Atkins Holm Majurey

MEMORANDUM

TO: Water New Zealand

FROM: Personal

DATE: 30 October 2019

SUBJECT: REVIEW OF DRAFT NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT 2019

INTRODUCTION

1. This memorandum reviews the Draft National Policy Statement for Freshwater Management 2019 ("Draft NPSFM"). The purpose of this review is to be productive, constructive and provide officials and the Minister with a recommended pathway forward.

2. The discussion material notes that the drafting of the Draft NPSFM is a new approach to improve its quality and make it clear and more accessible to all New Zealanders. Unfortunately, the drafting will have the reverse effect to this as it does not result in a document that is more logical, internally consistent with clearer obligations, actions and directions for local authorities to meet. This coupled with the fact that many regional councils are a long way down the path of giving effect to the 2017 NPSFM will mean considerable confusion, duplication of work and ultimately cost and time delays. All this will result in an outcome that is worse for freshwater management in New Zealand.

SUMMARY OF THE KEY POINTS

3. As noted above the Draft NPSFM is inconsistent with existing legislation, inadequately drafted, and unclear. The key concerns are, the Draft NPSFM:

   (a) is inconsistent with the section 5 of the RMA in the way in which it sets priority for freshwater;

   (b) objectives and policies do not meet the requirement of what these provisions should be;

   (c) contains directions to local authorities that appear to go beyond the functions that those organisations have;

   (d) contains unclear definitions that are different from the definitions used in the RMA;

   (e) inclusion of ‘action plans’ and ‘long term visions’ do not sit well within an RMA framework and would be better placed in the Local Government Act framework as part of long term planning.
4. A more detailed critic follows with a suggested pathway forward. In summary it is considered that either the Draft NPSFM be substantially re-written or the preferred option is that the 2017 NPSFM framework is adopted and updated to address the key matters that the reform package is seeking to have addressed and included.

SPECIFIC CONCERNS WITH DRAFT NPSFM

5. The details of the specific concerns are set out in this section of the memorandum following the order outlined above. For ease of reference most of the provisions referred to have been included in full.

Inconsistency with RMA – section 5 and priority of water

6. The RMA sets out the purpose of national policy statements as follows:¹

The purpose of national policy statements is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act.

7. The purpose of the RMA is contained in section 5 as follows:

   (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

   (2) 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, remediying, or mitigating any adverse effects of activities on the environment.

8. The Objective of the Draft NPSFM is as follows:

2.1 Objective

The objective of this National Policy Statement is to ensure that resources are managed in a way that prioritises:

a) first, the health and wellbeing of waterbodies and freshwater ecosystems; and

b) second, the essential health needs of people; and

   c) third, the ability of people and communities to provide for their social, economic, and cultural wellbeing, now and in the future.

   [emphasis added]

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¹ Resource Management Act 1991 section 45(1)
Critique

9. The RMA’s purpose as contained in section 5 requires resources to be managed in a way or at a rate which enables people and communities to provide for their social, economic, and cultural well-being, and for their health and safety. While the intention is that prioritisation that puts ‘health and wellbeing of waterbodies and freshwater ecosystems’ at the top reflects the bottom line setting approach envisaged by section 5, this black and white prioritisation could result in a situation where councils are unable to make management decisions in relation to freshwater that enables their communities to provide for their wellbeing.

10. Section 5 has been described as the “lodestar” of the Act.\(^2\) Case law holds that section 5\(^3\):

   It is not a part of the Act which should not be subject to strict rules and principles of statutory construction which aims to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meaning and its connotations which is intended to allow the application of policy in a general and broad way.

11. Subsequent cases have supported the importance of the openness of the language\(^4\):

   We have considered in the light of those remarks the method to be used in applying section 5 to a case where on some issues a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or to attain fully, one or more of the aspects described in paragraphs (a), (b) and (c). To conclude that the latter necessarily overrides the former, with no judgment of scale or proportion, would be to subject section 5(2) to the strict rules and proposal [sic] of statutory construction which are not applicable to the broad description of the statutory purpose. To do so would not allow room for exercise of the kind of judgment by decision-makers (including this Court — formerly the Planning Tribunal) alluded to in the NZ Rail case.

12. Subject to the comments below in relation to the King Salmon decision, the general approach taken by the Courts in relation to section 5 has been described as the “overall judgment” approach, which requires an ‘overall broad judgment of whether the proposal would promote the sustainable management of natural and physical resources. Such a judgment allows for comparison of conflicting considerations and relative scale and degree of them, and their relative significance in the final outcome’.\(^5\)

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\(^2\) Lee v Auckland City Council [1995] NZRMA 241 (PT)

\(^3\) New Zealand Rail Limited v Marlborough District Council 1994 NZRMA 70 at pg 72

\(^4\) North Shore City Council v Auckland Regional Council (1996) 2 ELRNZ 305

\(^5\) Independent News Auckland Ltd v Manukau City Council (2004) 10 ELRNZ 16 at [26]
13. Case law has considered whether section 5 contains any preference for factors to consider, with the Court holding that the RMA contains no preferences for any aspect in section 5 over another:  

In our view, the enabling and management functions of section 5(2) are of equal importance.

14. This was clarified in Long Bay-Okura Great Park Society Inc v North Shore City Council:  

[278] ... We observe that there is some confusion in the labels being attached to different provisions in Part 2. In Kiwi Property Management the first part of section 5(2) appears to be an 'enabling' function, and the second part of section 5(2) - section 5(2)(a) to (c) - is the 'management' function. That contrasts with the Winstone Aggregates decision where 'the management function' appears to be the name for the first part of section 5(2). We consider it is more consistent if the first component of section 5(2) is called 'the enabling obligation' and the second is simply called 'section 5(2)(a) to (c)'. But if the point of Kiwi Property Management is that the 'enabling' obligation and the section 5(2)(a) to (c) functions are of equal importance, then we respectfully agree. That is not the same as setting up a dichotomy between the 'natural environment' - which is not a phrase used in the RMA - and 'people'.  

[279] Counsel for Landco referred to Judges Bay Residents Association v Auckland Regional Council where the Environment Court held:  

In general the Act contains no preference for managing use and development of resources for enabling communities to provide for their economic wellbeing over protection of resources for enabling communities to provide for their social and cultural wellbeing, sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations, and avoiding, remediying adverse effects on the environment. [Our emphases]  

This decision makes another point completely - and one we respectfully agree with - where the Environment Court stated that the RMA contained no general preference for economic wellbeing over social and cultural wellbeing and the section 5(2)(a) and (b) matters.

15. In our view case law supports the proposition that prioritising one of the components of section 5 over another is not appropriate. Making decisions about resource management without enabling people and communities to provide for their social, economic, and cultural well-being and for their health and safety is not in accordance with section 5. A holistic approach to freshwater management would ensure that the ecological wellbeing of freshwater is provided for (enhanced where it is degraded and maintained where it is not degraded) in the context of community wellbeing. In short, a healthy freshwater system will ensure a healthy community. The two are inextricably linked.

16. The failure of the objective to achieve the purpose of the RMA is compounded by the stipulation that the first priority is 'the health and wellbeing of waterbodies and freshwater ecosystems', with the second

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6 Kiwi property Management Limited and Others v Hamilton City Council (2003) 9 ELRNZ 249 at paragraph 43
priority being ‘the essential health needs of people’. The use of the words of ‘first’ and ‘second’ priorities suggest that these matters are not subject to any other considerations or limitations. In other words the drafting does not indicate that the prioritisation of these matters is subject to enabling people and communities to provide for their social, economic, and cultural well-being. As noted above considerations of ecological wellbeing cannot be divorced from community wellbeing.

17. The intention of the objective is clear in that it is essentially trying to say what section 5 is intended to do which is to provide that the biophysical bottom lines must be set to ensure that wellbeing of waterbodies and freshwater ecosystems. Once these bottom lines are set (based on scientific evidence) the needs of communities can be considered. However the first priority is more black and white than section 5 in that it does not consider important concepts such as the current state of the water body under consideration, the rate of use or non-use of freshwater and the timing of any use changes.

18. It is acknowledged that section 5 has not been implemented consistently and appropriately in relation to freshwater (and indeed other resources) but this is not a problem with section 5. It is a problem with the implementation, the lack of national guidance from the time the RMA was enacted, and the enforcement, compliance and monitoring of the performance of the RMA. Section 5 sets a clear framework for ensuring ecological health in the context of providing for community wellbeing. Re-defining section 5 as has been done in the Draft NPSFM will inevitably result in to uncertainly and lead to confusion.

19. The 2008 BOI Report acknowledged 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’.\(^7\) We agree with this but do not consider that the current drafting of the Draft NPSFM is protected by this analysis as it simply does not achieve the purpose of the RMA. Significant risks arise from current drafting as noted below.

20. With regards to the decision of the Supreme Court in King Salmon it held that resort to Part 2 of the RMA is not necessary or helpful in order to interpret policies except in the case of invalidity, incomplete coverage, or uncertainty of meaning.\(^8\) This decision, and the subsequent Court of Appeal decision in Davidson\(^9\) which endorsed the above three caveats carved out by the Supreme Court, has emphasised that close attention must be paid to objectives and policies. Decision makers making decisions on the Draft NPSFM must, therefore, be cognisant of this imperative.

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\(^7\) Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management (January 2010) at [54]

\(^8\) Environmental Defence Society Inc v New Zealand King Salmon Company Lt [2014] NZSC 38 at [90]

\(^9\) RJ Davidson Family Trust v Marlborough District Council [2018] NZCA 316, specifically see [76] and [82]
21. The inconsistency with the purpose of the RMA constitutes both invalidity and uncertainty of meaning, which would then invite councils to resort to Part 2 for interpretation. This would not encourage consistency of approach as each council decision maker would be making decisions and analysis independently.

22. The Supreme Court in *King Salmon* saw that absent invalidity, incomplete coverage or uncertainty of meaning, recourse to Part 2, in enabling decision makers to decline to implement parts of the New Zealand Coastal Policy Statement if they considered that appropriate in the circumstances, does not fit readily into the hierarchical scheme of the RMA. The Supreme Court commented that while the scheme of the Act does give subordinate decision-makers ‘considerable flexibility and scope for choice’ that scope is not infinite, and the requirement to “give effect to” is intended to constrain decision-makers, and enabling discretion through resort to Part 2 seems incompatible with this.

23. Accordingly, there is judicial direction that allowing resort to Part 2 is undesirable. The current wording of the Draft NPSFM will inevitably lead to more litigation on what the words in the objective means in the context of Part 2. On a more pragmatic note, allowing decision-makers to resort to Part 2 would encourage inconsistency of application, thereby undermining the application and interpretation of the Draft NPSFM.

**Suggested solution**

24. As noted above the preferred solution is to have an enhanced 2017 NPSFM rather than a totally new NPS. If the way forward is to be a totally new NPS then significant changes are needed to the wording of this objective to ensure its consistency with section 5.

25. One option with regards to the wording is for officials to consider amending the objectives in line with the existing 2017 NPSFM and that proposed in 2008 by the Board of Inquiry (see the 2008 BOI Report) at that time. Such an approach would provide more clarity, consistency, and certainty, and provide the necessary updates the Government is seeking to make in freshwater policy.

**Objectives and Policies not fit for purpose**

26. The general drafting of the objectives and policies are currently not fit for the purpose. As noted, the objectives and policies must be appropriate to achieving the purpose of the Act.¹¹

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¹⁰ Environmental Defence Society Inv c The New Zealand King Salmon Company Ltd [2014] NZSC 38 at 38
¹¹ Resource Management Act s45A(1)
27. The 2008 BOI Report gave the following guidance regarding objectives and policies in a NPS:

[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 held 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.

[emphasis added]

28. The case referenced by the 2008 BOI Report is Auckland Regional Council v North Shore City Council [1995] CA29/96 1B ELRNZ at 433 which states:

'Policy' and 'policies' must bear their natural and ordinary meaning in the context of the Act. As an appropriate definition Mr Salmon cited what is described in the Oxford English Dictionary, second edition, as the chief living sense:

"5. A course of action adopted and pursued by a government, party, ruler, statesman, etc; any course of action adopted as advantageous or expedient."

The definition 'a course of action' is also given by other dictionaries, such as Chambers. It may readily be accepted as appropriate in the present context.

[emphasis added]

29. The 2008 BOI Report also noted that ‘[W]hen an objective is seen as too difficult to implement, this can lead to inaction.’ This is pragmatic advice, and we consider that the drafting of the objectives should ensure that they are achievable and possible to implement.

Critique

30. In light of this direction on what constitutes an ‘objective’ and what constitutes a ‘policy’, we do not consider that the objectives and policies contained in the Draft NPSFM are appropriately drafted.

31. Not only is the objective (as discussed above) inconsistent with the purpose of the RMA, it is drafted in a vague way, with no real clarification of what constitutes ‘the health and wellbeing of waterbodies and freshwater ecosystems’ and ‘the essential health needs of people’. The lack of clarity makes the objective difficult to measure and subsequently difficult to be confident that it has been met. This lack of clarity and uncertainty over achievement requirements makes the objective too difficult to implement with the risk being inaction – the very thing the new programme is seeking to address.

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12 Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management (January 2010) at [152]
32. General wording in objectives is not fatal provided they are backed up by clear policies. In this case the wording of the objective has flow-on effects in the policies. As the policies are intended to achieve the objective and any lack of clarity or uncertainty in the objective impacts on the wording of the policies that follow it.

33. It is, therefore, uncertain exactly how the policies will achieve the objective. For example, it is unknown whether managing freshwater in a way that gives effect to Te Mana o te Wai (Policy 1) will prioritise the ‘health and wellbeing of waterbodies and freshwater ecosystems’, ‘the essential health needs of people’, or ‘the ability of people and communities to provide for their social, economic, and cultural wellbeing, now and in the future’. This same uncertainty arises for all the policies.

Risks arising from current drafting

34. The risks of having objectives and policies which are not fit for purpose include:

(a) Uncertainty, leading to lack of action;
(b) Inability to measure success, leading to lack of action;
(c) Difficulty in implementation, leading to lack of action;
(d) Potential litigation, and specifically the risk of judicial review, leading to delay and a lack of action; and
(e) Lack of clear national direction, leading to uncertainty and lack of action in the regions.

Suggested solution

35. As noted above it is considered that an enhanced 2017 NPSFM is the answer or an amalgam of 2017 and the draft 2008 NPS. Some work has been done on what this redraft may look like and this can be shared with officials at the appropriate time.

Direction to local authorities which entail going beyond their functions

36. We consider that the Draft NPSFM appears to contain directions to local authorities which go beyond their functions and to the extent it does these would be ultra vires. Specifically, these are the directions contained in the NPSFM to regional councils to include content in their regional policy statements and regional plans.

Critique

37. While section 45A of the RMA states that a national policy statement may state ‘objectives and policies that must be included in policy statements and
plans\textsuperscript{13}, this does not mean that national policy statements may direct local authorities to take steps which go beyond their functions, powers, and duties, in regards to policy statements and plans.

38. The functions, powers, and duties of regional councils in relation to policy statements and plans are set out in Part 4 of the RMA.

30 Functions of regional councils under this Act
(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
   (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region;
   (b) the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance;
   (ba) the establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in relation to housing and business land to meet the expected demands of the region;
   (c) the control of the use of land for the purpose of—
      (i) soil conservation;
      (ii) the maintenance and enhancement of the quality of water in water bodies and coastal water;
      (iii) the maintenance of the quantity of water in water bodies and coastal water;
      (iii)a the maintenance and enhancement of ecosystems in water bodies and coastal water;
      (iv) the avoidance or mitigation of natural hazards:
      ...
   (e) the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—
      (i) the setting of any maximum or minimum levels or flows of water;
      (ii) the control of the range, or rate of change, of levels or flows of water;
      (iii) the control of the taking or use of geothermal energy;
   (f) the control of discharges of contaminants into or onto land, air, or water and discharges of water into water;
   (fa) if appropriate, the establishment of rules in a regional plan to allocate any of the following:
      (i) the taking or use of water (other than open coastal water);
      (ii) the taking or use of heat or energy from water (other than open coastal water);
      (iii) the taking or use of heat or energy from the material surrounding geothermal water;
      (iv) the capacity of air or water to assimilate a discharge of a contaminant;
   (fb) if appropriate, and in conjunction with the Minister of Conservation,—
      (i) the establishment of rules in a regional coastal plan to allocate the taking or use of heat or energy from open coastal water;
      (ii) the establishment of a rule in a regional coastal plan to allocate space in a coastal marine area under Part 7A:
   (g) in relation to any bed of a water body, the control of the introduction or planting of any plant in, on, or under that land, for the purpose of—

\textsuperscript{13} Resource Management Act 1991 s45A(2)(e)
(i) soil conservation:
(ii) the maintenance and enhancement of the quality of water in that water body:
(iii) the maintenance of the quantity of water in that water body:
(iv) the avoidance or mitigation of natural hazards:

[ga] the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity:

[gb] the strategic integration of infrastructure with land use through objectives, policies, and methods:

(h) any other functions specified in this Act.

39. The RMA specifies that every regional council shall have the function of ‘the establishment, implementation, and review of objectives, policies and methods to achieve integrated management of the natural and physical resources of the region’.

For something to be ‘integrated’ it needs to work in with other aspects of the environment, and not be prioritised above it. Further, ‘integrated’ suggests that a wide variety of factors are present in the management of the natural and physical resources, which precludes prioritisation at the expense of other factors.

40. The objectives, policies and methods must achieve ‘integrated management of the natural and physical resources of the region’. The RMA defines ‘natural and physical resources’ as:

natural and physical resources includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures.

41. This means that the objectives, policies, and methods must achieve integrated management of these elements of natural and physical resources, including all forms of plants and animals. Where the objectives, policies and methods preclude the integrated management of one of these aspects, this would make the objective, policy or method ultra vires.

42. While the RMA permits that regional councils can control ‘the use of land’ for the purpose of the maintenance and enhancement of the quality and quantity of water in water bodies and coastal water, and of ecosystems in water bodies and coastal water, this does not permit preventing the integrated management of other aspects of natural and physical resources.

43. The Draft NPSFM often recognises the need to manage integrated management while recognising the needs of other aspects of natural and physical resources, however there are particular sections where the Draft NPSFM instructs regional councils to include wording, methods, or wording and methods to the same effect, where that wording or method is outside the

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14 Resource Management Act 1991 s30(1)(a)
15 Resource Management Act 1991 s30(1)(c)
ability of the regional council to implement as it would be ultra vires. An example of this is the following:16

Every regional council must include in its regional policy statement the following policy (or words to the same effect): “The loss or degradation of all or any part of a natural inland wetland is avoided”

44. Another example includes:

3.2 Te Mana o te Wai

(1) Every regional council must include the following objective (or words to the same effect) in its regional policy statement: “The management of freshwater in our region must be carried out in a manner that gives effect to Te Mana o te Wai, as it is described in the National Policy Statement for Freshwater Management 2019 and understood locally.”

45. Te Mana o te Wai inherently involves the holistic aspects of freshwater. If the water is healthy the social, economic and cultural wellbeing of people and communities is healthy. Te Mana o te Wai does not prioritise one aspect over another all are inherently interconnected and important as part of the holistic consideration that is essential in freshwater management decisions. In essence, section 5 and the concept of integrated management are embodied in Te Mana o te Wai.

46. We have further concerns about the direction in [3.4] of the Draft NPSFM with regard to territorial authorities which states:

“District plans must include objectives, policies, and methods to avoid, remedy, or mitigate the cumulative adverse effects of land use on freshwater bodies, freshwater ecosystems, and sensitive receiving environments resulting from urban development.”

47. The functions of a territorial authority pursuant to section 31 of the Act, and in relation to water, are restricted to ‘the control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes’.17 Therefore the direction contained above is either ultra vires, or is restricted to actions solely undertaken in relation to the surface of water in rivers and lakes.

Risks arising from current drafting

48. We consider that drafting of the objectives and policies are at least unclear and confusing and at worst ultra vires in some areas. As such they are vulnerable to judicial challenge. If this were to occur this would weaken and delay the implementation which is exactly what the Government is seeking to overcome.

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16 Draft NPSFM Subpart 3 Specific Requirements, 3.15(2)
17 Resource Management Act 1991 s31(1)€
Suggested solution

49. As noted above.

Drafting of definitions

50. Some of the definitions used by the Draft NPSFM are drafted poorly as they carve out exceptions to the already established definitions contained in the RMA, thereby creating unnecessary confusion and inconsistency.

Critique

51. The inconsistencies arise specifically as follows:

<table>
<thead>
<tr>
<th>Draft NPSFM term and definition</th>
<th>Resource Management Act term and definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>'Coastal wetland'</td>
<td>'Wetland': Wetland includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet condition</td>
</tr>
</tbody>
</table>
| Coastal wetland means a natural wetland that is influenced by marine or coastal geomorphological processes to the seaward extent of freshwater influence, and includes:  
  a) Saltmarshes (of which mangroves can be a structural component); and  
  b) seagrass meadows in intertidal and subtidal zones less than 2 m below mean low water spring tide | |
| 'Constructed wetland'            |                                             |
| Constructed wetland means a wetland constructed by artificial means that:  
  a) supports an ecosystem of plants that are suited to wet conditions; and  
  b) is constructed for a specific purpose in a place where a natural wetland does not already exist | |
| 'Inland wetland'                 |                                             |
| Inland wetland means any wetland that is not a coastal wetland, but does not include geothermal wetlands | |
| 'Natural wetland'                |                                             |
| Natural wetland means a wetland as defined in the Act (regardless of whether it is dominated by indigenous or exotic vegetation) except that it does not include:  
  a) wet pasture or paddocks where water temporarily ponds after rain in places dominated by pasture, or that contain patches of exotic sedge or rush species; or  
  b) constructed wetlands; or  
  c) geothermal wetlands | |
<p>| 'Waterbody'                       |                                             |
| Waterbody means fresh water or geothermal water in a river, lake, | |</p>
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Waterbody</td>
<td>has the meaning in the Act, except that it does not include geothermal water. Stream, pond, wetland, or aquifer, or any part thereof, that is not located within the coastal marine area.</td>
</tr>
<tr>
<td>'Stream'</td>
<td>Stream has the same meaning as river in the Act, and is used interchangeably with that term, as consistent with common usage.</td>
</tr>
<tr>
<td>'River'</td>
<td>River means a continually or intermittently flowing body of fresh water; and includes a stream and modified watercourse; but does not include any artificial watercourse (including an irrigation canal, water supply race, canal for the supply of water for electricity power generation, and farm drainage canal).</td>
</tr>
<tr>
<td>'Freshwater'</td>
<td>is not defined in the Draft NPSFM.</td>
</tr>
<tr>
<td>'Fresh water'</td>
<td>Fresh water means all water except coastal water and geothermal water.</td>
</tr>
<tr>
<td>'Long-Term Action Plan'</td>
<td>A long-term plan prepared under sections 93-94 of the Local Government Act 2002 which deals with matters set out in the NPSFM.</td>
</tr>
<tr>
<td>'Coastal Environments'</td>
<td>Coastal environment encompasses the elements described in the New Zealand Coastal Policy Statement 2010, Policy 1, including the ecosystems, marine and intertidal areas, estuaries, dunes and land of the coastal environment.</td>
</tr>
<tr>
<td>'Sensitive receiving environment'</td>
<td>[a definition is needed not sure there is precedence from the freshwater area there is certainly some in the air quality arena]</td>
</tr>
<tr>
<td>'Natural wetlands'</td>
<td>Natural wetlands do not include wetlands which have been crafted by humans, and specifically does not include sediment ponds.</td>
</tr>
</tbody>
</table>

**Risks arising from current drafting**

52. There is no reason to re-define or tweak the meaning of terms or carve out exceptions (as has been done in regards to the drafting of 'waterbody')
where complete definitions already exist in the RMA. To do so risks creating uncertainty, inconsistency of application, and further, is unnecessary.

53. Further, it is undesirable to use the word ‘stream’ and ‘river’ interchangeably as the RMA is clear that the term ‘river’ includes a stream. The term ‘river’ should be used in the Draft NPSFM for consistency’s sake.

54. It is questionable whether it is necessary to define ‘freshwater’ in the Draft NPSFM as to not do so could cause unnecessary confusion and unreasonable uncertainty. This is particular the case when the Draft NPSFM has chosen to define some terms but not others. We propose that the definition of ‘freshwater’ as contained in the RMA is included in the Draft NPSFM.

Suggested solution

55. Our suggested solution to this drafting is to:
   a) use the definitions contained in the Act, as this is the primary legislation;
   b) include a direct reference to the definition for ‘freshwater’ as defined in the RMA;
   c) Remove all carve-outs from the definitions contained in the RMA; and
   d) Use the word ‘river’ as it is defined in the RMA.

GENERAL DRAFTING COMMENTS

The preamble

56. The preamble to the Draft NPSFM is unsatisfactory and unfit for purpose. The 2008 BOI Report gave the following guidance:

   "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."

57. Part 1 of the Draft NPSFM neither outlines the challenges for freshwater management, nor states the national values, issues, and goals, aside from explaining the concept of ‘Te Mana o te Wai’. Accordingly we consider that the preamble needs to be re-written in line with the direction from the 2008 BOI Report.

Action Plan and Long-Term Vision

58. The objectives and policies of the Draft NPSFM contain references to ‘long-term visions’ being prepared and placed within regional policy statements, and ‘action plans’ being prepared. Neither of these terms are defined, and

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18 Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management (January 2010) at [254]
19 Draft NPSFM at 3.2 Te Mana o te Wai
20 Draft NPSFM at 3.10 Identifying limits on resource use and preparing action plans
their purpose, intention, and parameters are therefore uncertain and confusing.

59. As such, we are uncertain what the status and format of the long-term vision and action plans are, where they sit in the hierarchy of documents, what their legal status is, and whether there are any legal requirements attached to these documents. Our feeling is that these documents are aspirational documents which have no legal effect, as we are uncertain under what authority these are prepared and what the legal status and enforceability of such a document is.

60. This drafting resulting in such confusion over the status and requirements associated with action plans and long-term visions is unacceptable.

Suggested Solution

61. We suggest that the process for formulating action plans and long-term strategies is incorrectly placed under the auspices of the RMA, where it should located under the provisions of the LGA 2002. This is because a long-term vision should set a vision and aspirations for outcomes, and these visions and aspirations are implemented through resource management statements and plans.

62. Under the RMA a policy and plan is reviewed every 10 years, which is antithetical to the concept of long-term planning.

63. The LGA 2002 provides a process by which a strategy can be prepared, with public engagement under the special consultative procedure contained in sections 93 through 94. A strategy prepared under this process has weight under the Act, as it constitutes a ‘management plans and strategies prepared under other Acts’ which must be had regard to by council when preparing or changing a regional policy statement.21

Parts 3 and 4

64. The Draft NPSFM contains the following sections:

   a) Part 3, Subpart 1: approaches to implementing objective and policies;
   b) Part 3, Subpart 2: national objectives framework;
   c) Part 3, Subpart 3: specific requirements;
   d) Part 3, Subpart 4: exceptions; and
   e) Part 4: timing.
   f) Appendices

65. As noted, the structure of the 2017 NPSFM is preferred but if the current structure is to be retained then the information currently contained in Parts 3

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21 Resource Management Act 1991 s61(2)(a)(9)
and 4 should be included as policies in the NPSFM. The Act specifies at section 45A that:

(1) A national policy statement must state objective and policies for matters of national significance that are relevant to achieving the purpose of this Act.

(2) A national policy statement may also state –

(a) the matters that local authorities must consider in preparing policy statements and plans;

(b) methods or requirements in policy statements or plans, and any specifications for how local authorities must apply those methods or requirements, including the use of models and formulae;

(c) the matters that local authorities are required to achieve or provide for in policy statements and plans;

(d) constraints or limits on the content of policy statements or plans;

(e) objectives and policies that must be included in policy statements and plans;

(f) directions to local authorities on the collection and publication of specific information in order to achieve the objectives of the statement;

(g) directions to local authorities on monitoring and reporting on matters relevant to the statement, including—

(i) directions for monitoring and reporting on their progress in relation to any provision included in the statement under this section; and

(ii) directions for monitoring and reporting on how they are giving effect to the statement; and

(iii) directions specifying standards, methods, or requirements for carrying out monitoring and reporting under subparagraph (i) or (ii):

(h) any other matter relating to the purpose or implementation of the statement.

66. Parts 3 and 4 contain directives which are relevant to the implementation of the objectives and policies, which are permitted under section 45A(2)(h) (‘any other matter relating to the purpose or implementation of the statement’). Part 3 subpart 2 contain directives regarding the national objectives framework which is created in the policies of the Draft NPSFM, which again is permitted under section 45A(2)(h). However, the specifications relating to the national objectives framework are better included as a policy giving effect to an objective – as they are in the 2017 NPSFM.

67. The confusion regarding the proper place for actions and directions in this Draft NPSFM appears throughout the drafting, as seen in the above discussion regarding the wording and content of the objectives and policies. If the national objectives framework is included as an objective, then the policies will detail how it is to be achieved, and we consider this structure will provide greater clarity and legal certainty than the current situation where a great amount of detail and technical requirements are included in Parts 3 and 4.
68. It is, therefore, considered that the content of Parts 3 and 4 should be included in the policies section of the NPSFM.

CONCLUDING COMMENTS

69. In undertaking this review detailed thought has been given to drafting changes that could be made to either enhance the 2017 NPSFM (the preferred approach) or produce a new NPS using the style of the 2008 Draft NPS updated to include the relevant parts of the 2017 NPSFM and the Draft NPSFM.

70. Further input can be provided at the appropriate time.