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Freshwater Consultation 2016
Ministry for the Environment
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Next steps for fresh water

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the *Next steps for freshwater* consultation document.
2. The Law Society provides the following comments in relation to the four key areas outlined in the consultation document:
 - freshwater and our environment
 - economic use of freshwater
 - iwi rights and interests in freshwater
 - freshwater funding

Freshwater and our environment

Maintain or improve overall water quality

Proposals

- 1.1 Amend Objective A2 of the National Policy Statement for Freshwater Management (NPS-FM) so that it applies within a freshwater management unit (FMU), rather than across a region.
- 1.2 Clarify that councils can maintain water quality by keeping quality within an attribute band, where it is specified in the National Objectives Framework (NOF), or demonstrating the values for that FMU are not worse off if it is not within the NOF.

Comments

3. The FMU enables assessment on a catchment/sub-catchment basis which is a more appropriate measure for freshwater than a regional council boundary. However, the consultation document does not discuss how cross-boundary issues — where an FMU straddles more than one region — will be dealt with. Further guidance should be provided in this respect.
4. The consultation document at page 11 includes a description of FMUs (catchment-based areas/sub-catchments) which differs from the definition included in the current NPS-FM (water

bodies/parts of such bodies determined by the council). It is not clear from the consultation document if an amendment to the definition is proposed. A description using “catchments/sub-catchments” is preferred to “water bodies”, as the former are more familiar terms.

5. The Law Society agrees it would be desirable to clarify the meaning of “overall” (proposed at page 13), given the concerns raised in case law about what the term means. The Law Society notes that proposal 1.2 may limit the use of offsets in relation to freshwater (as proposed in clause 62 of the Resource Legislation Amendment Bill (RLA Bill) introduced in 2015).

Recommendations

6. Provide guidance on how cross-boundary FMUs will be dealt with.
7. Amend the definition of FMUs to refer to “catchments” and “sub-catchments” and reflect the description proposed at page 13 of the consultation document.

Macroinvertebrate Community Index as a measure of water quality

Proposals

- 1.3 Require the use of Macroinvertebrate Community Index as a measure of water quality in the NPS-FM by making it a mandatory method of monitoring ecosystem health.
- 1.4 Work with the Land and Water Forum (LAWF) on the potential benefits of a macroinvertebrate measure for potential inclusion into the National Objectives Framework (NOF) as an attribute.

Comments

8. The Law Society supports the proposal to work with the LAWF on this issue but is concerned about timing and flow-on effects for council processes. If no outcome is produced by the time the current changes to the NPS-FM are implemented, further change to the NPS-FM will be necessary. There can be substantial costs involved in the planning processes required to give effect to national documents. It is preferable to introduce the changes at the same time to reduce duplication and costs.

Recommendation

9. Include in the current changes to the NPS-FM any proposals to use macroinvertebrate attributes in the NOF.

Significant infrastructure and water quality

Proposal

- 1.5 Provide further direction on providing evidence when councils or infrastructure owners request that the Government include specific significant infrastructure in Appendix 3 of the NPS-FM.

Comments

10. The consultation document states (at page 16) that the Government proposes to “enable regional councils or owners of significant infrastructure to seek exceptions based on evidence gathered during the limit-setting process where a need has been identified”. Any exemptions

would require public consultation. Exemptions based on evidence would provide greater rigour to the process, and public consultation provides an opportunity to table further information and consider effects on stakeholders. The proposals are also consistent with the principle of public participation underpinning the Resource Management Act 1991 (RMA).

Coastal lakes and lagoons

Proposals

- 1.6 Amend the attribute tables in Appendix 2 of the NPS-FM so that attributes clearly apply to intermittently closing and opening lakes and lagoons, with the same band thresholds and national bottom lines as lakes.
- 1.7 Provide direction to councils on how to request that, after meeting evidential thresholds, an FMU unit be allowed to use a transitional objective under Appendix 4 of the NPS-FM.

Comments

11. These changes fill a gap that has been identified in the application of the NPS-FM and provide clarity as to how intermittently closing and opening lakes and lagoons are to be treated.
12. The Law Society supports, for the reasons stated in [10] above, proposals (at page 18) to enable an evidence-based exemption for inclusion of a water body in Appendix 4 and to require public consultation prior to inclusion.

Stock exclusion from water bodies

Proposal

- 1.8 Create a national regulation that requires exclusion of dairy cattle (on milking platforms) from water bodies by 1 July 2017, and other stock types at later dates (as provided in table 2 on page 20).

Comments

13. The exclusion of stock from water bodies has been proposed in a number of documents (most recently in the RLA Bill), and has support from most sectors.
14. The table included in the consultation document at page 20 lists different dates for exclusion of different types of stock and for dairy support land. It also suggests different dates for dairy support land depending on whether the land is owned by the dairy farmer (2020) or not (2025).
15. There may be practical reasons for suggesting a distinction on the basis of land ownership for dairy support land — it is likely to be easier for farmers to undertake fencing on land they own, for example. However, the distinction could incentivise farmers to take/grant leases of dairy support lands rather than using land they own, in order to delay the implementation of the requirement by five years.

Economic use of freshwater

Technical efficiency and good management practice standards

Proposals

- 2.1 Require councils to apply technical efficiency standards in catchments that are at, or approaching, full allocation of water.
- 2.2 Where councils have elected to allocate discharge allowances, require them to apply good management practice in catchments that are at, or approaching, full allocation of contaminants.
- 2.3 Require councils to apply these standards at defined times, for example, at initial limit setting, on consent expiry, and/or on application to permanently transfer consents for water or discharge allowances.

Comments

16. The proposed national standards for technical efficiency and good management practice will promote regional consistency and reduce duplication.
17. The principles of technical efficiency and good management practice may apply equally to both urban and rural environments (as stated at page 24). However, different issues arise in urban and rural environments and it is likely that what is considered efficient and good practice will differ across these environments. The standards should identify which provisions apply in rural and urban environments.

Recommendation

18. Clearly demarcate which provisions of the standards apply to rural and urban environments.

Transferring consents to more efficient, higher valued uses

Proposal

- 2.4 Investigate a package of measures to better enable transfers between users so allocated water and discharge allowances can move to higher valued uses, such as:
 - standardising consent specifications to better enable transfer, such as separating 'take and use' components of a consent
 - making information available, including public registers of consented and used water and discharge allowances
 - model plan provisions specifying where and in what circumstances transfers are permitted
 - enabling water user groups and nutrient user groups to provide for low cost transfers

Comments

19. Making information available about consents and model plan provisions will enable users to identify opportunities for more efficient allocations and to assess the feasibility of obtaining transfers.
20. It is not clear if the proposals include enabling a partial transfer of a water take and use consent between users – such as transferring a certain share of the water take per annum. Further information about the process to be adopted will be necessary if partial transfers are included.

Recommendation

21. Provide further information if other measures such as partial transfers are proposed.

Addressing over-allocation and over-use at least cost

Proposal

- 2.5 Develop guidance on different methods of addressing over-allocation of water quality and/or quantity, if technical efficiency standards and good management practice standards are insufficient.

Comment

22. There are no details in the consultation document about the proposed form of the guidance or process to be used to develop the guidance. Developing the guidance in consultation with councils, other stakeholders and/or the public would be consistent with the principle of public participation underpinning the RMA.

Recommendation

23. Provide further details on the form and process for development of the guidance.
24. Provide opportunities for public participation in the development of the guidance.

Council funding for freshwater management

Proposal

- 2.5 Increase the ability of councils to recover costs from water users for monitoring, enforcement, research and management.

Comment

25. There are no details as to how councils will be able to recover such costs and what considerations will apply in making these decisions.
26. Councils already have the ability to recover actual and reasonable costs associated with monitoring of resource consents under section 36 of the RMA. The method of calculating such charges are normally set out in the long-term plan, with the rates to apply for the current financial year outlined in the annual plan.
27. Research costs, in particular, may be difficult to apportion to an individual consent or sector. The method of apportionment (e.g. flat rate, fixed percentage, percentage of water take or maximum daily rate) will also need to be considered.

28. Given the potential far-reaching effects of such charges, clear criteria should be developed and opportunities for public participation provided.

Recommendations

29. Provide further detail about the increased ability of councils to recover costs from water users, including clear criteria about when and how various charges can be imposed.

30. Provide opportunities for public participation in the development of the proposal.

Iwi rights and interests in fresh water

Te Mana o te Wai in freshwater management

Proposals

3.1 Include a purpose statement in the NPS-FM which provides context about the meaning of Te Mana o te Wai and its status as the underpinning platform for community discussions on freshwater values, objectives and limits.

3.2 Require regional councils to reflect Te Mana o te Wai in their implementation of all relevant policies in the NPS-FM.

Comment

31. Greater clarity is needed about the meaning of Te Mana o Te Wai (as noted at page 28). Requiring regional councils to reflect the concept of Te Mana o te Wai should ensure a consistent national approach while still enabling councils and iwi/hapū within a particular region to determine what the concept means for the water bodies within that particular region.

32. It is unclear if the best means of achieving greater clarity is through a purpose statement, rather than a definition or other operative provisions. It is also unclear whether a purpose statement would require other clauses to give the term full effect. These matters can only be determined once the proposed wording is available.

33. The manner in which Te Mana o te Wai is reflected and defined in the NPS-FM will also need to be cognisant of (and consistent with) relevant legislation that gives effect to settlements of Treaty of Waitangi claims. The Law Society notes, for example, that the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 is based on the principle of “Te Mana o Te Awa”.

Recommendation

34. Consider if a purpose statement is sufficient to provide clarity about the meaning of Te Mana o Te Wai, particularly having regard to existing legislation that gives effect to settlements of Treaty of Waitangi claims.

Iwi and hapū relationships with, and values for, water bodies

Proposals

3.3 Councils must, at the outset of their freshwater planning process, engage with iwi and hapū to ensure all iwi and hapū relationships with water bodies in the region are identified in regional planning documents.

- 3.4 Councils must, when identifying values and setting objectives for particular freshwater management units, engage with any iwi and hapū that have relationships with water bodies in the FMU.

Comments

35. The requirement for councils to engage with iwi/hapū in freshwater planning processes is consistent with the requirements of the Local Government Act 2002 to foster participation of Māori in decision-making processes, and also with sections 6(e), 7(a), and 8 of the RMA.
36. The NPS-FM should also note that when fulfilling the requirement to reflect all iwi/hapū relationships in planning documents, councils must have regard to any relevant Treaty of Waitangi settlements (Deeds of Settlement and implementing legislation) as to mana whenua status in the rohe.

Recommendations

37. Note that councils must have regard to any relevant Treaty of Waitangi settlements (Deeds of Settlement and implementing legislation) as to mana whenua status in the rohe.

Participation in freshwater decision-making

Enabling iwi and councils to agree how to work together

Proposals

- 3.5 The Government will amend the RMA to establish provisions for a new rohe (region or catchment)-based agreement between iwi and councils for natural resource management – a “mana whakahono a rohe” agreement. The mana whakahono a rohe will:
- be initiated by iwi through notice to the councils
 - be available to all iwi but will not override or replace existing arrangements for natural resource management in Treaty of Waitangi settlements nor preclude agreement of different arrangements under a Treaty settlement
 - provide for multiple iwi involvement where appropriate and agreed
 - set out how iwi and council(s) will work together in relation to plan-making, consenting, appointment of committees, monitoring and enforcement, bylaws, regulations and other council statutory responsibilities
 - include review and dispute resolution processes.

Comments

38. The mana whakahono a rohe arrangement was raised in discussions with the Freshwater Iwi Leaders Group and is proposed (at page 30) to be an alternative to the Iwi Participation Arrangement (IPA) included (at clause 38) of the RLA Bill.
39. Clarification is needed as to how the arrangement would fit with, and when it would be used as an alternative to, the IPA.

Recommendations

40. Provide clarification about if and how the proposal would be included in the RMA.

Water conservation orders

Proposal

- 3.6 The Government will amend the RMA to:
- require water conservation order (WCO) applications to provide evidence of consultation with relevant iwi and have one person nominated by the relevant iwi represented on the Special Tribunal convened to hear the application
 - require the Special Tribunal for a WCO (and, where relevant, the Environment Court) to consider the needs of iwi/tāngata whenua
 - require WCO applications to consider any planning processes already underway
 - allow the Minister for the Environment to delay an application if there will be a conflict with a regional planning process
 - allow councils to recommend to the Minister for the Environment that a WCO be created over an outstanding water body that has been identified through regional planning, and allow the Minister to consider recommendations under a streamlined procedure

Comments

41. It is not clear from the consultation document what the streamlined process to be used by the Minister might entail. Given the restrictions that WCOs can impose on water bodies, it will be important for any such process to provide opportunities for the consideration of stakeholder views.

Recommendation

42. Provide further details on the streamlined process for Ministerial decision-making of WCOs recommended by councils.

Freshwater funding

Freshwater improvement fund

Proposal

- 4.1 The Government proposes that eligible projects will need to meet the following criteria:
- only projects that support users to move to managing within quality and quantity limits will be considered
 - projects will need to demonstrate that they produce environmental benefits
 - projects will be considered if the overall public and private benefits are clearly demonstrated to be greater than the public and private costs

- irrigation projects will be eligible for funding only commensurate with any environmental benefits that would not be achieved by the funding available from other sources
- any legal entity will be eligible for funding
- changes in resource use or other business practices, or installed infrastructure, will all need to be sustainable beyond the length of the project without ongoing Government funding
- extension programmes will only be funded where there are clearly public benefits and the barriers to success are about adaptation and roll out at scale. These projects must continue to meet the initial objectives after the extension funding has stopped
- if comparable projects achieve similar economic and environmental objectives cost efficiently, preference will be given to projects that achieve co-benefits, such as improvements in ecosystem health, conservation and climate change
- Government funding should reflect the public benefits of each project and be limited to a maximum of 50 per cent of the cost of any project. Other sources of government funding will not count towards the co-funding requirement. Priority will be given to projects with funding sourced from either business or philanthropic funds, in addition to funding sources from local government
- the minimum government contribution for projects will be \$250,000. There will be no maximum contribution

Comments

43. Guidance should be provided on whether more than one project can be funded (either simultaneously or consecutively) in relation to a specific waterway.

Recommendation

44. Provide guidance on whether more than one project can be funded in relation to a specific waterway.

Conclusion

45. This submission was prepared by the Law Society's Environmental Law Committee. The committee convenor, Phil Page, can be contacted through the committee secretary, Karen Yates on 04 463 2962, karen.yates@lawsociety.org.nz.

Yours sincerely



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