Appendix 2: Westpower's submissions on the draft NPSFM and proposed NESFW – Response to specific questions and issues as per Discussion Document

**Policy direction**

*Te Mana o te Wai*

9. Do you support the *Te Mana o te Wai* hierarchy of obligations, that the first priority is the health of the water, the second priority is providing for essential human health needs, such as drinking water, and third is other consumption and use?

1. The fundamental concept and sole objective (Objective 2.1) of the draft NPSFM establishes a hierarchy which requires decision-makers at both the planning level and the consenting level to put the health and wellbeing of the water before providing for essential human needs, such as drinking water and other uses, such as hydro REG and local electricity distribution.

2. Westpower recognises fresh water as a tāonga and is acutely aware of the privilege to use such a highly valued natural resource in a sustainable manner and the environmental controls and obligations that come with such a privilege. Westpower is committed to maintaining and improving the health of fresh water while delivering REG to the West Coast community and therefore strives to constantly improve its environmental performance and reduce its environmental effects.

3. Westpower is, however, concerned that the hierarchy approach under Objective 2.1 provides little or no recognition of the benefits of hydro REG and electricity distribution and their importance for communities and the Government's climate change goals. The hierarchy approach will therefore make it challenging, if not impossible, to consent and re-consent both hydro REG and electricity distribution.

4. Westpower supports a more balanced fresh water framework that recognises the critical role of hydro REG and electricity distribution in providing for the essential needs of communities and achieving the Government's climate change goals while, maintaining and enhancing the health of water. Westpower considers that such an approach is in accordance with key principle of sustainable management in the Resource Management Act 1991 (“the RMA”).

5. To achieve this balance, the fresh water framework must enable hydro REG and electricity distribution in policies and plans, including through a consenting pathway if required. For activities that have a minor and / or transitory effect, such activities should be enabled through permitted activity status in plans because the potential environmental effects have been reduced to an acceptable level.

6. For more significant activities, a consenting pathway would provide meaningful recognition of the critical role of hydro REG and electricity distribution, while also recognising the importance of achieving environmental outcomes, including improving fresh water, in accordance with sustainable management. A consenting pathway would allow decision-makers to assess hydro REG and electricity distribution proposals in their particular context to determine what effects (if any) the proposal would have on fresh water and whether consent should be granted.

7. Objective 2.1 also applies nationwide without any distinction between rivers that are degraded and those that are currently of high or good quality. Nor does it provide any flexibility for specific
situations, where for example, there may be an extreme local or national need for hydro REG, and where the effects of protecting the water at all costs will have its own countervailing adverse effects such as the failure to substitute fossil fuel energy with hydro REG and therefore meet the Government's climate change goals.

8. Westpower considers that Objective 2.1 should be amended to remove the hierarchy of priorities so that decision-makers can maintain and improve the health and wellbeing of fresh water while enabling people and communities to provide for their essential health needs, including hydro REG and local electricity distribution, and their social, economic, and cultural wellbeing, now and in the future.

9. With respect to Policy 5 and clause 3.3 of the draft NPSFM, Westpower is concerned that there is much uncertainty about the intended effect of these policies. The word "reflect" is not used in the RMA and there is no case law on what this word means. If "reflect" means to "mirror" such that tangata whenua interests must be mirrored in the freshwater framework, Westpower considers that there could be natural justice issues when it comes to decision-making. Westpower submits that the drafting should clearly express the outcomes it seeks to achieve through these policies.

**New Māori value**

14. Do you foresee any implementation issues associated with either approach?

15. What are the benefits and impacts of either of these approaches?

10. Under the current NPSFM every regional council is to identify the values for each Freshwater Management Unit ("FMU"). These values include the "compulsory values" and "other values" set out in the appendices to the current NPSFM, as well as "other values that the regional council considers appropriate".

11. This approach has not changed under the draft NPSFM. However, the draft NPSFM introduces two additional "compulsory values," namely mahinga kai and threatened species (discussed below).

12. Westpower accepts that mahinga kai is an important value that should be recognised in the fresh water framework as a compulsory value. Westpower strives to ensure that our impacts on mahinga kai values are minimised and opportunities to enhance or restore them are taken.

13. Westpower supports mahinga kai being identified as a compulsory value in the draft NPSFM in accordance with Proposal 1. Unlike Proposal 2, Proposal 1 provides certainty as to the scope and outcome of this value. Further, it does not require the investment of significant time and resources by various stakeholders to determine the tangata whenua values.

14. While Westpower is supportive of Proposal 1 and the introduction of mahinga kai as a compulsory value, it has concerns that as currently drafted the new national objectives framework, in particular the requirement to maintain or improve fresh water "at or above the current state" of the attribute (including mahinga kai), imposes a "no-effects" regime, making it very difficult, if not impossible, to enable through policies and plans hydro REG and electricity distribution activities that have a minor

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1 Policy CA2 of current NPSFM.
2 Compulsory values in the current NPSFM include "ecosystem health" and "human health for recreation".
3 "Other values" in the current NPSFM include for example "natural form and character", "fishing" and "hydro-electric power generation".
4 Clause 3.7 of draft NPSFM.
or transitory effect and to establish an enabling consenting pathway for more significant hydro REG and electricity distribution activities.

**New planning process for freshwater**

17. Do you support the proposal for a faster freshwater planning process? Note that there will be opportunity to comment on this proposal in detail through the select committee process on the Resource Management Amendment Bill later this year.

15. Westpower does support a specialist panel being established to hear submissions and make decisions on the implementation of the draft NPSFM and proposed NESFW. However, Westpower wish to note its concerns about the potentially limited resources available, in particular water quality experts, to enable several planning hearings to occur (potentially simultaneously) and within tight timeframes. The resourcing limitations may make it difficult to deliver robust and sustainable long term outcomes for fresh water.

**Exceptions for major hydro schemes**

19. Does the proposal to allow exceptions for the six largest hydro-electricity schemes effectively balance New Zealand’s freshwater health needs and climate change obligations, as well as ensuring a secure supply of affordable electricity?

16. Westpower is supportive of the intent of the “exception” proposal but is very concerned about the "exception" being limited to the listed schemes. Westpower considers that the exception regime should be expanded to include both existing and new smaller hydro REG including Westpower's Amethyst and proposed Waitaha hydro schemes.

17. As currently drafted, the freshwater reform package – in particular the requirements under the national objectives framework to maintain or improve fresh water "at or above the current state" of attributes, and the wetlands, instream infilling, fish passage and environmental flow requirements – will make it very challenging, if not impossible to develop, operate, maintain and upgrade new and existing hydro REG.

18. It is therefore crucial that an "exception" regime is included in the fresh water reform package to provide an enabling consenting pathway for the development, operation, maintenance and upgrade of existing and future hydro REG so that these schemes can continue to run as efficiently, effectively and flexibly as possible, consistent with reasonable water quality outcomes. A consenting pathway enables decision-makers to assess a hydro REG proposal in its particular context, including both the positive and adverse effects to determine whether consent would accord with the principle of sustainable management.

19. There is no rationale for why smaller existing and new hydro REG schemes should not be included in the list of exceptions.

20. Excluding smaller schemes and new hydro schemes from the "exception" regime undermines the National Policy Statement for Renewable Electricity Generation ("NPSREG"). The NPSREG provides strong direction that all hydro REG, irrespective of scale, plays a crucial role in New
Zealand's energy economy. The NPSREG also provides strong direction to provide for the development of new hydro REG. The NPSREG provides as follows:

(a) pre-amble: "The contribution of renewable electricity generation, regardless of scale, towards addressing the effects of climate change plays a vital role in the wellbeing of New Zealand, its people and the environment."

(b) sole Objective: "To recognise the national significance of renewable electricity generation activities by providing for the development, operation, maintenance and upgrading of new and existing renewable electricity generation activities, such that the proportion of New Zealand's electricity generated from renewable energy sources increases to a level that meets or exceeds the New Zealand Government's national target for renewable electricity generation."

(c) Policy A: "Decision-makers shall recognise and provide for the national significance of renewable electricity generation activities, including the national, regional and local benefits relevant to renewable electricity generation activities. These benefits include, but are not limited to: …

b) maintaining or increasing security of electricity supply at local, regional and national levels by diversifying the type and/or location of electricity generation…"

(d) Policy B: "Decision-makers shall have particular regard to the following matters: …

b) even minor reductions in the generation output of existing renewable electricity generation activities can cumulatively have significant adverse effects on national, regional and local renewable electricity generation output; and

c) meeting or exceeding the New Zealand Government's national target for the generation of electricity from renewable resources will require the significant development of renewable electricity generation activities."

(e) Policy E2: "Regional policy statements and regional and district plans shall include objectives, policies, and methods (including rules within plans) to provide for the development, operation, maintenance, and upgrading of new and existing hydro-electricity generation activities to the extent applicable to the region or district."

(f) Policy F: "As part of giving effect to Policies E1 to E4, regional policy statements and regional and district plans shall include objectives, policies, and methods (including rules within plans) to provide for the development, operation, maintenance and upgrading of small and community-scale distributed renewable electricity generation from any renewable energy source to the extent applicable to the region or district."

21. To ensure alignment with the NPSREG Westpower submits that all existing and future hydro REG, including Westpower's Waitaha and Amethyst hydro schemes must be included in the "exception" regime.
22. Further, under the draft NPSFM large scale hydro REG is very unlikely to be consented in the future. Allowing for the continued development, operation, maintenance and upgrading of smaller new and existing hydro is therefore essential for:

(a) ensuring that New Zealand has a secure, reliable and cost effective supply of energy to provide for the health and well-being of New Zealand's communities and industry;

(b) providing storage and flexibility to support other intermittent forms of REG such as wind and solar; and

(c) decarbonising New Zealand and achieving the Government's climate change goals. All hydro schemes, regardless of size, make an essential contribution to the Government's REG and emissions reduction targets.

23. Westpower therefore submits that all existing and future hydro REG, including the Waitaha and Amethyst scheme should be included in the "exception" regime.

24. Westpower is concerned however that as currently drafted the "exception" regime is illusory and does not provide a consenting pathway to enable even the listed large scale hydro REG.

25. The "exception" regime requires councils "to have regard to the importance of not adversely affecting the generation or storage capacity of a scheme or its operational flexibility". This is not directive wording and will therefore not take precedence over the strongly directive requirements in the policies relating to the national objectives framework, wetlands, instream infilling, fish passage and environmental flows. This creates a significant risk that that the freshwater reform package will jeopardise the ongoing operation, maintenance and upgrade of existing large scale hydro REG.

26. The "exception" regime needs to be amended so that at the very least it provides a clear and certain consenting pathway to enable existing and new hydro REG.

27. Westpower is committed to its ongoing environmental obligations to reduce any potential effects of its existing schemes on fresh water and is not looking to avoid such obligations. However, in the absence of an "exception" regime the requirements proposed in the freshwater reform package will significantly impact on hydro REG. It is essential that the "exception" regime provides a clear consenting pathway to enable all existing and new smaller hydro REG schemes, such as the Waitaha and Amethyst hydro schemes to allow the benefits of hydro REG, such as assisting with the transition away from fossil fuels and powering communities, to be realised. A consenting pathway will provide balance between recognising the benefits of existing hydro schemes, while recognising the importance of delivering environmental outcomes, including improved water quality, in accordance with sustainable management.

28. Westpower therefore submits that the "exception" regime be amended to ensure that it provides a clear and certain consenting pathway to enable existing and new hydro REG, irrespective of scale, including the Amethyst and Waitaha hydro schemes.

29. With respect to local electricity distribution, it is crucial that the freshwater reform package is amended to enable such activities where they will have a minor or transitory effect. Where such activities will have a more than minor effect, it is essential that the draft NPSFM provides an
enabling consenting pathway for these activities. Otherwise this essential service could be compromised, endangering the health and well-being of the West Coast community.

30. Local electricity distribution may not fit within the strategic intent of the current "exception" regime in clause 3.22 so may instead require either its own separate "exception" regime or explicit carve outs within each of the new policies, including for example, the national objectives framework, wetlands and streams policies.

**Raising the bar on ecosystem health**

**Attributes**

20. Do you think the proposed attributes and management approach will contribute to improving ecosystem health? Why/why not?

31. Under both the current NPSFM and draft NPSFM freshwater quality must be maintained or improved. However, the draft NPSFM introduces a significantly different framework requiring compliance with strict new requirements to ensure the health and wellbeing of waterbodies and freshwater systems is maintained or improved "at or above the current state of that attribute", even in relation to high quality fresh water. Westpower’s concerns with this new regime are discussed below.

**Values and Environmental Outcomes**

32. Under the current NPSFM every regional council is to identify the values for each FMU. These values include the "compulsory values" and "other values" set out in the appendices to the current NPSFM, as well as "other values that the regional council considers appropriate".

33. This approach has not changed under the draft NPSFM. However, the draft NPSFM introduces two additional "compulsory values", namely threatened species and mahinga kai (discussed above and below).

34. The "other values" (discretionary values) are unchanged and include "Hydro-electric power generation".

35. As a discretionary value, Westpower is concerned that FMUs with hydro-electric power generation values will not be identified as such. In our experience it can be difficult persuading councils to accept the inclusion of hydro-electric power generation values in plans. Under the proposed strategic framework of the draft NPSFM, in particular Objective 2.1, Westpower expects that it will become even more difficult to include hydro-electric generation values in policies and plans.

36. Under the current NPSFM, failure to identify hydro-electric generation as a value may not have caused significant implications. However, under the draft NPSFM if hydro REG and local electricity distribution are not identified as values then environmental outcomes / objectives, targets and environmental flows and levels cannot be developed with reference to such values. This will make

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5. Policy CA2 of current NPSFM.
6. Compulsory values in the current NPSFM include "ecosystem health" and "human health for recreation".
7. “Other values” in the current NPSFM include for example "natural form and character", "fishing" and "hydro-electric power generation."
8. Clause 3.7 of draft NPSFM.
it very difficult, if not impossible, to consent and re-consent the development, operation, maintenance and upgrading of hydro REG and local electricity distribution.

37. Westpower submits that the draft NPSFM be amended to include hydro REG and local electricity distribution as a compulsory value to enable through policies and plans, electricity distribution activities that will have a minor or transitory effect, and to provide a consenting pathway for new and existing hydro REG, and electricity distribution activities that will have a more than minor effect. This value must recognise the benefits of hydro REG in terms of responding to the risks of climate change by reducing greenhouse gas emissions and the delivery of secure, affordable energy to communities. Such an approach would be consistent with the NPSREG (discussed above). This compulsory value must also recognise the essential service that local electricity distribution provides, without which REG cannot be delivered to communities, potentially endangering the health and well-being of communities.

National objectives framework

38. Under the current NPSFM, the framework for establishing fresh water objectives is based on implementing environmental bottom lines (that is minimum standards for ensuring the health of a waterbody) as follows:
   (a) The attributes need to be set "at" or "above" the minimum acceptable state for that attribute as set out in Appendix 2 of the current NPSFM.9
   (b) While there is the ability to set attributes at or above the current state of the attributes, this applies only where the objectives seek to "maintain" overall water quality.

39. The draft NPSFM framework is significantly different and is based on identifying the current attributes of fresh water and maintaining and improving those attributes. Under this framework regional councils must set objectives, or targets, for contaminant levels and indicators of ecosystem health which are "at" or "above" the current attributes of the fresh water, irrespective of whether the fresh water is healthy or degraded, as follows:
   (a) Councils must set a target attribute state for every attribute.10
   (b) Target attributes must be "at" or "above" the current state of that attribute.11
   (c) However, if the current attribute is worse than the national bottom line, the target attribute must be set at, or above, the national bottom line.12
   (d) Once a council has set the target attributes councils must establish limits on resource use through rules to achieve the target attributes.13

40. Westpower considers that the proposed framework is a much more restrictive test compared with the current framework and is likely to "lock up" all rivers from any future water and land use, impacting significantly on new and existing hydro REG and also on local electricity distribution.

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9 Policy CA2(d) of current NPSFM.
10 Clause 3.9(1) of draft NPSFM.
11 Clause 3.9(2)(b) of draft NPSFM.
12 Clause 3.9(3) of draft NPSFM.
13 Clause 3.10 of draft NPSFM.
41. One of Westpower's biggest concerns is that this framework, in particular the requirement to maintain or improve fresh water "at" or "above" the current state of an attribute, essentially imposes a "no-effects" regime, safeguarding ecosystem health focused attributes at all costs. Such an approach would be inconsistent with the RMA which is not a "no effects" regime.

42. Under this framework, works required to develop new hydro REG, works required to operate, maintain and enhance existing hydro REG and works required to develop, operate, maintain and upgrade local electricity distribution would need to demonstrate that they do not have any adverse effects on the attributes whatsoever, which would be difficult, if not impossible, to comply with. This new framework will therefore make it very difficult, if not impossible, to enable through policies and plans local electricity distribution which has minor or transitory effects and to establish an enabling consenting pathway for hydro REG and local electricity distribution activities which have a more than minor effect, in policies and plans.

43. Westpower's other big concern is that the national objectives framework applies nationwide to all fresh water across New Zealand irrespective of whether the rivers are currently deteriorated or healthy. The framework does not provide any recognition that there are some very healthy rivers which have the capacity to support hydro REG without harming freshwater health, life-supporting capacity or other environmental bottom lines.

44. Westpower absolutely accepts and supports imposing strict requirements where fresh water is degraded in order to improve fresh water quality. However, Westpower cannot see the rationale for applying this restrictive framework to healthy fresh water which has the capacity to support hydro REG. Such an approach will essentially "lock up" and prohibit any further use and development of healthy fresh water (and land uses that affect fresh water), stymieing new and existing hydro REG (as well as all other water and land uses such as local electricity distribution). This approach does not align with sustainable management and Part 2 of the RMA and will ultimately result in the failure of the Government to meet its REG and emissions reduction targets.

45. As discussed above, Westpower seeks that new and existing smaller hydro REG including the Waitaha and Amethyst schemes, be included in the "exception" regime to allow for the development, operation, maintenance and upgrading of these schemes. Such an exception may ameliorate Westpower's concerns with the national objectives framework in terms of new and existing hydro REG.

46. As discussed above, it is crucial that the draft NPSFM is amended to enable electricity distribution activities that have a minor or transitory effect and to provide an enabling consenting pathway where the effects of such activities will be more than minor. Otherwise this essential service could be compromised, endangering the health and well-being of the West Coast community. This could be achieved through a separate "exception" regime for local electricity distribution.

47. If no such exception regimes are provided for, Westpower seeks that the national objectives framework be amended to:

(a) ensure that the national objective framework does not impose a "no-effects" regime for hydro REG and local electricity distribution and either enables or provides a consenting pathway for
the development, operation, maintenance and upgrading of both new and existing hydro REG and local electricity distribution;

(b) require councils to have regard to the national significance of hydro REG and the NPSREG when setting environmental outcomes, target attribute states and in turn, environmental flows and levels and take limits (discussed below); and

(c) potentially develop one objective framework for healthy fresh water that has the capacity to support use and development and another objective framework for low quality fresh water that does not have such capacity, to recognise the varying quality and resource use pressure across New Zealand, in accordance with sustainable management.

**Threatened indigenous species**

**22. Do you support the new compulsory national value? Why/why not**

48. Westpower is supportive of the inclusion of compulsory values for threatened species.

49. Westpower is committed to monitoring and minimising its environmental impacts on freshwater, and constantly improving our performance, including in relation to threatened species. Westpower therefore supports an approach which seeks to ensure that proper consideration is given to the protection and enhancement of threatened indigenous fish.

50. However, as discussed above, Westpower has significant concerns that as currently drafted the national objectives framework seeks to protect attributes, such as threatened species, at all costs. In other words, the framework imposes a "no-effects" regime which will make it very challenging if not impossible to consent or re-consent in particular hydro REG, but may also affect the ability to enable local electricity distribution. As discussed above, Westpower therefore seeks changes to this framework.

51. Westpower further notes that it is unclear which attributes in Appendix 2A relate to the "threatened species" compulsory values and would be grateful for further detail and specificity to provide clear direction.

**Fish passage**

**23. Do you support the proposed fish passage requirements? Why/why not?**

52. Westpower supports the new fish passage requirements as they apply to new instream structures, so long as those requirements do not compromise the ability to consent new hydro schemes.

53. Westpower does not support the new fish passage requirements in relation to existing schemes, its reasons for this position are set out below.

**24. Should fish passage requirements also apply to existing instream structures that are potentially barriers to fish passage, and if so, how long would it take for these to structures to be modified and/or consented?**

54. While Westpower is generally supportive of preventing loss to fish species as far as practicable, Westpower does not support the new fish passage requirements in relation to existing schemes.
55. Westpower's Amethyst hydro scheme was commissioned in 2013 and is an existing lawfully established hydro scheme with instream structures and activities that are critical to the ongoing operation of Amethyst. Amethyst does not have a dam but has a low level weir used to abstract the water from the Amethyst River. This weir had to be constructed solely by helicopter access as the terrain precluded the installation of any roadway, which presented some difficult engineering challenges.

56. Amethyst is subject to modern and robust consent conditions as well as concession conditions (the majority of the scheme has been constructed in public land administered by the Department of Conservation). In accordance with both the concession and consenting regimes, the utmost attention was paid to minimising the environmental effects of the scheme, which is also in line with Westpower's commitment to the environment.

57. The weir was commissioned having the utmost regard to the needs of indigenous species. Fish passage was not deemed necessary by decision-makers because the effects on indigenous species in the absence of fish passage were less than minor. The Amethyst River provides a natural barrier to fish passage. The only indigenous species above the Amethyst scheme is the Koaro which has the ability to climb up the wet rocks to the side of the scheme.

58. Given that fish passage was found not to be necessary for the Amethyst scheme, the risk that fish passage would allow for the migration of undesirable species, and the current fish pass technology and equipment, Westpower considers that it is unnecessary, uncertain, impracticable and inefficient to replace the Amethyst's instream structures and activities, or to retrofit them with the ability to provide fish passage. Such retrofitting is likely to have a significant impact on Westpower. Fish passage is unlikely to be unfeasible. Even if it was possible to provide fish passage, there is a significant risk that this would allow undesirable species nit he upper reaches and would jeopardise the electricity outputs from the scheme and would come at a major cost, potentially rendering the scheme unviable.

59. For these reasons Westpower's position is that the draft NPSFM and proposed NESFW should be amended to ensure that existing hydro REG is not required to retrofit their instream structures to provide fish passage.

60. The draft NPSFM and proposed NESFW fish passage requirements should only apply to new structures which generally can be designed in a manner to allow for fish passage.

61. As discussed above, Westpower, suggests that the "exception" regime in Clause 3.22 (discussed above) be amended to include all hydro REG including existing schemes such as the Amethyst hydro scheme. Westpower submits that the "exception" regime be further amended to explicitly exempt existing hydro REG from the draft NPSFM fish passage provisions. This will provide Westpower with the certainty that the Amethyst hydro scheme will not be caught by these new potentially unfeasible requirements.

**Wetlands**

25. Do you support the proposal to protect remaining wetlands? Why/why not?

62. Westpower supports protecting remaining wetlands from further loss, as far as practicable. In line with Westpower's commitment to the environment, Westpower accepts the importance of continuing
to ensure that our impacts on wetlands are minimised and opportunities to enhance or restore them are adopted. Westpower is therefore supportive of an approach which seeks to ensure that proper consideration is given to the protection and enhancement of wetlands and that any effects on wetlands are minimised as far as practicable.

63. However, Westpower is concerned that as currently drafted the freshwater reform package imposes strict requirements on activities that may potentially impact wetlands, which will compromise the development, operation, maintenance and upgrading of new and existing hydro REG and local electricity distribution.

64. As discussed in the cover letter, given the topography of the West Coast (mountains to the east and the sea to the west with a large number of rivers and streams running from the mountains to the sea), the route options for local distribution lines is severely constrained. It may therefore be necessary in some instances to locate local distribution lines on or near wetlands. While Westpower would also strive to reduce the effects of such activities as far as practicable, in some instances there may be some residual effects.

65. The draft NPSFM requires councils to insert a policy into their regional plans stating that "the loss or degradation of all or any part of a natural inland wetland is avoided." Westpower considers that this "avoid" policy will have a very significant impact on its hydro REG activities.

66. The Supreme Court decision in Environmental Defence Society Inc v New Zealand King Salmon Company Ltd ("King Salmon case") and subsequent case law,14 have held (albeit within the context of the New Zealand Coastal Policy Statement ("NZCPS")) that the use of the term "avoid" means "do not allow" (some exceptions may apply).15 In King Salmon the Supreme Court also held that policies, while not rules, can be worded to be so directive that the effect is the same as a rule. It also held that more directive policies "trump" those that are less directive. Therefore this policy, on its face means "do not allow the loss or degradation of all or any part of a natural inland wetland." which will make it very challenging if not impossible to consent or re-consent hydro REG.

67. Policy 8 of the draft NPSFM also states “There is no further loss or degradation of natural inland wetlands.” That wording is absolute and supports the interpretation that an absolute avoidance policy to be included in RPS’s.

68. Under the current drafting the policy will be very broad in its application16 and it is arguable that any "mere" loss of any part of a wetland, no matter how minor, trips this policy.17

14 [2014] NZSC 38. In the recent High Court case Environmental Defence Society v Otago Regional Council [2019] NZHC 2278 (Port Otago case) the High Court found that the avoidance policies in the NZCPS take precedence over other infrastructure policies in the NZCPS. This is similar to previous decisions of the High Court that held the avoidance policies take precedence over the infrastructure and development provisions of the NZCPS. The Supreme Court in King Salmon and subsequent cases to date have accepted that minor and transitory effects may be acceptable and that mitigation and remediation can be taken into account when determining if adverse effects are avoided. However, the High Court in the Port Otago case commented that the avoidance policies require absolute avoidance of (and "inevitably" prohibit) adverse effects on the stated values. This is a strict approach to the requirement to "give effect to" the NZCPS in lower planning documents and is a further evolution of the King Salmon approach in RMA planning.

15 Port Otago applied the NZCPS avoidance policies as not allowing a consenting pathway for infrastructure even to provide for health and safety.

16 "natural wetland" is very broadly defined and does not impose a significance test so will be very broad in its application.

17 The policy relates to "all or any part" and the definition of "loss or degradation" does not impose any parameters. It is arguable that any "mere" loss of any part of a wetland, no matter how minor, trips this policy. In other words, this policy is establishing a "no effects" regime.
69. The current drafting of the NPSFM and NESFW creates uncertainty about the implication of the wetland provisions. The draft NPSFM states that adverse effects on wetlands are to be managed by applying the effects management hierarchy.\textsuperscript{18} The “avoid” policy must also be read subject to any rules that give effect to the NESFW.\textsuperscript{19}

70. The proposed NESFW does provide a consenting pathway for existing hydro REG in respect of vegetation destruction and earth disturbance (discretionary activities subject to meeting criteria).

71. However, because the definition of "nationally significant infrastructure" is limited to new hydro REG which is connected to the national grid, the NESFW does not provide a consenting pathway for new hydro REG that is not connected to the national grid, such as Westpower's proposed Waitaha scheme. Furthermore, earth disturbance for drainage associated with both new and existing hydro REG would be prohibited under the NESFW.\textsuperscript{20}

72. The proposed NESFW also does not enable electricity distribution activities that are minor or transitory. Nor does it provide an enabling consenting pathway for local electricity distribution where the effects of such activities on wetlands may be more than minor. Under the proposed NESFW activities necessary for the development, operation, maintenance and upgrade of local distribution lines (for example vegetation disturbance and earth disturbance) on or near wetlands, will be non-complying, even if the effects are minor or transitory.

73. In any case, given the clear direction of the "avoid" policies and the strategic level intent of the draft NPSFM, Westpower considers there to be significant risk that these policies will create an absolute avoidance regime, that is, a "no-effects" regime (akin to the NZCPS). That approach is also consistent with the sole objective of the draft NPSFM, Objective 2.1, which explicitly prioritises the health and wellbeing of fresh water above use of fresh water.

74. Even if the framework is held not to be a "no-effects" regime, given the strategic intent of the draft NPSFM (including Objective 2.1) the implications for Westpower are that at best, it will be significantly more difficult, if not impossible, to consent new and re-consent new and existing hydro REG and local electricity distribution.

75. Turning to the proposed NESFW, Westpower has identified the following issues which need to be addressed:

(a) in relation to vegetation destruction and earth disturbance, there are exemptions for existing hydro REG but not new hydro REG because the definition "nationally significant infrastructure" does not include new hydro REG which does not connect to the national grid such as Westpower's proposed Waitaha scheme. This means that new hydro REG would be non-complying – as opposed to discretionary, hindering the ability of the Government to achieve its REG and emission reduction targets;

(b) the exemptions do not extend to "upgrading" of existing hydro REG which is crucial in light of the Government’s REG and emission reduction targets;

\textsuperscript{18} Clause 3.15(4) of draft NPSFM.
\textsuperscript{19} Clause 3.15(3) of draft NPSFM.
\textsuperscript{20} Clause 14 of proposed NESFW.
(c) in relation to earth disturbance for drainage, there is no exemption for either new or existing hydro REG meaning that such activities would be prohibited. Again, this would hinder achieving the Government's REG and emission reduction targets;

(d) there are no exemptions for the development, operation, maintenance or upgrading of local distribution lines meaning that such activities will be either non-complying\(^{21}\) or prohibited\(^{22}\), even if the effects of such activities are minor or less than minor or transitory;

(e) the requirements for meeting the standards are unclear and uncertain; and

(f) there are some gaps in the activity status cascade.

76. It is vital that the wetland policies are amended to remove the "avoid" policies to enable, through policies and plans, electricity distribution activities which have minor or transitory effects; and to provide a clear enabling consenting pathway for the development, operation, maintenance and upgrading of new and existing hydro REG and electricity distribution activities which have a more than minor effect.

77. As discussed above, Westpower seeks that new and existing hydro REG including the Waitaha and Amethyst hydro schemes, be included in the "exception" regime. Westpower submits that the "exception" regime be further amended to explicitly exempt new and existing hydro REG from the draft NPSFM wetland provisions. This will provide certainty of an enabling consenting pathway for hydro REG activities where they may have potential effects on wetlands.

78. As discussed above, Westpower seeks that local electricity distribution activities which have a minor or transitory effect be enabled in policies and plans, and that an enabling consenting pathway be provided for electricity distribution activities which have a more than minor effect. To achieve this, either a new separate "exception" regime for local electricity distribution needs to be provided in the draft NPSFM, or the wetland provisions themselves need to explicitly exempt local electricity distribution from their application. This will provide Westpower with the certainty that local electricity distribution can be enabled, through a consenting pathway if necessary, where they may have potential effects on wetlands.

Streams

27. Do you support the proposal to limit stream loss? Why/why not?

79. Westpower supports protecting, as far as practicable streams, particularly streams in cities and towns (which is the focus of the Discussion Document), from further loss. Westpower accepts the importance of continuing to ensure that our impacts on streams are minimised and that opportunities to enhance or restore them are adopted. Westpower is therefore supportive of an approach which seeks to ensure that proper consideration is given to the protection and enhancement of streams and that any effects on streams are minimised as far as practicable.

80. However, Westpower is concerned that as currently drafted the freshwater reform package imposes strict requirements on instream activities in all waterbodies (not just waterbodies in or near urban areas as the Discussion Document suggests).

\(^{21}\) Clause 8 and 11 of proposed NESFW.
\(^{22}\) Clause 14 of proposed NESFW.
81. Infilling is an essential component of developing, operating, maintaining or upgrading hydro REG, meaning that these new instream infilling requirements will compromise the development, operation, maintenance and upgrading of new and existing hydro REG.

82. Again, as discussed in the cover letter, the route options for local electricity distribution are significantly constrained in the West Coast due to its topography. It may therefore be necessary in some instances to locate local distribution lines within rivers and streams.

83. In the absence of a definition of "infilling" there is uncertainty about whether this would include pole placement and any associated protection works within rivers and streams. If it did, this would mean that the new instream infilling requirements would compromise the development, operation, maintenance and upgrading of local distribution lines.

84. The draft NPSFM requires councils to insert a policy into their regional plans stating that every regional council must make or change their regional policies and plans to "ensure that the infilling of river or stream beds is avoided, unless there are no other practicable alternative methods of providing for the activity and it is part of [a limited list of exempted activities]." 23

85. As discussed above, case law following the Supreme Court in King Salmon and subsequent cases have held (in relation to the NZCPS) that "avoid" means "do not allow" (some exceptions may apply).

86. In terms of the exceptions, "nationwide significant infrastructure" is exempted from this "avoid" policy. In the absence of a definition of "nationwide significant infrastructure" in the draft NPSFM the proposed NESFW definition of "nationwide significant infrastructure" is likely to apply. As discussed above, this does not include new hydro REG that does not connect with the national grid. Nor does it include existing hydro REG. Therefore, both Westpower's existing hydro REG scheme Amethyst and Westpower's proposed hydro REG Waitaha scheme would not be exempted and would be caught by the "avoid" policy.

87. Similar to the wetland policies, the current drafting of the NPSFM and NESFW creates uncertainty about the implication of the wetland provisions. The "avoid" policy must be read subject to any rules that give effect to the proposed NESFW. 24 The proposed NESFW does provide a consenting pathway for instream infilling associated with REG. However, this is not enabling. Instream filling for existing or new hydro REG would be a non-complying activity. Further, the draft NPSFM provides that adverse effects on streams are to be managed by applying the effects management hierarchy. 25 Lastly, Policy 9 of the draft NPSFM states "there is no further net loss" 26 of streams. This creates a link to the ability to offset and compensate, compared with the absolute approach in Policy 8.

88. However, as for the wetland policies, there is a significant risk that the stream policies, in particular the infilling policies will create, a "no effects" regime. Westpower is concerned that this will make it very challenging, if not impossible, to consent infilling of streams / rivers which are an essential

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23 Clause 3.16(5) of draft NPSFM.
24 Clause 3.16(2) of draft NPSFM.
25 Clause 3.16(3) of draft NPSFM.
26 Westpower considers that there are uncertainties and concerns about the definition of "net loss" in the proposed NPSFM and whether this is essentially requiring a "net gain" which is a high threshold.
component of the development, operation, maintenance and upgrading of both existing and new hydro REG and also new and existing local electricity distribution

89. Westpower is concerned that the requirement for diversion and culverting to not "result in a net loss" creates uncertainties because the definition of "net loss" in the draft NPSFM (including in Policy 9) is essentially requiring a "net gain" which is a high threshold.

90. Turning to the proposed NESFW, Westpower is concerned that the infilling rules do not enable existing or new hydro, meaning that any infilling required to operate, maintain and upgrade existing and new hydro REG would be non-complying. Consenting or re-consenting such activities would therefore be very challenging, potentially preventing the Government from achieving its climate change goals.

91. In terms of amendments to the instream works provisions generally, it is vital for the development, operation, maintenance and upgrading of new and existing hydro REG and local electricity distribution that the stream policies are amended to narrow the application of the stream policies to streams in cities and towns. Such an approach would align with the reasoning for this policy in the Discussion Document.

92. Alternatively:

(a) further amend the "exception" regime to explicitly exempt new and existing hydro REG from the NPSFM stream provisions. This will provide certainty to Westpower that an enabling consenting pathway will be provided for hydro REG where they may have potential effects on streams; and

(b) explicitly exempt local electricity distribution from the NPSFM stream provisions through either a new separate "exception" regime or through the stream provisions themselves. This will provide Westpower with certainty that electricity distribution activities can be enabled, through a consenting pathway if necessary, where such activities may have potential effects on streams.

93. A further option is to amend the stream provisions to enable electricity distribution activities which have a minor or transitory effect and to provide an enabling consenting pathway for the development, operation, maintenance and upgrading of new and existing hydro REG and local electricity distribution activities which have a more than minor effect as follows:

(a) remove the "avoid" policies; and

(b) either amend the definition of "nationally significant infrastructure" in the proposed NESFW (and insert this into the NSPFM for clarity) to include both existing and new hydro REG, regardless of whether it connects to the national grid, and local electricity distribution; or

(c) insert a specific exemption into both the NPSFM and NESFW for existing and new hydro REG and local electricity distribution.

94. Additional changes or clarifications that Westpower considers necessary are as follows:

(a) provide a definition of "infilling" to provide certainty of application; and

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27 Clause 18 of proposed NESFW.
(b) amend the definition of "net loss" to provide certainty and clarity of meaning;

95. In the absence of such amendments electricity distribution activities which have a minor effect on streams will not be enabled and consenting and re-consenting infilling will either become very challenging or impossible, for new and existing hydro REG and local electricity distribution activities.

29. Do the ‘offsetting’ components adequately make up for habitat loss?

96. Westpower is supportive of a framework for regulating effects whereby:

(a) activities that have a minor and / or transitory effect are enabled through permitted activity status in policies and plans because the potential environmental effects have been reduced to an acceptable level;

(b) an enabling consenting pathway is provided for both new and existing hydro REG and new and existing local electricity distribution where the effects are more than minor; and

(c) applicants are allowed to employ the effects management hierarchy, including the ability to offset (and also compensate) if an applicant so chooses.

97. Offsetting can make a significant contribution to improving New Zealand’s unique and diverse biodiversity. In some cases offsetting can assist in halting or even reversing the decline of New Zealand’s indigenous biodiversity. Without offsetting it will be very difficult to halt, let alone reverse, the decline in New Zealand’s natural biodiversity.

98. Offsetting is now a well-developed process with clear principles and parameters, providing certainty that biodiversity gains will be achieved to balance any significant biodiversity losses that cannot be countered by avoiding, remedi ing or mitigating adverse effects of a proposal. Offsetting principles have been adopted in policies and plans and applied throughout the country with success.

99. In terms of the effects management hierarchy more generally, section 104(ab) of the RMA and the NPSREG28 (in relation to REG) provide the ability for applicants to employ compensation measures during the consenting of activities such as hydro REG and local electricity distribution activities to manage effects.

100. To align with the RMA and the NPSREG and to assist with the management of effects, the proposed NESFW needs to be amended to reflect this core principle and include provisions to allow all hydro REG activities to utilise compensation measures. For example, as currently drafted the proposed NESFW (clauses 6 and 18) requires offsetting if effects cannot be avoided, remedied or mitigated and does not explicitly allow for compensation. Reference to compensation needs to be included in these provisions.

101. Further, throughout the proposed NESFW there is reference to avoiding, remedi ing or mitigating "any residual adverse effect” (see for example clauses 6 and 18 of the proposed NESFW). This suggests that all effects, even a minor or less than minor effect, are to be addressed. As discussed above, a "no-effects” regime is contrary to the RMA. The proposed NESFW needs to be amended

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28 Policy C2 “When considering any residual environmental effects of renewable electricity generation activities that cannot be avoided, remedied or mitigated, decision-makers shall have regard to offsetting measures or environmental compensation including measures or compensation which benefit the local environment and community affected.”
to refer to “any significant residual adverse effect”. This aligns with the Department of Conservation’s Biodiversity Offsetting guidance which defines offsetting as:

"Measurable conservation outcomes resulting from actions designed to compensate for significant residual adverse biodiversity impacts arising from project development after appropriate prevention and mitigation measures have been taken. The goal of biodiversity offsets is to achieve no net loss and preferably a net gain of biodiversity on the ground."  

Minimum flows

37. Is any further direction, information, or support needed for regional council management of ecological flows and levels?

102. Westpower disagrees with the proposed framework for setting environmental flows and levels under the draft NPSFM.

103. Under the current NPSFM environmental flows must be set to give effect to the objectives in the NPSFM including the water quantity objectives, which among other matters, seek:

(a) “To enable communities to provide for their economic well-being including productive economic opportunities, in sustainably managing freshwater quality, within limits.”

104. The current NPSFM therefore allows environmental flows and levels to be set having regard to the need to sustainably use fresh water to provide for well-being.

105. The draft NPSFM proposes to significantly change the framework for setting environmental flows. Under the new regime regional councils develop environmental flows and levels for each FMU on the basis of identified environmental outcomes. Regional councils must then set take limits in order to meet the specified environmental flows and levels.

106. As has been discussed above, under the current drafting hydro-electric generation is not a compulsory value. This creates a real risk (particularly given the strategic intent of the draft NPSFM and the sole objective of Te Mana o te Wai) that hydro-electric generation will not be identified as a value and therefore an environmental objective will not be set for hydro-electric generation.

107. There is therefore a significant risk that environmental flows and levels and take limits will not be developed on the basis of hydro-electric generation, nor any other value which recognises the importance of sustainably using fresh water to provide for well-being. They will be set on the basis of environmental protection values only which does not align with a sustainable management approach.

108. This would have a significant impact on Westpower and consequently the West Coast community as the owner of Westpower. It will challenging, if not impossible, to ensure that the necessary flows and levels, which are crucial for the development, operation, maintenance and upgrading of new and existing hydro REG, are obtained. In the absence of environmental flows and levels that have been set according to hydro-electric generation values, electricity outputs from hydro schemes will be jeopardised, potentially rendering hydro REG unviable.

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30 Objective B5 of current NPSFM.
31 Clause 3.11 of draft NPSFM.
109. Fluctuations are essential for ensuring that the operational capacity and output of hydro generation schemes are, at the very least, maintained. They therefore need to be recognised when setting environmental flows and levels and water takes.

110. Westpower seeks amendments to address these issues as follows, either:

   (a) amend the “exception” regime (discussed above) to provide Westpower with the certainty that in relation to new and existing hydro REG (irrespective of whether it is connected to the national grid) the environmental flows and levels will be developed based on hydro REG values; or

   (b) amend the national objectives framework to ensure that environmental flows and levels and water takes are set on the basis of hydro REG values (among other matters).

**Draft NPSFM**

40. Are the purpose, requirements, and process of the National Objectives Framework clearer now? Are some components still unclear?

111. One further concern Westpower has is the absence of any direction in the NPSFM about the processes which regional councils must employ to identify matters such as wetlands, outstanding waterbodies and habitats for threatened species.

112. Westpower considers that in the interests of fairness and transparency, the NPSFM should explicitly direct regional councils to engage with all stakeholders, including infrastructure providers, when undertaking their identification processes.

113. Westpower therefore submits that the NPSFM be amended to provide greater direction and therefore clarity and certainty, about how regional councils should identify matters such as wetlands, outstanding waterbodies and habitats for threatened species and at the very least require regional councils to engage with infrastructure providers in the identification processes.

**Alignment with other national direction under the RMA**

79. Do you think there are potential areas of tension or confusion between the proposals in this document and other national direction? If so, how could these be addressed?

114. Westpower considers that allowing continued access to freshwater to provide for the development, operation, maintenance and upgrading of hydro REG while, seeking to improve fresh water, is essential to meeting the Government's ambitious climate change targets.

115. As discussed above, the NPSREG recognises the fundamental importance of REG's contribution to reducing our country’s greenhouse gas emissions and achieving the Government's ambitious climate change aspirations.\(^{32}\)

\(^{32}\) The NPSREG recognises hydro REG as a matter of national significance and requires decision-makers to recognise and provide for REG in their policies and plans in order to meet the Government’s REG targets. The NPSREG states that the benefits of these activities include maintaining or increasing electricity generation capacity while avoiding, reducing or displacing greenhouse gas emissions.
116. As currently drafted, the draft NPSFM is diametrically opposed to the objectives of the NPSREG. The draft NPSFM does not provide any clear linkages with the NPSREG. This will make it very difficult for decision-makers to implement both pieces of national direction consistently.

117. The draft NPSFM needs to be amended to explicitly align with the NPSREG. The freshwater reform package needs to be amended to require decision-makers to give significant weight to the NPSREG and the significance of hydro REG’s contribution to achieving New Zealand’s climate change and greenhouse gas emission goals, when making decisions in relation to fresh water.

118. In the absence of clear alignment there will be much conflict between the NPSFM and the NPSREG. There will be much uncertainty about how decision-makers are to provide for existing and future hydro REG, resulting in lengthy and expensive litigation.

119. Given the strongly directive policies in the draft NPSFM to "avoid" adverse effects (wetlands and infilling of streams), in the absence of explicit alignment, it is likely that the NPSFM will "trump" the NPSREG, compromising existing and future hydro REG. This will jeopardise the Government’s climate change targets along with the provision of a secure, reliable and cost effective source of electricity.

120. Westpower seeks that a new policy be inserted into the draft NPSFM to explicitly recognise the importance of, and provide for hydro REG, irrespective of whether it is new, existing, large or small.