



**Resource Management Law Association
of New Zealand Inc.**

Resource Management Law Association Submission

February 2014

Proposed amendments to the National Policy Statement for Freshwater Management 2011 - A Discussion Document

INTRODUCTION

1. This is a Submission regarding the proposed amendments to the National Policy Statement (Freshwater Management) (“**NPSFM**”) made on behalf of the Resource Management Law Association of New Zealand Inc (“**RMLA**”).

2. The RMLA is concerned to promote within New Zealand:
 - a. An understanding of Resource Management Law and its interpretation in a multi-disciplinary framework;

 - b. Excellence in resource management policy and practice; and

 - c. Resource management processes which are legally sound, effective and efficient and which produce high quality environmental outcomes.

3. The RMLA has a mixed membership. Members include lawyers, planners, judges, environmental consultants, environmental engineers, local authority officers and councillors, central government policy analysts, industry representatives etc. Currently the Association has over 1,100 members.
4. Within such an organisation there is inevitably a divergent range of interests and views.
5. While the membership has been consulted in preparing this submission, it is not possible for the RMLA to form a single universally accepted view on the proposed amendments to the NPSFM. It should also be noted that a number of members may be putting in their own submissions and those may represent quite different approaches than the views expressed here.
6. For these reasons, this submission is made with a view to ensure that the amendments:
 - a. Are consistent with the general framework of existing laws, regulations and policies of relevance, and work alongside the Resource Management Act 1991 ("**RMA**") where relevant, including within the context of the NPSFM as it stands (as well as regional plan frameworks that have been promulgated to date to give effect to the NPSFM).
 - b. Are practicable and workable.
 - c. Will assist in promoting best practice.

PURPOSE OF PROPOSED AMENDMENTS

7. **Specific matter:** The principal purposes of the proposed amendments appear to be to:
 - a. Require that all regional councils account for all water takes and sources of contaminants.

- b. Establish a National Objectives Framework to provide for greater consistency between regions, and reduce uncertainty and costs in the identification of values of water bodies, and in the setting of water quality objectives in respect of those values by regions.
 - c. More clearly articulate Tangata Whenua values for freshwater.
8. **Submission:** The RMLA supports the intent of the proposed amendments, as summarised above. Further submission points and recommendations in this submission are intended to assist in the development of effective regulatory and policy mechanisms to give effect to those intentions.

SETTING FRESHWATER OBJECTIVES

A National Objectives Framework – Mechanism

9. **Specific matter:** The discussion document proposes that identification of values and setting of "attribute states" within a National Objectives Framework be done primarily through amendments to the NPSFM.
10. **Submission:** The April 2013 discussion document "Freshwater Reform 2013" noted that amendments to section 69 and Schedule 3 of the RMA would be required to implement the proposed National Objectives Framework. The November 2013 discussion document however is silent on the relationship between the proposed changes to the NPSFM, and section 69 and Schedule 3 of the RMA.
11. These two parts of the RMA create a voluntary "opt in" system for councils to classify water bodies under certain categories, and manage those water bodies to particular standards set out in Schedule 3. If a council provides in its plan that a water body is to be managed for a water quality class (value) identified in Schedule 3, then section 69 (1) provides that the rules in the plan must require the observance of the standards specified in the Schedule for that purpose (unless in the council's opinion those standards are not stringent enough, in which case more stringent standards can be applied).

12. There is no apparent correlation between the national values and “attribute states” proposed in the NPSFM amendments, and the section 69 and Schedule 3 class (values). For example section 69 and Schedule 3 refers to a water body's "purpose" and water quality "standards", whereas the proposed amendments refer, in a similar vein, to "values" and "attributes". There is therefore potential for duplication and uncertainty to arise between the two instruments, and confusion with regards to terminology, should those provisions of the RMA remain, at least without amendment to clarify the relationship.
13. **Recommendation:** Clarify (including ideally through amendment to section 69 and Schedule 3), the intended relationship between proposed NPSFM amendments (National Objectives Framework provisions in particular), before the amendments to the NPSFM come into force.
14. **Specific matter/Submission:** The National Objectives Framework proposed in the NPSFM has a technical dimension to it, for example in proposing to set numeric standards for contaminants (Appendix 2). This is more characteristic of the type of planning provision typically found within a National Environmental Standard (NES) than a National Policy Statement (NPS). Conversely, the express intent is to allow flexibility for regions to derive numerical objectives reflecting the communities’ assessment of values and desired attribute states, and so the use of the NPS mechanism is understandable.
15. This should not however undermine the statutory import of the NPSFM, noting that the proposed preamble references the National Objectives Framework as a "*decision support tool to assist regional councils and communities to more consistently and transparently plan for freshwater objectives*".¹ If the purpose was simply to provide authoritative guidance, then consideration could be given to publication of a best practice guide as an alternative to amendments to the NPSFM, as is commonly undertaken by the Ministry for the Environment: <http://www.mfe.govt.nz/publications/water/#guides>. An NPS does much more than that however, and must be ‘given effect to’ by all regional and district plans.

¹ Discussion Document, page 48

16. **Recommendation:** Amend the statement cited above to clarify the intended role of the National Objectives Framework now to be embedded within the NPSFM, eg by adding the words “and which must be applied in giving effect to the NPSFM”.

MAINTENANCE OF WATER QUALITY

17. **Specific matter/Submission:** One of the more difficult issues of both interpretation and implementation arising for Councils under the NPSFM as it stands is the requirement in Objective A2, that overall water quality be maintained or improved, and degraded water be improved. The subsequent focus in the proposed amendments on setting an attribute state “*at or above the minimal acceptable state for that attribute*”² will be a critical element of the NPSFM, as will decisions generally about what attribute state is to apply with reference to the assessment of the “current state of the freshwater management unit” required under Policy CA1 (f)(i). Councils will need to determine whether, having regard to the range of considerations under the latter policy, a lower attribute state for a given value can be adopted (albeit above the minimum attribute state or national bottom line).
18. The Discussion Document records that the Objective A2 obligation applies,³ but uncertainty remains over how such choices about particular freshwater management units are to be made consistent with that obligation, and this issue is likely to be a significant focus of submissions on the proposed amendments. This uncertainty needs to be addressed if the purposes of the amendment (as set out above, and reducing costs and uncertainty in particular) are to be achieved.
19. Policy CA 1 (d)'s emphasis on minimum acceptable state makes sense for degraded water bodies that fall under Objective A2 (c), as it is a rational basis for determining just how much a degraded water body needs to be improved; to identify the values it does, could and should support, and to identify the minimum acceptable state that must be regained to support those values, as the target to be attained over time. However, for water that is not degraded, it is not clear under the amendments how the

² Proposed Policy CA1 (d), Discussion Document page 58

³ Discussion Document, page 16, Preamble (Pages 48-49)

requirement in the NPSFM that water quality (overall) must be maintained is to be applied.

20. Much of the scientific and resource management community and general public are of the impression that the proposed amendments allow for the degradation of water quality **down to** minimal acceptable states/national bottom lines set out in the attribute states tables, particularly if the quality of other water bodies (freshwater management units) is improved (so that overall water quality is maintained or improved). If this is a misunderstanding, amendments to the proposed NPSFM can resolve this. If, conversely, the intent is that attribute states for some values (and for some freshwater management units) can be reduced despite the requirements of Objective A2 (as to overall water quality), that should be expressly stated in the NPSFM to avoid litigation (and address the existing degree of uncertainty) on the point.
21. Policy CA1 (f) sets out the matters that are relevant when identifying values and setting attribute states, but does not expressly require that water quality, relevant to the identified values, is to be maintained or improved. The reference to this imperative within Objective A2 in Policy CA 1(f) (vii) is not expressly stated, and reference to the Objective itself in the Policy is set within the context of “other matters relevant and reasonably necessary.”
22. Further uncertainty arises with Policy CA2 which requires that freshwater objectives for compulsory values be set "at or above national bottom lines", but these are limited to the relevant values (ecosystem and human health). As noted, Policy CA1(d) requires the assignment of an attribute state above the “minimum acceptable states”. Unfortunately, the definition of “minimum acceptable state” in the proposed amendments is circular, in referring to Appendix 2 where, other than as to national bottom lines, no minimum actually seems apparent. This is in contrast to the Glossary on Page 76 of the Discussion Document that refers to the boundary between the C and D states as being the minimum (as is consistent with the explanation on page 16 of the Discussion Document).

23. While national bottom lines and “minimum acceptable states” may be intended to be synonymous for the compulsory values, the latter threshold is broader in compass, and will cover values that are not compulsory (and so do not have national bottom lines) as Appendix 2 is populated for other values.⁴
24. **Recommendation:** If the overarching requirement in Objectives A2 is that degraded water quality be improved, and water quality otherwise be maintained, the uncertainties outlined above could be resolved by:
- a. References to setting of targets for degraded and ‘over-allocated’ water bodies, such as in policy A2, being explicitly linked to the minimum acceptable states/national bottom lines set in Appendix 2, as it is the targets, for the degraded and over allocated water bodies, where those minimum acceptable states have most direct relevance; and
 - b. If the intent is that no degradation of attribute state for any given value is permissible, an amendment could be added to policy CA clarifying that where an attribute for a particular value falls within attribute state A, B, or C (as identified under Policy CA 1(f)), the water quality for that freshwater management unit (value) shall not degrade to the point it drops down to the next band; and/or
 - c. If (conversely) the assessment is intended to be made on an ‘overall’ basis across values and applying the competing factors in Policy CA 1(f), it could be made explicit in the new Policy CA provisions that higher or lower attribute states may be applied, but "subject to" Objective A2's requirements that overall water quality be maintained or enhanced. As it stands (and as noted earlier), the reference to Objective A2 in Policy CA 1(f) (vii) is oblique in that regard;
 - d. For example, Policy CA1(d) could be amended to clarify (and make express) the connection between the exercise to be undertaken under section CA, and the overarching objective (A2) that water quality generally be maintained or improved, or not degraded. To that end, it might go on to state (or a new Policy

⁴ See also Page 16 of the Discussion Document, and page 48 of the Preamble (fourth paragraph)

CA 1(e) might be added) that in deciding which attribute state(s) to apply, including any higher or lower attribute state (above the minimum acceptable) than currently exists, having regard to the matters set out in Policy CA 1(f), every Council must give effect to the obligations in Objective A2 that the overall freshwater quality of freshwater within the region is maintained or improved; and/or

- e. CA2 could be amended to further clarify that freshwater objectives for compulsory values must also be set **at or above existing state**, as well as the national bottom lines, whichever is higher; and/or
- f. The definition of “minimum acceptable state” could be clarified, for example applying that set out in the glossary on Page 76.

MONITORING - CC ACCOUNTING FOR FRESHWATER TAKES AND CONTAMINANT LOADS

- 25. **Specific matter:** The Discussion Document notes that water quality monitoring and accounting is varied, with different approaches, models, timing etc, and that national guidance is needed to improve robustness of critical information. However the NPS does not then direct or set the methodology or gathering of particular information, or confirm that this guidance will be provided.
- 26. **Submission:** The proposed amendments arguably make the regional council's undertaking more complex by introducing a new requirement, separate to section 35, that every regional council determine its own methods for defining "freshwater management units", monitoring water quality and accounting for freshwater takes and contaminant loads.⁵ No guidance is given as to "how" this would be done, yet experience has shown that freshwater modelling and 'accounting' of the kind required can be contentious,⁶ and complex as well as expensive for regional councils.

⁵ Proposed Policy CB1, page 61 Discussion Document and Proposed Policy CC1, page 62

⁶ Refer the widely reported issues surrounding the so called "TRIM" model in the Tukituki Catchment Proposal case

27. **Recommendation:** RMLA recommends that priority be given to training, assistance and provision of methodologies for freshwater monitoring and accounting that Councils can use, including to ensure that the freshwater monitoring data can be compared on a regional and national basis as required by Objective CC1(c).

ACCOUNTING FOR MAINTENANCE AND IMPROVEMENT

28. **Specific matter:** There is still a lot of uncertainty about what the requirement to maintain or improve "overall" water quality in Objective A2 actually means. The preamble for examples states "*Overall freshwater quality **within a region** must be maintained or improved. This national policy statement allows some variability in terms of freshwater quality, including between freshwater management units, as long as overall freshwater quality is maintained within a region*".⁷
29. **Submission/Recommendation:** The NPSFM itself does not address this significant degree of uncertainty for regional councils, nor does it attempt to direct how improvement in one water body (freshwater management unit) could offset degradation in another (or as to how reductions in one value might be offset by improvements in another, if that is the intent, as addressed above). Instead, in terms of that 'accounting', councils are left to determine their own methodology of how, effectively, a net maintenance of water quality is to be measured and achieved on a regional scale.⁸ If the extent of litigation (as currently experienced in regions giving effect to NPSFM) and costs /uncertainty are to be reduced, the issue needs to be confronted at national level, either through the NPSFM itself (eg within the preamble) or through implementation guidance. The current amendment provides an opportunity to rectify this situation, and that should be taken up by the Ministry in the RMLA's view.

LIMITS AND ALLOCATION

30. **Specific matter:** The NPSFM sets water quality attribute states, but does not indicate how allocation of assimilative capacity above those states is to be addressed, in other words the setting of limits, and allocation process within those limits.

⁷ Discussion Document, page 48

⁸ Proposed Policy CC1, Discussion Document, page 62

31. **Submission/Recommendation:** The NPSFM is more likely to be effective if these pieces of the puzzle are addressed together. This is particularly the case given that the "freshwater quality accounting system" councils are required to create must record, aggregate and keep updated information on loads, concentrations, sources of contaminants and where limits have been set, the proportion of the limit being used. The key to determining these matters in the freshwater accounting system is the limits, allocative mechanism and framework, on which the proposed NPSFM amendments are silent.
32. RMLA recommends that the linkage between the setting of attribute states, subsequent limits and allocation be addressed as a matter of priority if the proposed NPSFM takes effect in its current form.

PROCESS

33. **Specific matter:** It seems likely that there are some contentious issues, some of which are technical, arising out of the proposed amendments.
34. **Recommendation/Submission:** If on review of the submissions it appears that there are some strongly contested points, particularly those that relate to differences in expert opinion on central technical matters (proposed bottom lines and numeric limits; what is "ecosystem health" for example, and what standards are required to safeguard it), RMLA recommends the Minister consider whether for parts of the proposed amendment package the hearing and testing of submissions and evidence on specific questions, by a Board of Inquiry, would result in a more robust, transparent and accepted outcome.

RELEVANT STATUTORY INSTRUMENTS

35. **Specific matter:** The National Objectives Framework proposes an optional value for drinking water, but there is no link or acknowledgement to the fact that an NES for sources of human drinking water is in place already, and there is no integration between the NPSFM and the NES.

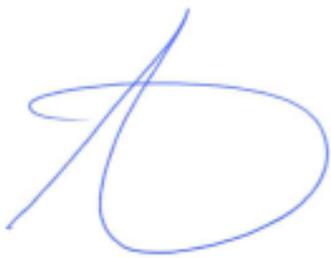
36. **Submission/Recommendation:** The proposed amendments need to be reviewed in order to ensure consistency and integration with the NES drinking water.
37. **Specific matter:** On the point of accounting for freshwater takes, there is no acknowledgement of, or integration with, the NES for water metering (RM (Measurement and Reporting of Water Takes) Regulations. "Freshwater quality accounting system" is defined as a system that, *"for each freshwater management unit, records, aggregates and keeps regularly updated information on the measured, modelled or estimated:*
- (a) total freshwater take*
 - (b) proportion of freshwater taken by each major category of user; and*
 - (c) where limits have been set, the proposition of the limit that has been taken.*
38. **Submission/Recommendation:** The provisions in respect of freshwater accounting cross reference to the NES water metering regulations to clarify their role within the NPSFM framework.
39. **Specific matter:** As noted above, "total freshwater takes" must be modelled or estimated to give effect to the water quantity accounting system requirements.
40. **Submission/Recommendation:** The Water metering regulations only require the metering of takes pursuant to water permits for 5l/s or more. However the definition of water takes in the proposed NPSFM includes *"a take of ground or surface water whether authorised or not"*. There should be consistency between what the Water metering regulations monitor and the NPSFM. And the phrase "whether authorised or not" could be interpreted as including unlawful takes, which we assume was not the intention.

TRANSITIONAL EFFECT

41. **Specific matter:** Amended policy E1 (f) clarifies that for Councils that have already notified their staged implementation programme of the NPSFM, such that it is fully implemented by 31 December 2030, those Councils must review and revise the staged

implementation programme to take into account the NPSFM amendments, within a set timeframe.

42. The proposed amendments do not however address how (or whether) Councils that have fully implemented the NPSFM 2011 are to give effect to the proposed amendments on a transitional basis.
43. **Submission/Recommendation:** A transitional policy is required to clarify the duties of those Councils who have undertaken the process of giving effect to the provisions of the NPSFM 2011, relevant to the proposed amendments. For example it might include a provision confirming the amendments do (or do not) apply to regional plan changes notified (or where decisions on submission have been made) by the date the amendments come into force.
44. The RMLA wishes to be heard in support of this submission.



Signature of Martin Williams, President

on behalf of the Resource Management Law Association of New Zealand Inc.

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