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Freshwater
Ministry for the Environment
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By email to: consultation.freshwater@mfe.govt.nz

KiwiRail Feedback on Action for Healthy Waterways

KiwiRail Holdings Limited (KiwiRail) is the State Owned Enterprise responsible for the management and operation of the national railway network. This includes managing railway infrastructure and land, as well as rail freight and some passenger services within New Zealand. KiwiRail Holdings Limited is also the Requiring Authority for land designated “Railway Purposes” (or similar) in District Plans throughout New Zealand.

As a mode of transport, rail produces 66% less emissions than trucks to move the same volume of freight across the transport network. The natural advantage of rail as an energy efficient, and low carbon mode of transport provides significant opportunity for New Zealand in the transition to a low emissions future. Providing for efficient and effective public transport is also vital to planning for successful cities and passenger rail transport is a vital element of this. KiwiRail seeks to protect its ability to operate, maintain, and upgrade the rail network to ensure that this network can keep pace with, and grow to cater for, future rail demand.

To achieve this, KiwiRail encourages land uses near the railway corridor that does not compromise the short or long-term ability to operate a safe and efficient rail network, both day and night. The rail network crosses watercourses, given its long linear network connecting centres around New Zealand. Detours to avoid such crossings are not practicable. Over time, existing infrastructure assets need maintenance, upgrading and replacing – this includes structures in and over freshwater. By its very nature this often involves disturbance of a waterway to facilitate works, and a structure in/over a waterway.
KiwiRail’s feedback on the applicable questions provided on the Action for Healthy Waterways is set out in the following table. Some of the questions within the consultation document are on areas that have no specific relevance to KiwiRail in seeking to operate, maintain and enhance the rail network, therefore we have remained silent on those aspects and excluded the questions from the table.

KiwiRail is available to meet with the Ministry to discuss any elements of the feedback provided within this table, and to provide any clarification that may assist in decisions on the changes requested.

Regards,

Personal details removed

Personal details
RMA Team Leader
KiwiRail
## Questions from Section 1.6

5. **What support or information could the Government provide to help you, your business, or your organisation to implement the proposals?**

Consistent interpretation and application of the policy and rule framework would be supported, including having clear guidance and supporting documentation – e.g. template compliance plans. Having clear guidance on what is required to show compliance or gain consent approval would also be supported. KiwiRail’s experience is that each Council tends to interpret provisions differently and to require differing levels of material as part of a consent process. With a national network, KiwiRail would support national consistency.

Adoption of a policy and rule framework that is supportive of nationally significant infrastructure would be supported. Some of the requirements within the NPS-FM could require extensive costs and technical guidance to be implemented, and having national tools and resource available to support that would be appreciated, e.g. technical assessments to support potential drainage maintenance works within 100m of a wetland, noting that the wetland could be as small at 500m\(^2\) in area.

8. **Do you have any other comments?**

While the policies may not have unintended consequences on the protection and/or restoration of ecosystem health, there are conflicts with nationally significant infrastructure and the requirement to maintain and operate this is an efficient manner. Clearer recognition is required of the competing demands of infrastructure and freshwater protection overall. Balance is required in any changes to the RMA as well as any National Policy Statement / National Environmental Standards to ensure that competing demands are appropriately considered.

The detail provided in Part 2 of the NPS-FM is supported, as this sets out the high-level objective and policies for the management of freshwater within NZ.

The detail provided in Part 3 of the NPS-FM is not supported, particularly where the specific direction of the NPS-FM is for planning documents to include policies seeking to ‘avoid’ certain activities or effects. This is expanded on below, however fundamentally the concern is this has no reflection on scale and duration of effect, there is no consideration of positive effects overall, and recent case law has determined that ‘avoid’ means ‘avoid’ therefore there is no scope for remediation or mitigation of effects, let alone offsetting as also anticipated in the NPS-FM.

## Questions from Section 4.7

**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.**

KiwiRail are aware that any changes to the RMA are subject to a separate Parliamentary process, however
wish to note that it is vital that a right to be involved through submissions and appeals where there is a national interest, such as with national infrastructure, is vital and must continue to be provided. KiwiRail would support that this is retained rather than restricted through any change to the freshwater planning framework.

Questions from Section 5.13

Fish passage

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

KiwiRail support the use and adoption of a nationally consistent system for the provision of fish passage. KiwiRail also support that new instream structures less than 4m in height should be designed to include fish passage provisions, however we note that the intention expressed at 5.5 in the Action for Healthy Waterways in this regard does not align with what is proposed in the text of the NPS-FM.

From past experience KiwiRail is aware that different native species require different degrees of fish passage, and therefore a national database of what species are found where is required to ensure that the type and style of fish passage provided is appropriate to the site and species using the facility, and also consistently identified and implemented. We understand that this is a large piece of work that is not currently available, however in order to ensure that Plan making is appropriate, and also that designs for providing fish passage in watercourses are effective, this detail is required.

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?

KiwiRail submit that it would take a long time to retrofit fish passage around the country. Without serious financial support, KiwiRail cannot retrofit 4000plus km of network to ensure fish passage is provided at all instances where the rail network crosses watercourse in a short period of time (i.e. less than 10 years). This is something we actively manage at the time of upgrades and replacements of these assets along the network, recognising the importance of fish passage, however the cost and time implications to address this along the entire network retrospectively is prohibitive at this stage in the event it was imposed. Having a clear trigger and prioritisation of the implementation of this provision is a necessity if retro-fitting fish passage is going to be imposed.

Wetlands

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

Recognising that there is a decline in the area and quality of natural wetlands, and the intention of the NPS-FM is to reverse the declining trend, is supported by KiwiRail. The specific aspects of the NPS-FM and methods outlined in the NES-FW to achieve this are in some instances a concern at a practical level.

The definition of natural wetland as proposed in the NPS-FM is very broad and open to a subjective interpretation and application. This could have the effect of every scale of wetland being identified and included irrespective of significance or quality at the present time and whether it is simply a ponding area rather than a wetland. Further, aspects such as ‘patches of exotic sedge or rush species’ being identified as a measure and determining factor for exceptions, and that it only relates to pasture or paddocks, is not a measure that provides certainty when determining what is or isn’t a wetland, and is open to a subjective interpretation in all instances. KiwiRail would have no certainty at a national level that some areas aren’t now going to be considered wetlands, thereby placing restrictions on the ability to operate and maintain the rail network nationally that are unreasonable and don’t currently exist.

KiwiRail support the intent of Policy 8 of the NPS-FM, that There is no further loss or degradation of natural inland wetlands. However, this protection needs to be balanced. KiwiRail is concerned that this provision could be interpreted as involving large-scale prohibitions or restrictions on activities which involve infill into, or are destructive of, wetlands and streams, including drainage, damming, diversion, disturbance, reclamation or vegetation clearance (e.g. Rules 7, 10-11 and 18 of proposed NES-FW or Policies 8-9 and Rules 3.15-3.16 of proposed NPS-FM). However, the proposed NPS-FM does provide exceptions for activities that are necessary to enable the development, operation, maintenance and upgrade of national significant infrastructure where there are no practicable alternative methods, and support the balance that this
KiwiRail have a concern with the provision below (3.15(2) in the NPS-FM) and the requirement of the NPS-FM for Regional Councils to include ‘avoid’ policies. Based on recent case law, which has found there to be a strict requirement for the translation of ‘avoid’ policies into more detailed planning documents therefore there is no scope for a balanced approach or consideration in the event that nationally significant infrastructure requires temporary works in or over a wetland.

3.15 Inland wetlands

(2) 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.” [emphasis added]

If the policy at 3.15(2) seeks to ‘avoid’ an effect, there is limited scope for a rule framework to be provided that consents such activities, as proposed under 3.15(4).

In Subpart 1 of Part 2 of the NES-FW, nationally significant infrastructure means all or any of the following: e) any railway (as defined in the Railways Act 2005). This is supported by KiwiRail, however we note that the rules are intended to achieve the policy direction, and if the policy is to ‘avoid’ any loss or degradation effect, then there is no scope for nationally significant infrastructure to be consented for the maintenance or upgrading of that infrastructure without some potential degradation of the wetland, even if only temporary.

The scale of the trigger for wetlands being 0.05ha (500m²) to be mapped, and then any effect on them being managed through a consented process, which for some rules triggers at 10m distance and for other rules is at 100m distance (e.g. Rule 12) seems to result in effect management that does not relate to the wetland and controls which are disproportionate to the outcome sought. The likelihood of an activity 100m from a 500m² wetland having an effect is submitted as generally being low. Requiring a discretionary activity consent to facilitate maintenance in that instance is not considered to be effective or efficient resource management.

KiwiRail support the intent of the NES to offer some protection for nationally significant infrastructure, however note that the rule framework does not align with the policy, nor does it at a practical level offer any protection for infrastructure. Many of the Rules, e.g. Rule 7, 10, 11 and 12 of the NES-FW make the activities a discretionary activity. In obtaining a resource consent for such works the policy framework to support the proposal is fundamental, and ‘avoid’ policies will not provide any support for the activity. Further, discretionary activities are able to be declined therefore there is no certainty that existing nationally significant infrastructure can continue to exist and potential for the specific provision for nationally significant infrastructure to be circumvented. Without extensive financial investment in new locations, in some areas relocation is not possible.

KiwiRail recognises that Part 2, Subpart 1 of the NES-FW includes at Rule 6 a suite of conditions for nationally significant infrastructure. Including conditions to address consistency is supported. However, KiwiRail note that this is not an exhaustive list and therefore Councils have scope to impose other conditions. With the consent framework setting up a discretionary activity consent requirement, such conditions could be far reaching and not strictly limited to the scale of effects of the proposal. The specific conditions of concern include condition b which requires wetland monitoring for the duration of the consent. If the consent enables construction works, the monitoring should be limited to that duration. Once the structure, e.g. bridge, is in place then no further ongoing wetland monitoring should be required by virtue of no further works being carried out.

Rules 15 and 16 of the NES-FW relate to water take activities in wetlands. This is defined in Rule 15 as including damming or diverting water. This would include temporary damming and diversion activities associated with infrastructure upgrade or maintenance works. There is no recognition of the temporary nature of such activity, or the scale of damming and diversion (e.g. part of the watercourse only), with all damming and diversion requiring a discretionary activity consent when associated with nationally significant infrastructure. The consent trigger is therefore not relevant to the scale of effect and the technical expertise required to show compliance with clause 16(b) will result in temporary activities requiring a level of design and detail inconsistent with the scale of the effects.

KiwiRail does not oppose obtaining consents for temporary activities, or its structures, however seeks that
the consent framework is not a ‘one size fits all’ type approach and there is a range of scales and nature of effects that can be generated.

26. If this proposal was implemented, what would you have to do differently?
There are some instances where the rail network crosses or is immediately alongside existing wetland areas. Restrictions on the ability to undertake maintenance would result in potentially unsafe operating environments, particularly where such consent restrictions on earthworks for drainage for example are in place within 100m of the wetland and where certain changes arise (as proposed in Rule 12) – which to establish would require extensive technical assessment of the hydrology of the wetland and the surrounding area as well as significant lead in times for detailed design before works could occur to go through a consent process, and potentially appeals depending on the outcome. The consent process in itself would be challenging also given the policy direction of ‘avoid’ which is a high threshold. This would make drainage maintenance works which are necessary to enable continued operation of the rail network, an expensive and drawn out consented process without certainty of outcome. At present, where the drainage network is not part of a wetland or stream, the maintenance is able to be addressed through the Outline Plan process to the District Council which has a greater degree of certainty for nationally significant infrastructure providers.

Streams

27. Do you support the proposal to limit stream loss? Why/why not?
As with the provisions for wetlands, KiwiRail support the intention of Policy 9 however have a concern with the direction to include ‘avoid’ policies for certain activities or effects (Section 3.16(5)), including infilling of streams and rivers even to a partial extent to support upgraded infrastructure. Even with a discretionary activity rule status it will be difficult for KiwiRail to obtain consents to undertake necessary maintenance and operational improvement works. While there is greater flexibility in the provision in that the lack of practical alternative qualifier is adopted, there is still no certainty consent can be obtained and what is practical to one party may not be practical to us when balanced with health and safety obligations and rail operation requirements.

Rule 21 of the NES-FW includes permitted standards for the installation of culverts, Rule 22 includes a similar statement for weirs. These are supported by KiwiRail, however the requirements at (1)(a) of both rules that this also be permitted by the regional plan invokes a confused planning process. If the effects are such that these are able to be permitted through an NES-FW, the regional plan should not be adopting a more stringent requirement.

28. If this proposal was implemented, what would you have to do differently?
As with the Wetland discussion above, KiwiRail could potentially have to undertake extensive assessments and consenting processes for all maintenance and operational activities, whereas at present consents are normally only required for replacement or new assets in or over watercourses. Further, there is often no effect on watercourses from structures over the watercourse, e.g. a bridge that has no piers in the riverbed, and therefore no consents should be required under the NES-FW for maintenance where there is no change to or disturbance of the riverbed.

29. Do the ‘offsetting’ components adequately make up for habitat loss?
The offsetting components appear to relate to conditions able to be imposed on resource consents in order to achieve a future target state, rather than reflecting effects of an activity on the current state such that does not make it worse (3.10 NPS-FM). Offsetting requirements could therefore far exceed the effect proposed to be created by an activity. The ability for offsetting is supported, however the implementation of this needs to reflect effects, not anticipated or desired future states. The assessment of effects and the calculations for degree of offsetting, along with its application, should be scientific based not ideological, to ensure the framework is achievable.

34. Do you have any comments on the proposed suspended sediment attribute?
Clear linkages to the works proposed or carried out and the remediation required is important, for both suspended sediment and any reaction to deposited sediment. KiwiRail support sediment control measures being adopted and that these are nationally consistent, to ensure that all parties undertake works in water
whereby suspended sediment can become an issue, in an appropriate manner. Any measures need to allow for periods of increased sediment such as during construction works in a watercourse. Even with erosion and sediment control measures in place, there will be some disturbance of a temporary nature. Consideration of how the NES-FW seeks to distinguish and address temporary sedimentation effects as opposed to continued effects such as run off from erosion prone land, would be supported.

35. If this proposal was implemented, what would you have to do differently?

Increased controls on sediment run-off, with proposed restrictions on earthworks and vegetation removal near freshwater resources (e.g. Rules 7-18 of proposed NES-FW) will likely require more onerous consent procedures including assessments leading up to design, consent approvals, condition compliance costs and remediation costs. In some instances vegetation clearance, for example, is part of ensuring the rail infrastructure continues to operate safely and efficiently and to manage flood potential on the rail network and adjacent land. Under the NES-FW this will require a discretionary consent, assessed against a framework of ‘avoid’ policies, which has the real potential of being declined or such onerous conditions imposed that compliance costs outweigh any benefits gained from doing the works.

Questions from Section 7.4

47. Do you agree with the scope of the proposed risk management plans for wastewater and stormwater operators? Are there other aspects that should be included in these plans?

Clarity around the definition of a ‘stormwater network operator’ or ‘stormwater operator’ would be supported, to ensure that any new provisions apply where anticipated rather than inadvertently capturing other parties. KiwiRail has a stormwater drainage network that runs parallel to the rail corridor, being an open drainage network rather than a piped network. This spans much of the country, including the multitude of natural and physical environments that the rail network passes through. However, without clarity being provided this could inadvertently be included in the provisions requiring the preparation of a risk management plan for the whole country where the rail network is located, resulting in potentially an unintended outcome and one that KiwiRail have limited ability to influence the management of, given the nature of overland flows which are also often captured in the drainage network.

Questions from Section 11.3

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?

The policy provisions in the NPS-FM appear to not require consideration of positive effects. Positive effects are important considerations and KiwiRail agree that often the decision-making process does not take these into account, which is a focus in the recent NPS-UD. The NPS-FM provisions could be amended to ensure the decision-making process considers all effects – positive and negative, rather than only focusing on negative effects.

80. Do you think a planning standard is needed to support the consistent implementation of some proposals in this document? If so, what specific provisions do you consider would be effectively delivered through a planning standard tool?

To ensure national consistency, which is a benefit for networks such as the rail network that passes through 70 of the 78 Council’s in NZ, consideration of the most appropriate tool to achieve consistent implementation would be supported. In the event of adoption of an NES for freshwater management which has a rule framework, a planning standard tool may not provide any additional benefit. Without an NES, a planning standard would be supported.