contents and subject-matter of the NPS;
- has refined the issues, objectives and policies to more fully achieve the policy approach;
- has addressed the internal consistency of the NPS as a whole, and removed potential inconsistencies;
- has addressed the wording of the NPS, including that of the objectives and policies, and improved it;
- has considered the certainty and clarity provided by the NPS, and improved it;
- has considered the possibility of unintended or unforeseen but likely outcomes, and avoided them;

and recommends the amendments to the content of the proposed NPS that have been incorporated in the recommended NPS at Appendix C so that it will more fully serve the purpose of the RMA.

[277] The Board has set out in this report its reasons for its conclusions on considering the submissions, further submissions and evidence.

[278] The Board has also considered how local authorities should, in accordance with section 55, give effect to the NPS, and whether or not some changes needed to regional policy statements or regional plans would be best achieved by direct insertion into regional policy statements or plans under section 55(2A)(b). Its consideration of those questions is influenced by the further amendments made to section 55 by the 2009 Amendment Act²⁷ since the Board was constituted and its terms of reference established.

[279] Regional policy statements have to give effect to national policy statements.²⁸ Regional councils have to consider the desirability of preparing or changing regional plans for implementation of a national policy statement.²⁹ Regional plans have to give effect to a national policy statement.³⁰ Consent authorities considering resource consent applications and territorial authorities considering requirements for designations have to have regard to a national policy statement.³¹

[280] In addition, if a national policy statement directs, a regional council has to amend a regional policy statement, or a plan, to include specific objectives and policies set out in the national policy statement, or so that objectives and policies specified in the document give effect to the objectives and policies specified in the statement.³² Those amendments are to be made

without using the Schedule 1 process.³³ A national policy statement is able to include transitional provisions.³⁴

[281] The Board recommends that the NPS direct regional councils to make or change regional plans (without using the Schedule 1 process) to the extent needed to ensure the plans include transitional provisions on water quantity and quality management in Policies D10 and E4 respectively. The changes would require resource consent (as discretionary activities) for changes of land uses, activities, taking, using, damming and diverting or draining of wetlands and specify criteria by which applications are to be assessed. That would provide interim control during the period in which amendments to regional plans are prepared and made under the Schedule 1 process to give effect to the NPS.

[282] In summary, the Board recommends for the Minister's favourable consideration the revised version of the NPS at Appendix C.

[283] The Board thanks all the many individuals and organisations who made submissions or further submissions, and all who gave evidence at the public hearings.

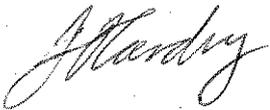
Dated at Christchurch this 28th day of January 2010.



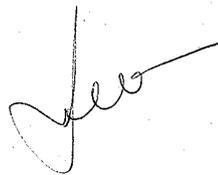
Judge David Sheppard (Chair)



Mr Kevin Prime (Member)



Associate Professor Jon Harding (Member)



Mrs Jenni Vernon (Member)

Endnotes

²⁷ Resource Management (Simplifying and Streamlining) Amendment Act 2009, s53.

²⁸ RMA, s62(3).

²⁹ RMA, s65(3).

³⁰ RMA, s67(3).

³¹ RMA, s104(1)(B)(iii) and s171(1).

³² RMA, s55(2).

³³ RMA, s55(2A).

³⁴ RMA, s55(4).

APPENDIX A

PROPOSED NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT

Preamble

All New Zealanders have a common interest in ensuring that the country's freshwater resources are managed wisely, in order to provide for present and future environmental, cultural, social and economic well-being of New Zealand.

Water is central to the social, economic and cultural well-being of many aspects of New Zealand's society. It has deep cultural meaning to all New Zealanders. It is also highly valued for its recreational aspects. It forms a vital input to many forms of economic activity, and most crucially underpins important parts of New Zealand's biodiversity and natural heritage. Many of New Zealand's freshwater bodies are iconic and well known globally for their natural beauty and intrinsic values. Understanding and managing threats to water with respect to the availability, quality, health and economic value are therefore fundamental to our well-being.

New Zealand now faces real challenges, of varying degrees and causes across regions, in ensuring there is sufficient water in our lakes, rivers, and aquifers; protecting freshwater ecosystems, in limiting and remediating degradation of water quality; and in ensuring that society gains the greatest benefit from the allocation of available water. For example, recent monitoring reported that only 60% of New Zealand's freshwater swimming spots tested met the New Zealand guidelines for water-based (contact) recreation almost all of the time. In addition, there is an incomplete understanding of how much water can be sustainably allocated and where it can best be used, and of how alternative land uses affect water quality and options for managing those effects. Those challenges, including those arising from climate change, are nationally significant. Key issues identified through previous consultation and hui regarding fresh water and freshwater management include water quality, allocation, ongoing engagement, and effective implementation of the RMA.

To respond effectively to these challenges and issues requires agreement on and balancing of cultural, ecological, economic and social goals for management of New Zealand's freshwater resources. Identifying sustainable targets for take and use of water, and achieving a smooth transition to them are not straightforward tasks. This National Policy Statement forms part of a suite of efforts to achieve that balance and deliver those targets.

The Treaty of Waitangi (Te Tiriti o Waitangi) is the underlying foundation of the Crown–Māori relationship with regard to Freshwater Resources. This proposed National Policy Statement is one step in the process of addressing tangata whenua values and interests including the involvement of iwi and hapū in the management of fresh water. Additionally, the proposed National Policy Statement is a non-exhaustive step towards progressive strategies at

the national and regional level in order to meet shared objectives in respect of the Freshwater Resources of New Zealand.

Given the central importance of Freshwater Resources to New Zealand and New Zealanders and in order to achieve the purpose of the RMA, the Crown recognises that there is a particular need for clear central government policy that directs local government to implement measures necessary to achieve the following goals:

- address existing and future constraints on the availability of Freshwater Resources
- address the effects of existing and future discharges of contaminants to Freshwater Resources
- provide more certainty in respect of competing demands on New Zealand's Freshwater Resources and facilitate opportunities to increase benefits from the use of Freshwater Resources, within the above constraints on availability and effects of discharges
- meet the recreational aspirations of New Zealanders, including that Freshwater Resources are swimmable
- address matters of national significance relating to the sustainable management of Freshwater Resources
- improve the integrated management of Freshwater Resources by territorial authorities, regional councils, and others whose activities affect Freshwater Resources.

In developing and applying measures, local government should aim wherever possible to provide flexibility in how these goals are achieved, so as to encourage and empower innovation and local solutions. It is expected that this National Policy Statement will have an immediate influence on RMA decision-making. It will also call for progressive improvement in the management of New Zealand's Freshwater Resources. Councils will be expected to make publically available information in this regard, which will be monitored and published as required under section 35 of the RMA. Each national state of the environmental report should demonstrate progress in achieving the goals of the NPS and show continuing improvements in the state of New Zealand's Freshwater Resources, including towards meeting contact recreation guidelines. This is in order that by 2035 the quality of these resources meets the aspirations of all New Zealanders. This date has been chosen as an ambitious yet achievable target, setting a balance between the need to make changes in a timely manner and the cost incurred by making those changes.

Purpose

The purpose of this National Policy Statement is to state inter-related and integrated objectives and policies as to the management of Freshwater Resources as a matter of national significance that is relevant to achieving the purpose of the Act.

Objectives

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.

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.

Objective 3 – Improving the quality of fresh water

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.

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
- b. Land-use Development; and
- c. discharges of contaminants.

Objective 5 – Addressing freshwater degradation

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

Objective 6 – Managing demand for fresh water

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 fresh water:
- b. the need to provide for resilience against the biophysical effects of climate change (such as through infrastructure for supply, storage and distribution of fresh water):
- c. 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 fresh water.

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

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

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.

Policies as to regional policy statements

Policy 1

By the second anniversary of the date of commencement of this National Policy Statement, every regional council must notify, in accordance with Schedule 1 of the Act, a proposed regional policy statement or variation to a proposed regional policy statement or change to its operative regional policy statement in order that as soon as practicable thereafter every regional policy statement specifies objectives, policies and methods which –

- a. Determine and timetable priorities for when regional plans will set Freshwater Quality Standards and Environmental Flows and Levels for all Freshwater Resources of the region; and
- b. Identify Notable Values (including potential values) of –
 - i. Any Outstanding Freshwater Resources; and
 - ii. Any Degraded Freshwater Resources; and
- c. In accordance with Policy 1(a) and (b), guide and direct the setting in regional plans for all Freshwater Resources of the region of –
 - i. Freshwater Quality Standards; and
 - ii. Environmental Flows and Levels;

including for the protection of Notable Values of any Outstanding Freshwater Resources and the enhancement or restoration of Notable Values of any Degraded Freshwater Resources; and

- d. Guide and direct local authorities as to the involvement of iwi and hapū in the management of, and decision-making regarding, all Freshwater Resources of the region, including but not limited to, requiring local authorities to disclose how they are intending to achieve this involvement; and
- e. Identify Tangata Whenua Values and Interests in respect of all Freshwater Resources of the region; and
- f. Guide and direct regional and district plans (including considerations for the determination of resource consent applications and notices of requirement) in relation to the recognition of Tangata Whenua Values and Interests in respect of all Freshwater Resources of the region; and
- g. Guide and direct regional plans (including considerations for the determination of resource consent applications) to restrict existing takes, uses, damming and diversion of fresh water in order to sustain Notable Values and non-consumptive Tangata Whenua Values and Interests in times of low flow; and
- h. Guide and direct regional and district plans (including considerations for the determination of resource consent applications and notices of requirement) to effectively manage Land-use Development and discharges of contaminants to control the adverse effects of the discharge of contaminants into fresh water or onto or into land in circumstances where contaminants may enter fresh water; and
- i. Guide and direct regional and district plans (including considerations for the determination of resource consent applications and notices of requirement) to manage demands for fresh water, including demands arising from Land-use Development and discharges of contaminants, in a manner which –
 - i. Provides certainty to communities and water users (including as appropriate through prioritisation of allocation for takes of fresh water for reasonably foreseeable Consumptive Use); and
 - ii. Provides priority for reasonably foreseeable domestic water supply, over other competing demands, provided that appropriate demand strategies are established for such supply; and
 - iii. Promotes efficient Freshwater use (including through the transferability of resource consents, where appropriate); and
 - iv. Increases resilience to the effects of climate change; and
 - v. Controls adverse effects; and
- j. Guide and direct regional and district plans (including considerations for the determination of resource consent applications and notices of requirement) to ensure integrated management of the effects of Land-use Development –
 - i. by encouraging co-ordination and sequencing of infrastructure for supply, storage and distribution of fresh water; and
 - ii. by controlling adverse effects (including associated discharges of contaminants) on the quality and available quantity of Freshwater Resources.

Policies as to regional and district plans

Policy 2

Every regional council must –

- a. By the date or dates specified in the regional policy statement, notify a proposed regional plan, change or variation, to set Freshwater Quality Standards and Environmental Flows and Levels for the Outstanding, Degraded and other Freshwater Resources of the region to give effect to the regional policy statement in relation to the matters in Policies 1(a) to (c); and
- b. By no later than 40 working days following the date a regional policy statement or change notified pursuant to Policy 1 is made operative, every regional council must notify a proposed regional plan, change or variation to give effect to the regional policy statement in relation to all other matters in Policy 1; and
- c. By no later than 40 working days following the date a regional policy statement or change notified pursuant to Policy 1 is made operative, every regional council must notify a proposed regional plan, change or variation to include rules to achieve the following:
 - i. Require that all water permits for the Consumptive Use of fresh water granted after the date of commencement of this National Policy Statement include conditions for the efficient Consumptive Use of fresh water including, as a minimum, providing for the use of industry good practice and technology to achieve efficient use:
 - ii. Require that all water permits for the Consumptive Use of fresh water granted after the date of commencement of this National Policy Statement include conditions for, where appropriate, the return of fresh water to Freshwater Resources, in order to achieve the requirements of paragraph (a) of this Policy:
 - iii. Require that all discharge permits affecting Freshwater Resources granted after the date of commencement of this National Policy Statement include conditions for –
 - a. Protection against degradation of the quality of fresh water of Freshwater Resources (including through the management of activities giving rise to stormwater discharges); and
 - b. Sustainable management of demands on fresh water in a manner which has regard to available supply of fresh water and adverse effects, both individual and cumulative; and
 - c. Integrated management of the effects of Land-use Development and discharges of contaminants on the quality and available quantity of Freshwater Resources;to be achieved, as a minimum, by the use of industry good practice:
 - iv. Require effective monitoring and reporting on matters relating to paragraphs (c)(i), (ii) and (iii) of this Policy.

Policy 3

By no later than 40 working days following the date a regional policy statement or change notified pursuant to Policy 1 is made operative, every territorial authority must notify a proposed district plan, change or variation in order that as soon as practicable thereafter every district plan –

- a. Gives effect to the regional policy statement; and
- b. Includes rules to require that all relevant land-use and subdivision consents granted after the commencement of this National Policy Statement include conditions for –
 - i. Protection against degradation of the quality of fresh water of Freshwater Resources (including through the management of activities giving rise to stormwater discharges); and
 - ii. Sustainable management of demands on fresh water in a manner which has regard to available supply of fresh water and adverse effects, both individual and cumulative; and
 - iii. Integrated management of the effects of Land-use Development and discharges of contaminants on the quality and available quantity of Freshwater Resources; andto be achieved, as a minimum, by the use of industry good practice; and
- c. Includes rules to require that all relevant land-use and subdivision consents granted after the commencement of this National Policy Statement include conditions to require monitoring and reporting on matters relating to paragraph (b).

Policies as to the preparation of policy statements and plans

Policy 4

When preparing a regional policy statement or variation or change to give effect to Policy 1 and when preparing a regional plan or variation or change to give effect to Policy 2, every regional council must consider the following:

- a. The Notable Values of each Freshwater Resource:
- b. The sensitivity of each Freshwater Resource and its Notable Values to adverse effects including effects of Land-use Development and the discharge of contaminants:
- c. The needs of primary and secondary industry and communities for sustainable fresh water supply:
- d. The contribution of existing and potential uses of Freshwater Resources and of existing economic investment to regional and national social, economic and cultural well-being:
- e. The importance of avoiding over-allocation of Freshwater for Consumptive Use:

- f. Tangata Whenua Values and Interests:
- g. Social and economic transition costs:
- h. The value of swimmability to the community.

Policy 5

When preparing a district plan or variation or change to give effect to Policy 3, every territorial authority must consider the following:

- a. The importance of controlling Land-use Development in a way and at a rate that minimises the adverse effects on the quality and available quantity of Freshwater Resources:
- b. The importance of ensuring that the planning and implementation of Land-use Development applies industry good practice in order to –
 - i. Minimise the adverse effects on the quality and available quantity of Freshwater Resources; and
 - ii. Maximise efficiency in the use of Freshwater Resources:
- c. The importance of ensuring that the planning for and implementation of infrastructure for water supply, wastewater treatment and stormwater are undertaken –
 - i. In an integrated manner; and
 - ii. At a rate that, as a minimum, keeps pace with the rate of Land-use Development:
- d. Tangata Whenua Values and Interests:
- e. Social and economic transition costs.

Policy as to certain consents and designations

Policy 6

Without limiting Policies 1 to 3, this National Policy Statement will be achieved also through the inclusion, unless inappropriate, of conditions on any relevant resource consents granted and recommendations on designations confirmed in respect of the following:

- a. Efficient Consumptive Use of fresh water (including where appropriate, the return of fresh water to Freshwater Resources):
- b. Protection against degradation of the quality of Freshwater Resources (including through the management of activities giving rise to stormwater discharges):
- c. Sustainable management of demands on fresh water in a manner which has regard to available supply of fresh water and adverse effects, both individual and cumulative:

- d. Integrated management of the effects of Land-use Development and discharges of contaminants on the quality and available quantity of Freshwater Resources:
to be achieved, as a minimum, by the use of industry good practice:
- e. Monitoring and reporting on matters relating to paragraphs (a) to (d).

Policy as to non-regulatory methods

Policy 7

In addition to giving effect to Policies 1 to 3 and Policy 6 by regulatory means, regional councils and territorial authorities may give effect to this National Policy Statement through non-regulatory methods (including financial contributions, development contributions under the Local Government Act 2002 and other methods).

Policy as to information

Policy 8

All local authorities will make publicly available (including electronically) a record of the process used to identify the Tangata Whenua Values and Interests in Freshwater Resources of the region as required to give effect to Policy 1(e), including the identification of the relevant iwi and hapū.

All local authorities will assist the Minister for the Environment by making publicly available (including electronically) an up-to-date register of the regulatory and non-regulatory methods to give this National Policy Statement full effect.

Review of this National Policy Statement

Policy 9

The Minister for the Environment will seek an independent review of the implementation and effectiveness of this National Policy Statement at achieving all the objectives and policies of the National Policy Statement no later than 10 years after it comes into force and shall then consider the need to review, change or revoke this statement. Collection of data to inform this review will begin at least two years prior to the review.

Definitions

In this National Policy Statement:

“**Act**” means the Resource Management Act 1991.

“**Consumptive Use**” means any use of fresh water 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 the fresh water.

“**Degraded Freshwater Resources**” means 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 achieve the purpose of the Act.

“**Environmental Flows and Water Levels**” means 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.

“**Freshwater Quality Standard**” means a regional rule on freshwater quality which gives effect to this National Policy Statement.

“**Freshwater Resources**” means 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].”

“**Land-use Development**” includes land-use intensification, land-use change, and subdivision of land.

“**Notable Values**” in relation to any Freshwater Resource includes:

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

“**Outstanding Freshwater Resources**” means 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.

APPENDIX B

TERMS OF REFERENCE FOR BOARD OF INQUIRY ON THE PROPOSED NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT

Establishment of a Board of Inquiry

The Minister for the Environment (Minister) has decided to develop a National Policy Statement for Freshwater Management. The proposed National Policy Statement for Freshwater Management (proposed NPS) is attached as Appendix 1.

Pursuant to section 46A(1)(a) of the Resource Management Act 1991 (RMA), the Minister has chosen to use the process set out in sections 47 to 52 of the RMA to advance the proposed NPS. The Minister has appointed the Board of Inquiry (the Board), with the agreement of the Cabinet.

Role of the Board

The Board, in accordance with sections 48 to 51 of the RMA, is to:

- a. inquire into the proposed NPS;
- b. consider all submissions duly made and all the evidence duly given on the proposed NPS;
- c. report to the Minister on the contents and subject-matter of the proposed NPS, with any recommendation the Board has about amendments to the content of the proposed NPS so that it will more fully serve the purpose of the RMA and of this proposed NPS.

The process

- a. The Board is to give the public adequate time and opportunity to make written submissions on the content and subject-matter of the proposed NPS.
- b. The Board is to consider the most appropriate method to engage with tangata whenua.
- c. The Board is to publish the written submissions duly made.
- d. The Board may provide opportunity for the making of further submissions in response.
- e. The Board is to sit in public when hearing submissions and evidence in support of written submissions and submissions in response.
- f. The Board may invite and consider further submissions on amendments to the proposed NPS prior to completing its report and recommendations.

Matters to be explicitly addressed

The Board shall provide, in its report:

- recommendations on the wording of the proposed NPS, including the objectives and policies;
- recommendations on how councils should give effect to the proposed NPS pursuant to section 55;
- reasons for the content of its report and recommendations.

The report and recommendations may also address:

- the internal consistency of the proposed NPS as a whole, and ways to address any potential inconsistencies;
- the level of certainty or clarity provided by the proposed NPS, and if this is inadequate, ways to improve it;
- the removal or further refinement of issues, objectives and policies where this is appropriate for achieving the policy approach of the proposed NPS;
- the identification of any unintended or unforeseen, but likely outcomes of the proposed NPS, and ways to address these;
- whether or not some of the changes needed to regional policy statements, district or regional plans would be best achieved via direct insertion into the regional policy statements or plans pursuant to section 55 (2A) (b) of the RMA, and if so what those provisions should state.

The Board's report to the Minister

The Board's report should be sent to the Minister's Office as a signed hard copy, and copied to the Secretary for the Environment, as an electronic copy.

Term of inquiry

The inquiry will run from the date of appointment set out in the letters of appointment until the receipt by the Minister of the report and recommendations, under section 51(2) of the RMA.

The Board is invited to report progress on the inquiry to the Minister by 31 May 2009.

Administrative support to the Board

- a. The Ministry is to provide the Board with the administrative support and assistance it requires in order to carry out its tasks efficiently and effectively.
- b. The Ministry will provide the Board with the following documents for background reference:
 - Wai Ora – Report of SWPoA Consultation Hui

- Comments received from iwi authorities and stakeholders during consultation
 - Report on the evaluation under Section 32 of the RMA of the proposed NPS.
- c. The Ministry is also to provide any other documents that the Board requires to carry out its task.
- d. The Ministry is to make a record of the proceedings at public sittings of the Board.

APPENDIX C

NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT

(As recommended by the Board of Inquiry)

Preamble

Fresh water is highly valued by New Zealanders for many uses and intrinsic values. Yet the availability of supplies of fresh water, and its suitability for those uses and for maintaining those values, are under threat. New Zealanders are faced with considerable challenges in managing allocations of water that leave enough in lakes, rivers and aquifers for the health of associated ecosystems; in eliminating contamination of them; and in protecting wetlands. The challenges are greater due to increasing climate change.

National policies are needed to address those challenges and remove the threats for good. In some respects that may take a generation. But national policies on management of fresh water will only be credible if, by carrying them through, those goals will be reached.

There follow lists of values of fresh water for enabling well-being of people and communities, and of intrinsic values; of national issues about freshwater management; and of national goals. They are the foundations for setting national objectives and policies for freshwater management. Meanings are given of some terms used in them.

National values of fresh water

There are values for which people and communities may make use of fresh water to provide for their own well-being and amenity, for example:

- domestic drinking and washing water
- animal drinking water
- community water supply
- fire fighting
- hydro-electricity generation
- commercial and industrial processes
- irrigation
- recreational activities (including waka ama)
- food production and harvesting, e.g. fish farms and mahinga kai
- transport and access (including tauranga waka)
- cleaning, dilution and disposal of waste.

There are also values that relate to recognising and respecting fresh water's intrinsic values for: safeguarding the life-supporting capacity of water and associated ecosystems; and sustaining its potential to meet the reasonably foreseeable needs of future generations. Examples of these values include:

- the interdependency of the elements of the freshwater cycle
- the natural form, character, functioning and natural processes of water bodies and margins, including natural flows, velocities, levels, variability and connections
- the natural conditions of fresh water, free from biological or chemical alterations resulting from human activity, so that it is fit for all aspects of its intrinsic values
- healthy ecosystem processes functioning naturally
- healthy ecosystems supporting the diversity of indigenous species in sustainable populations
- cultural and traditional relationships of Māori with fresh water, including mauri, waahi tapu, wai taonga, recognised customary activities and spiritual values
- historic heritage associations with fresh water
- providing a sense of place for people and communities.

All the values in both lists are important national values of fresh water.

National issues about freshwater management

Four national issues about freshwater management arise:

- over-allocation of fresh water
- contamination of fresh water
- loss of wetlands
- incompletely integrated management.

National goals

These issues are nationally significant and to address them and ensure that all those national values of fresh water are safeguarded, this National Policy Statement has these national goals:

- to phase out over-allocation
- to phase out contamination
- to protect wetlands
- to improve the integration of management.

A. General objective

Objective A1

To manage fresh water in a way and at a rate that –

- 1) maintains, and to the extent practicable, restores and enhances the intrinsic values of fresh water:
 - a) in the interdependence of the elements of the freshwater cycle; and
 - b) in the natural form, character, functioning and natural processes of water bodies; and
 - c) in natural and healthy conditions free from alterations resulting from human activity; and
 - d) in healthy ecosystem processes functioning naturally; and
 - e) for safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
 - f) for providing healthy ecosystems supporting the diversity of indigenous species in sustainable populations; and
 - g) for sustaining cultural and traditional relationships of Māori with fresh water; and
 - h) for sustaining the potential for fresh water to meet the reasonably foreseeable needs of future generations; and
- 2) (while not detracting from attaining clause 1), enables people and communities to provide for their social, economic and cultural well-being, and for their health and safety.

B. Tāngata whenua roles and Māori values and interests

Objective B1

To ensure that tāngata whenua are involved, and Māori values and interests are recognised and provided for, in the management of fresh water and associated ecosystems.

Policy B1

By every regional council making or changing its regional policy statement to the extent needed to ensure it contains policy:

- (a) for identifying Māori values and interests in all fresh water and freshwater ecosystems in the region; and
- (b) for involving tāngata whenua in management and decision-making regarding fresh water and freshwater ecosystems in the region.

C. Integrated management

Objective C1

To improve integrated management of fresh water, associated ecosystems and use of land in whole catchments.

Policy C1

By every regional council managing fresh water and freshwater ecosystems, and controlling activities and use of land, in whole catchments, so as to avoid adverse cumulative effects anywhere in the catchment.

D. Water quantity

Objective D1

To safeguard the life-supporting capacity, ecosystem processes and indigenous species and their associated ecosystems of fresh water from the adverse effects of taking, using, damming, or diverting of fresh water or of draining of wetlands.

Objective D2

To phase out over-allocation of fresh water.

Policy D1

By every regional council making or changing regional plans to the extent needed to ensure the plans allocate fresh water among types of activity in a manner and at rates that (having regard to reasonably foreseeable impacts of climate change) enable environmental flows and levels to be fully sustained.

Policy D2

By every regional council making or changing regional plans to the extent needed to ensure the plans set environmental flows and levels for all bodies of fresh water in its region (except ponds and naturally ephemeral water bodies).

Policy D3

By every regional council phasing out existing over-allocation.

Policy D4

By every regional council avoiding any decision and any other action that results in future over-allocation.

Policy D5

By every regional council, wherever permissible, reviewing water permits and consents to ensure the exercise of them safeguards intrinsic national values of fresh water:

- (a) in over-allocated catchments; and
- (b) in over-allocated water bodies; and
- (c) in times of low flow or level.

Policy D6

By every regional council managing demand for fresh water so that the aggregate of all amounts of fresh water in a water body that are authorised to be taken, used, dammed or diverted does not over-allocate the water in the water body.

Policy D7

By every regional council managing use of fresh water so as to avoid wastage.

Policy D8

By regional councils imposing conditions of water permits requiring adoption of the best practicable option to achieve conservation of water.

Policy D9

By every regional council making or changing regional plans to the extent needed to ensure the plans state criteria by which applications for approval of transfers of water permits are to be decided, including:

- (a) the extent to which the transfer would result in enhanced quality of fresh water;
- (b) the extent to which the transfer would maintain quantities of fresh water in natural water bodies
- (c) the extent to which the transfer would enhance the conservation of water.

Policy D10 and direction (under section 55) to regional councils

By every regional council making or changing regional plans (without using the process in Schedule 1) to the extent needed to ensure the plans include the following policy to take effect immediately, and to continue in effect until changes required by Policy D1 (allocation), Policy D2 (environmental flows and levels), and Policies D3 and D5 (over-allocation) of this national policy statement have been given full effect:

- “1. This policy applies to:
 - (a) any change in the character, intensity or scale of any activity that involves any taking, using, damming or diverting of fresh water or draining of any wetland; and
 - (b) any change in the natural variability of flows or level of any fresh water, by which the activity or variability is not the same or similar in character, intensity, scale, or relative frequency and extent as that which immediately preceded the change.
2. Any change to which this policy applies requires resource consent (as a discretionary activity), and any application for consent is to be decided by criteria that include:
 - (a) the extent to which the change would adversely affect safeguarding the life-supporting capacity of fresh water and of any associated ecosystem; and
 - (b) the extent to which it is feasible and dependable that any adverse effect on the life-supporting capacity of fresh water and of any associated ecosystem resulting from the change would be fully avoided.”

E. Water quality

Objective E1

To protect the quality of outstanding fresh water, to enhance the quality of all fresh water contaminated as a result of human activities, and to maintain the quality of all other fresh water.

Objective E2

To safeguard the life-supporting capacity, ecosystem processes and indigenous species and associated ecosystems of fresh water from adverse effects of the use or development of land, and of discharges of contaminants.

Policy E1

By every regional council making or changing regional plans to the extent needed to ensure the plans:

- (a) set freshwater quality standards for all bodies of fresh water in their regions; and
- (b) by rule, prescribe attainment of those standards (except in respect of contaminants that do not result from human land use or activity).

Policy E2

By every regional council avoiding any decision and any other action that results in future contamination of fresh water.

Policy E3

By regional councils imposing conditions of discharge permits requiring adoption of best practicable options to protect against contamination of fresh water.

Policy E4 and direction (under section 55) to regional councils

By every regional council making or changing regional plans (without using the process in Schedule 1) to the extent needed to ensure the plans include the following policy to take effect immediately, and to continue in effect until changes required by Policy E1 (freshwater quality standards) of this national policy statement have been given full effect:

- “1. This policy applies to any change in the character, and to any increase in the intensity or scale, of any land use or activity—
 - (a) that is not of the same or similar character, intensity or scale as that which immediately preceded it; and
 - (b) that involves any discharge (by any person or by any animal) of any contaminant or water into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of any natural process from the discharge of that contaminant, any other contaminant) entering fresh water.
2. Any change or increase in intensity of land use or activity to which this policy applies requires resource consent (as a discretionary activity), and any application for consent is to be decided by criteria that include:
 - (a) the extent to which the land use or activity would avoid contamination of, and any other adverse effect on, fresh water;
 - (b) the extent to which it is feasible and dependable that any adverse effect on fresh water, and on any ecosystem associated with fresh water, resulting from the use or activity would be fully avoided.”

F. Progressive implementation programme

Policy F1

1. This policy applies to the implementation by a regional council of a policy of this national policy statement.
2. Every regional council is to implement the policy as promptly as is reasonable in the circumstances, and so it is fully completed by no later than 31 December 2030.
3. Where a regional council is satisfied that it is impracticable for it to complete implementation of a policy fully by 31 December 2014, the council may implement it by a programme of defined time-limited stages by which it is to be fully implemented by 31 December 2030.
4. Any programme of time-limited stages is to be formally adopted by the council within 18 months of the date of gazetting of this national policy statement, and publicly notified.
5. Where a regional council has adopted a programme of staged implementation, it is to publicly report, in every year, on the extent to which the programme has been implemented.

Meanings of terms

In this national policy statement:

“Act” means the Resource Management Act 1991.

“Environmental flows and levels” means the water flows and levels required to provide for the intrinsic values of fresh water contained in the second list of values of fresh water in the preamble.

“Fresh water” has the same meaning as in section 2 of the Act.

“Freshwater quality standard” means a regional rule on freshwater quality which provides for the intrinsic values of fresh water contained in the second list of values of fresh water in the preamble.

“Over-allocation” means

- allocating fresh water in a water body among types of activity
- authorising the taking, using, damming or diversion of fresh water in the water body

to an extent that exceeds the amount of water available in the water body after taking into account:

- (a) environmental flows and levels in respect of the water body; and
- (b) amounts of water likely to be taken from the water body under section 14(3)(b) of the Act; and
- (c) amounts of water in the water body already allocated or committed by current water permit.

Terms given meaning in the Act have the meanings so given.