

**IN THE MATTER** of the Resource Management Act 1991 ("RMA")

**AND**

**IN THE MATTER** of proposed amendments to the National Policy Statement for Freshwater Management ("Freshwater NPS") pursuant to section 53 of the RMA

**SUBMISSION ON PROPOSED AMENDMENTS TO THE FRESHWATER NPS –  
BERRY SIMONS ENVIRONMENTAL LAW**

**TO:** Water Submissions  
Ministry for the Environment  
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**1. INTRODUCTION**

- 1.1 Berry Simons Environmental Law ("Berry Simons") welcomes the opportunity to make a submission on the proposed amendments to the National Policy Statement for Freshwater Management 2011 ("Freshwater NPS") which are set out in the discussion paper published by the Ministry for the Environment ("MfE") entitled "*Proposed amendments to the National Policy Statement for Freshwater Management 2011: A discussion document*" ("discussion paper").
- 1.2 Berry Simons is a specialist Environmental and Resource Management Law firm with significant experience in Water Law. Berry Simons has acted for a range of parties (including territorial authorities, regional councils and Fish and Game) in relation to the promulgation of water related policies, both water quality and water quantity, and in relation to resource consent applications for water takes and wastewater and other discharges. Berry Simons therefore has a sound working knowledge of the freshwater management issues which the proposed amendments seek to address.
- 1.3 Berry Simons generally supports the inclusion of provisions which would assist regional councils to apply the provisions of the Freshwater NPS efficiently and effectively, including amendments which bring clarity to the process.

**Purpose and scope of submission**

- 1.4 The primary purpose of this submission is to address the workability of the proposed amendments, including from a drafting perspective. In that regard, it is of fundamental importance that the provisions of the Freshwater NPS are clear and unambiguous and are easy to follow and apply, particularly in order to avoid unnecessary litigation as to the interpretation and application of those provisions.
- 1.5 Against that background, this submission addresses the following matters:

- (a) Issues related to process (Section 2);
- (b) Whether it is appropriate to include the proposed amendments (particularly in relation to technical matters) in the Freshwater NPS or via a separate National Environmental Standard ("NES") (Section 3);
- (c) Our comments in relation to the workability and, in particular, the clarity of the National Objectives Framework ("NOF") (Section 4);
- (d) The identification of national values and potential issues with respect to interpretation (Section 5); and
- (e) The exemptions provisions (Section 6).

## 2. **PROCESS ISSUES**

### **Hearing of submissions**

- 2.1 It is noted that there is currently no provision for a hearing of submissions. However, the proposed amendments represent significant changes to the Freshwater NPS and are likely to impact upon processes that regional councils have already embarked upon.
- 2.2 In Berry Simons' submission, the complexity of the proposed amendments and the significant impact that those amendments are likely to have (on local authorities in particular) warrant the opportunity for submitters to be heard in order to:
  - (a) Assist MfE to understand the issues raised;
  - (b) Enable rigorous debate and testing of the propositions which underlie the proposed amendments; and
  - (c) Provide transparency to the process.
- 2.3 One option which MfE may wish to consider is to hold a hearing in respect of specific issues which attract either a large volume of submissions or submissions which raise issues which need to be worked through with rigour.
- 2.4 In the event that MfE does hold a hearing of submissions, Berry Simons would welcome that opportunity and wishes to be heard in support of its submission.

### **Transitional issues**

- 2.5 It is submitted that further guidance is required in relation to how resource consent applications in catchments which are at or nearing full allocation are to be addressed in the transitional period while regional councils undertake the planning processes required by the NOF.
- 2.6 In particular, existing regional planning instruments contain freshwater objectives and establish allocation limits and allocable flows which have not necessarily been established in accordance with the process contemplated by the amendments to the Freshwater NPS, namely the identification of values and the setting of freshwater objectives having regard to those values. Many allocable flows and limits have been determined on the basis of a general scientific rule of thumb, rather than as a result of focussed studies which either determine the values of the water body or the specific

minimum flows required to protect ecological bottom lines in that water body.

- 2.7 It is submitted that this is an appropriate approach for regional councils to have taken to date, but the issue that arises is that when a water body is at full allocation by reference to the "default" allocable flows or limits, some regional councils may adopt the view that the Freshwater NPS precludes any further allocation beyond those limits (particularly in light of Policy B5), irrespective of the actual effects on the environment or on the values associated with that water body and despite those limits not being set in accordance with the Freshwater NPS.
- 2.8 By way of example, the Waikato Regional Council's ("WRC") Variation 6: Water Allocation sets allocable limits in the manner outlined above. However, it recognises the importance of municipal supply and enables applications to be made for the purposes of municipal supply (as a discretionary activity) in a catchment where allocation exceeds the allocable limits. The Freshwater NPS came into force nearing the end of the Environment Court hearing of appeals on Variation 6 and, in order to enable WRC to achieve its objective to ensure that water is available for municipal supply purposes, amendments were made to Variation 6 to make it clear that exceedence of those allocable flows for municipal supply purposes did not represent "over allocation" in the context of the Freshwater NPS. Otherwise, WRC would be precluded from granting consent to municipal supply authorities by virtue of Policy B5.
- 2.9 Similar situations apply in other regions – where regional councils are setting limits without having undertaken the planning process contemplated by the Freshwater NPS and reflected in the amendments, but are struggling to address issues around how to ensure that water is available for planned growth. Guidance as to how these issues should be addressed in the transitional period, while regional councils are undertaking planning in accordance with the NOF, is highly desirable.

### **Allocation mechanisms**

- 2.10 It is understood that the complex issues relating to allocation of water when a catchment is at or nearing full allocation are intended to be addressed at later stage of the proposed Freshwater Reforms and not in the context of these amendments to the Freshwater NPS.
- 2.11 It is submitted that it is highly desirable that the water allocation reforms are progressed as soon as possible – particularly in light of the issues described above. While setting freshwater objectives and allocable flows and limits is important, it is only half the picture and regional councils and water users require certainty, both in terms of how water will be allocated and how over allocation is to be phased out over time.

## **3. APPROPRIATENESS OF AMENDMENTS TO NATIONAL POLICY STATEMENT**

- 3.1 This section of our submission addresses whether the proposed amendments to the Freshwater NPS are appropriate to include in an NPS or whether they are better addressed via an NES.
- 3.2 In that regard, the purpose of an NPS is to "*state objectives and policies for matters of national significance that are relevant to achieving the purpose of the Act*".<sup>1</sup>

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<sup>1</sup> Section 45(1), RMA.

- 3.3 An NES may prescribe technical standards, methods or requirements in relation to any matters referred to in sections 9 – 15 of the RMA, including in relation to contaminants, water quality, level or flow and monitoring (which matters are relevant in the context of the proposed amendments).<sup>2</sup> The standards may be qualitative or quantitative, and the NES may include methods for classifying a natural or physical resource and methods or processes to implement standards and exemptions from standards.<sup>3</sup>
- 3.4 The proposed amendments to the Freshwater NPS are highly prescriptive and technical in nature and, in our view, tend to fall within the scope of provisions contemplated to be included in an NES rather than high level policy direction contemplated by section 43 as being appropriate for an NPS. In that regard, the proposed amendments:
- (a) Prescribe methods and requirements for setting limits for contaminants and bottom lines / minimum acceptable standards in terms of water quality;<sup>4</sup>
  - (b) Prescribes requirements for monitoring;<sup>5</sup>
  - (c) Includes methods and processes to implement standards;<sup>6</sup> and
  - (d) Includes exemptions from the standards.<sup>7</sup>
- 3.5 We therefore recommend that MfE give further consideration to whether an NES is a more appropriate means of addressing these issues than an NPS, particularly in light of the fact that the proposed amendments are highly technical in nature and overly complicate a policy document which is otherwise relatively high level and straight forward.
- 3.6 Alternatively, MfE could consider a “halfway house”, by which the NPS contains a policy relating to the process for establishing freshwater objectives which links to an NES which establishes the relevant standards that need to be met for each of the values associated with a freshwater body.
- 3.7 It is also noted that it is not clear as to how the proposed amendments to the Freshwater NPS relate to section 69 and Schedule 3 of the RMA, which provide for the classification and management of water bodies for various purposes.

#### 4. **NATIONAL OBJECTIVES FRAMEWORK – GENERAL**

- 4.1 This section of our submission addresses the general workability of the NOF, particularly in terms of the drafting of the central policy (Policy CA1) and related provisions.

##### **Overall process logical**

- 4.2 The process for establishing freshwater objectives is logical, insofar as it requires:
- (a) Values to be identified along side communities;

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<sup>2</sup> Section 43(1), RMA.

<sup>3</sup> Section 43(2), RMA.

<sup>4</sup> Policy CA1 and Appendices 1 and 2, which fall within the scope of section 43(1)(a)(i) and (ii).

<sup>5</sup> Sections CB and CC, which fall within the scope of section 43(1)(c).

<sup>6</sup> Policy CA1, which falls within section 43(2)(d).

<sup>7</sup> Policy CA2, which falls within Section 43(2)(e).

- (b) Attributes which support those values to be identified and defined (where possible, numerically);
- (c) The desired state of the water body to be defined by reference to those attributes and values;
- (d) Freshwater objectives to be formulated (where possible, numerically) having regard to the desired state of the water body and a range of other matters, including any social and economic implications.

**Drafting lacks clarity**

4.3 However, Policy CA1 and related provisions are overly complex, are difficult to understand and follow and, in some places, lack linkages between fundamental concepts.

4.4 For example:

- (a) Subclauses (a) and (b) are somewhat repetitive;
- (b) The terminology and drafting of subclause (c) is overly complicated and difficult to understand;
- (c) It is not clear from subclause (e) that attribute states must be set to ensure the minimum acceptable states must be met but also to ensure overall water quality is maintained or improved;
- (d) There is no requirement to assign attribute states for attributes which are not listed in Appendix 2;
- (e) The use of both terms "national bottom lines" and "minimum acceptable states" does not appear necessary and is somewhat confusing. Indeed a "national bottom line" is defined as a "minimum acceptable state" for a "national value" and it is submitted that only one or the other is necessary;
- (f) The wording of Policy CA2 implies that the freshwater objective is set for the value, not for the freshwater management unit, but earlier clauses imply that the freshwater objectives are set for the freshwater management unit for the purposes of reflecting the values;
- (g) It is not clear whether freshwater objectives must ensure that minimum acceptable states for non-compulsory values must be met.

4.5 If this policy is to be retained, it is respectfully submitted that it should be redrafted in a manner which is easy to understand and implement. Amendments which would achieve clarity and, in our view, greater workability of the provisions in that regard are contained in **Appendix A** to this submission.

**Freshwater management unit supported**

4.6 The proposed amendments which enable regional councils to manage freshwater bodies and apply the objectives and policies of the Freshwater NPS on a catchment or sub-catchment basis is strongly supported.

- 4.7 It is submitted that this approach is more consistent with Objective A2, which provides for overall water quality in the region, as opposed to water quality in each and every water body, to be maintained or enhanced.
- 4.8 It is noted, however, that further guidance as to how freshwater management units are to be defined by regional councils may be helpful, particularly in terms of ensuring that water bodies which are hydrologically connected are managed in an integrated manner.

#### **Policy CA3 unnecessary**

- 4.9 It is also noted that Policy CA3 enables a regional council to set a freshwater objective below a national bottom line on a transitional basis if that is listed in Appendix 4.
- 4.10 That approach requires an amendment to the Freshwater NPS. Such an approach appears unnecessary, particularly in light of the time and cost involved in amending the NPS, and in light of the fact that regional councils will be able to specify time frames for achieving freshwater objectives and targets. Thus, it appears that a regional council could simply set a long time frame for achieving the freshwater objective, rather than having to go through the process of identifying transitional objectives, which is likely to render Policy CA3 redundant.

#### **5. NATIONAL VALUES**

- 5.1 This section of our submission addresses the identification of "compulsory national values" and "additional national values" in Appendix 1 and, in particular, the significance of a value being identified in the Appendix 1 "list", the scope of "additional national values" and the relationship between "values" and "uses".

#### **Significance of "additional national values"**

- 5.2 While "compulsory national values" must be taken into account when setting freshwater objectives, it is clear that the "additional national values" listed in Appendix 1 are not compulsory but simply must be considered in the value setting exercise. Nor is the list of values which may apply in any given scenario exhaustive - regional councils may identify other values of fresh water bodies which are not contained in Appendix 1.
- 5.3 However, the identification of the listed values as "national values" implies that other values which may be associated with a particular water body are regional or local values and are not important at a national level. By extension, the Freshwater NPS may be interpreted as signifying that those values which have been included in "the list" are more important at a national level than those which have not and should therefore take precedence where there is a conflict.
- 5.4 MfE staff confirmed at the public meeting in Auckland on 4 December 2013 that it is not intended that the "additional national values" are to be given more weight than locally identified values. It was suggested that the additional national values are in fact "local values" that may or may not be relevant to each water body and which are not more important than any other values identified at a local level and that it may be appropriate to amend the terminology to reflect that.
- 5.5 Such amendments are support as they would avoid an interpretation of Appendix 1 which would essentially "prioritise" national values over those values identified at a local level. In that regard, it is submitted that the Freshwater NPS should be amended so that:

- (a) "Compulsory national values" are called "national values";
- (b) "Additional national values" are called "local values"; and
- (c) Any other values identified by the regional community are also called "local values".

**Scope of the "additional national values"**

- 5.6 The additional national values identified at Appendix 1 have largely been derived from the preamble of the existing Freshwater NPS and are sufficiently broad to capture many values associated with water generally.
- 5.7 One of the additional national values is "drinking water". While the explanatory text refers to "water supply", it is possible that the "drinking water" value may be interpreted narrowly, particularly given the explanatory note which describes the value as "*the use of freshwater for sustenance*".
- 5.8 A narrow interpretation of the term "drinking water" would not encompass water supply for the broader purposes of health and sanitation (other than drinking). It is submitted that it should be abundantly clear on the face of the Freshwater NPS that water for the purposes of human and sanitation is included in the "drinking water" value.
- 5.9 It is also noted that the "drinking water" value is not likely to be interpreted to include water for other "community" uses, such as water that is taken by municipal supply authorities and used for hospitals, public swimming pools and other community uses – despite the fact that the current preamble recognises community water supply as a national value. It appears that the omission of community water supply is an oversight.
- 5.10 Further, water for "fire fighting" and for "irrigation" of sports fields and recreational areas are identified as uses associated with the "economic or commercial development" value. These are not economic or commercial activities - they are community uses of water.
- 5.11 It is submitted that the "drinking water" value should be amended to refer to "domestic and municipal supply". This value would capture water taken by:
  - (a) Individuals for their reasonable domestic needs under section 14(3)(b) of the RMA; as well as
  - (b) Municipal supply authorities to support the needs of towns, cities and smaller settlements, including for the purposes of human health and sanitation, the wide variety of community uses (such as hospitals, education, facilities, scientific institutions, fire fighting, swimming pools and recreational / amenity uses).
- 5.12 It is submitted that if the "uses" concept is retained, the uses associated with municipal supply should include, as a minimum:
  - (a) Human health and sanitation;
  - (b) Community uses, including for education, recreation and amenity;
  - (c) Industrial and commercial uses; and
  - (d) Fire fighting.

### **Relationship between "uses" and "values"**

- 5.13 Appendix 1 not only identifies the "national values" but also identified "uses" relevant to each value.
- 5.14 The role of the identified "uses" in the context of the proposed amendments is unclear. In particular, it is not clear whether the identified uses are intended to "limit" the value or are simply examples to assist in identifying values.
- 5.15 It is possible that Appendix 1 may be interpreted to mean that the identified uses are the only, or at least the most important, uses relevant to that particular value.
- 5.16 It is submitted in that regard that, as a minimum, Appendix 1 should be amended to make it clear that the "uses" identified as relevant to the value are not exhaustive and are not intended to limit the generality of the defined value. Having said that, it is not clear what value there is in listing the uses associated with identified values at all. In that regard, it is the value listed in Appendix 1 (not the "use" of water) that must be considered when identifying values for the water body.

### **6. EXEMPTIONS FROM NATIONAL BOTTOM LINES**

- 6.1 The proposed amendments identify specific exceptions to the general rule that freshwater objectives must be set at or above national bottom lines.
- 6.2 It is noted that Policy CA2(c) provides for exceptions to that rule if the water body is listed in Appendix 3, which would require an amendment to the NPS, but contains no criteria for including such water bodies in that appendix.
- 6.3 It is submitted that the First Schedule process of the RMA is sufficient to ensure rigorous testing of a proposal to exempt a certain water body and it is appropriate that such decisions are made at a regional level. It is further submitted that the policy should contain the criteria upon which the decision is to be made to ensure that the process is clear and transparent.
- 6.4 In that regard, the discussion paper notes that the exemption is to apply to significant existing infrastructure, such as hydroelectricity generation or drinking water dams that are authorised to take most or all of the water out of a stretch of river. The following set of criteria is identified in the discussion paper:
  - (a) The need for an exception must arise because of limited efficient or effective management options for significant existing infrastructure;
  - (b) The significant existing infrastructure affecting the water body must enable economic benefits that have a significant impact on national or regional GDP;
  - (c) The economic benefits can only be realised if the objectives for the water body are set below bottom lines.

6.5 However, it does not appear that the criteria listed would provide for the circumstances which are considered by the discussion paper to represent appropriate exemptions. In particular, it is appropriate that water bodies that have been modified for municipal supply purposes be exempt from the provisions but such infrastructure may not, in some circumstances, fulfil the specific economic criteria.

**Contact:** [withheld]  
Senior Associate  
  
[withheld]

## APPENDIX A

### Recommended amendments to address drafting issues

**Note:** Recommended amendments shown in underline and italics and ~~strikethrough~~

An explanatory note is provided in *[square brackets, red and italics]*

#### Definitions

**"Compulsory *National* values"** mean the ~~national~~ values relating to ecosystem health and to human health (secondary contact recreation) included in Appendix 1 and for which a non-exhaustive list of attributes is provided in Appendix 2.

**"National value"** means any value described in Appendix 1.

*[It is submitted that the only national values are those listed as "compulsory values" in Appendix 1. All other values are local values, but the other values listed in Appendix 1 are required to be considered in the context of identifying the local values of water bodies. "Local values" could be defined if that were considered necessary.*

*Consequential amendments would need to be made throughout the NPS to remove reference to compulsory values and replace with reference to national values, etc. The last part of the definition of compulsory values is unnecessary for the purposes of the definition.]*

#### CA. National Objectives Framework

##### Objective CA1

To provide for an approach to establishing freshwater objectives for national and local values ~~and any other values that:~~

- a) Is nationally consistent; and
- b) Recognises regional and local circumstances.

##### **Policy CA1**

By every regional council ~~applying the following processes in developing freshwater objectives for all freshwater management units~~ in accordance with the following process:

- ~~a) Considering all national values and how they apply to local and regional circumstances;~~

*[Clause a) is unnecessary – it does not add anything to what is required by clause b)]*

- b) Identifying the values of these associated with all freshwater management units. The values identified must include: ~~which;~~

- i. ~~Must include the compulsory *national* values; and~~
  - ii. ~~May include any other national values or other *local* values that the regional council considers appropriate (in either case having regard to local and regional circumstances). *In identifying appropriate local values, consideration must be given to the local values identified in Appendix 1;*~~
- c) Identifying *the relevant attributes for each value identified in Policy CA1(b), which shall include;*
- i. *Any attribute that is identified in Appendix 2 as applying to the national or local value;*
  - ii. *Any attribute that the regional council considers appropriate to the national or local value, whether or not that attribute is identified in Appendix 2;*

~~For the compulsory values or any other national value for which relevant attributes are provided in Appendix 2:~~

- ~~A. The attributes listed in Appendix 2 that are applicable to each value identified in Policy CA1(b) for the freshwater body type; and~~
- ~~B. Any other attributes that the regional council considers appropriate for each value identified in Policy CA1(b) for the freshwater body type; and~~
- iii. ~~For any national value for which relevant attributes are not provided in Appendix 2 or any other value, the attributes that the regional council considers appropriate for each value identified in Policy CA1(b) for the freshwater body type;~~

*[Amendments for clarity and ease of comprehension]*

- d) *Assign an attribute state for each* ~~those attributes specified in Appendix 2~~ *which is:*
- i. at or above the current state; or*
  - ii. where the current state is below the minimum acceptable state for that attribute in Appendix 2 (where applicable),* ~~assigning an attribute state at or above the minimum acceptable state for that attribute;~~

*[Requirement to assign an attribute state at or above the current state ensures that overall water quality is maintained or improved in accordance with Objective A2.*

*There is no requirement to assign an attribute state where the attribute is not specified in Appendix 2, however the definition of*

*"minimum acceptable state" contemplates that minimum acceptable states will be identified either in Appendix 2 or elsewhere – query whether it is intended that the regional council identifies minimum acceptable states where Appendix 2 does not.]*

e) Formulating freshwater objectives:

- i. ~~In those cases where an applicable numeric attribute state is specified in Appendix 2, in numeric terms by reference to that the specified numeric attribute state specified in Appendix 2; or~~
- ii. ~~In those cases where the attribute is not listed in Appendix 2, in numeric terms where practicable if a numeric attribute state is not specified in Appendix 2, otherwise in narrative terms; and~~
- iii. ~~Which reflect the highest attribute state ~~On the basis that, where an attribute applies to more than one value, the most stringent freshwater objective for that attribute is adopted;~~~~

*[Amendments for clarity / ease of comprehension]*

f) *When identifying values, assigning attribute states and formulating freshwater objectives*, considering the following matters *where relevant* at all relevant points in the process described in Policy CA1(a)-(e):

- i. The current state of the freshwater management unit, and its anticipated future state on the basis of past and current resource use;
- ii. The spatial scale at which freshwater management units are defined;
- iii. The limits that would be required to achieve the freshwater objectives;
- iv. Any choices between the values *of the freshwater management unit* that *will be required* in formulating ~~on~~ of freshwater objectives and associated limits ~~would require~~ *and any social and economic implications of such choices*;
- v. ~~Any implications for resource users, people and communities arising from the choice of freshwater objectives and associated limits including for actions, investments, ongoing management changes and any social and economic implications;~~

*[This clause is repetitive, overly complicated and can easily be captured as a simple concept in the previous clause]*

- vi. The timeframes required for achieving the freshwater objectives, including the ability of regional councils to set long timeframes for achieving targets; and
- vii. Such other matters relevant and reasonably necessary to give effect to the objectives in this national policy statement, ~~including Objective A2.~~

*[The last part of this clause is meaningless and adds nothing to the rest of the clause]*

## **Policy CA2**

By every regional council setting ~~ensuring that~~ freshwater objectives for all freshwater management units ~~the compulsory values are set~~ which ensure that the minimum acceptable states for the national values are met, ~~at or above the national bottom lines for all freshwater management units,~~ unless:

- a) The existing freshwater quality of the freshwater management unit is already below the national bottom line and that is caused by naturally occurring processes; or
- b) Both of the following apply:
  - i. Impacts of historical activities in the freshwater management unit have caused the existing freshwater quality of the freshwater management unit to be below the ~~national bottom line~~ minimum acceptable state;
  - ii. The reversal of those impacts is not reasonably practicable, either physically or ecologically, even in the long term; or
- c) The freshwater management unit is listed in Appendix 3.

[The wording of this policy implies that the freshwater objective is set for the value, not for the freshwater management unit, but earlier clauses imply that the freshwater objectives are set for the freshwater management unit for the purposes of reflecting the values. This needs to be clarified.

Query whether it is intended that the freshwater objectives for freshwater management units ensure that minimum acceptable states for all attributes / values are met or just the compulsory values. If the former, this policy should be amended to reflect that. There is currently no requirement to do so.

Note also that criteria for determining an Appendix 3 listing should be included.]