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Public Notice of Inquiry into proposed National Policy Statement on Freshwater Management

This is a submission by the New Zealand Law Society's Environmental Law Committee (the Committee) on the proposed National Policy Statement for Freshwater Management.

Introduction

Concern surrounding inadequate management of New Zealand's water resources prompted the Government to form the Sustainable Water Programme of Action in 2004. That document identified key areas of concern surrounding water management in New Zealand and identified goals to guide future management as follows:

(a) *To improve the quality and efficient use of freshwater by building and enhancing partnerships with Local Government, industry, Maori, science agencies and providers and rural and urban communities,*

(b) *To improve the management of undesirable effect of land use on water quality through increased national direction and partnerships with communities and resource users,*

(c) *To provide for increasing demand on water resources and encourage efficient water management through increased national direction, working with local government on options to support and enhance local decision-making, and developing best practice.*

The underlying assumption appears to be that freshwater management under the existing regime has not achieved good outcomes. In the view of the Committee sufficient mechanisms currently exist within the Resource Management Act 1991 (the Act) to achieve the stated goals. The NPSFM provides additional mechanisms, and a clearer indication of the importance which the Government places on this matter.

Aim of the National Policy Statement for Freshwater Management

The National Policy Statement for Freshwater Management (NPSFM) has been proposed to provide central direction and guidance to local authorities on how they manage freshwater resources within their area. It has been developed in an attempt to address the goals identified in the Sustainable Water Programme of Action as stated above. Section 32 of the NPSFM made the following observation:

> *"New Zealand is fortunate in that overall it has an abundance of high quality freshwater. Despite this, many regions in New Zealand have significant freshwater management issues regarding the quality, quantity and allocation of their freshwater resources. These issues are largely a result of human activity such as land use practices, water abstraction and use."*[1]

The NPSFM aims to target non-point source (diffuse) discharges by focusing on land use management for the benefits of water resources. The other area of concern that the NPSFM attempts to address is water allocation. Demand for water, particularly for irrigation, has increased significantly in recent years, putting mounting pressure on water resources. Currently, water allocation is achieved on a "first in, first served" basis, which does not always allow competing values to be managed.

The Committee does not wish to express a view on whether current water management practices are performing well as this is a policy issue, on which the Society does not normally comment. There is significant regional variation making such an assessment difficult to state succinctly. As previously noted, tools to manage these problems already exist within the Act.

Roles of Regional and Territorial Authorities

The roles of regional and territorial authorities under the Act are quite distinct, although they do overlap in some areas. Regional councils are required to provide integrated management of natural and physical resources. Regional councils, among other things, can control land use, water use, and discharges for the purpose of maintaining and enhancing the quality and quantity of water.[2] Territorial authorities are required to provide integrated management of the effects of the use and development of land by controlling the actual and potential effects such as natural hazards, noise and habitat destruction.[3]

Sections 30 and 31 of the Act indicate that the primary responsibility for water management sits with regional councils. They have the ability to manage land use[4]; water allocation[5] and discharges[6] to ensure water resources are not adversely affected[7]. Water management is not the statutory function of territorial authorities, otherwise than indirectly through controlling the effects of the use of land (section 31(1)(a)). The NPSFM will emphasise the ability of regional councils to direct territorial authorities to manage land in a way that provides acceptable water outcomes.

Some regional councils have now developed 'land use' policy and methods that address the effects of land use change on water resources in their regions. The issues driving the Government's support for the NPSFM reflect regional councils' lack of motivation, priorities or resources, rather than a lack of regulatory authority. The Government could have submitted on proposed regional policy statements and proposed plans in order to remedy any perceived deficiencies, and may do so when these instruments are changed in the future.

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1 Proposed National Policy Statement for Freshwater Management – Section 32 Evaluation, 1.1.
2 Resource Management Act 1991, section 30.
3 Resource Management Act 1991, section 31.
4 Resource Management Act 1991, section 9(3)
5 Resource Management Act 1991, section 14
6 Resource Management Act 1991, section 15
7 Resource Management Act 1991, Section 30(c)(ii),(iii),(iiia)

Diffuse Discharges

The current water management regime has focused on managing the effects of point source discharges on water quality (section 15 of the Act). However, the Government's concern is that fewer improvements have been made in management of land and with control of non-point source (diffuse) discharges into water.[8] The Government's view is that diffuse discharges are the most significant contributor to declining water quality in New Zealand. Poor linkages between land use change and the effect this has on water resources is blamed for the lack of progress in managing diffuse discharges.

Policies 3 and 5 of the NPSFM have the effect of ensuring that territorial authorities manage land use in a way that delivers acceptable water quality and quality outcomes. So there may be some overlap with regional councils function for managing water resources, particularly in relation to rural land use. It is noted that the definition of Land-Use Development does not make it clear whether the NPSFM is meant to apply to a change in land use from extensive farming to intensive farming; arguably this is not a land use change because it is still farming.

There are some examples where regional councils have engaged in managing land use activities, where such activities adversely affect water resources. For example, Waikato Regional Council introduced a regional plan variation that classified activities, such as farming and forestry, as controlled or discretionary activities within the Lake Taupo water catchment area. The variation will require farmers to apply for resource consent to carry out farming activities in the catchment and give the council the opportunity to ensure appropriate management plans are in place to mitigate the effects of the activities adequately, such as nitrate leaching. The variation has been subject to a number of appeals from various parties including Carter Holt Harvey Limited, Federated Farmers and Fonterra, all wishing to see these restrictions removed. The Environment Court released its interim decision on the variation in November 2008[9]. The Court, for the large part, has supported the Council's attempts to manage land use activities more proactively in order to protect water resources. This example indicates that the tools are available to regional councils, but are perhaps being used infrequently. It demonstrates that there is not a lack of power for regional councils to manage land-use activities. There may be political considerations that discourage regulatory intervention to manage diffuse discharge issues.

The Canterbury Regional Council (Environment Canterbury) has also adopted such methods in its Natural Resources Regional Plan (NRRP). The NRRP includes a number of policies, methods and rules to manage land-use activities to avoid adverse effects of non-point source discharges on waterways. The policies and methods include measures to exclude stock from riparian margins, setting nitrogen levels for leachate from irrigated land, managing stock access to water bodies and regulating the application of fertiliser. Activities such as fertiliser application are regulated by rules under the plan (and many other regional plans) and will require resource consent where application methods do not comply with the plan rules.

Waikato Regional Council and Environment Canterbury also provide instances of how the current regime provides the ability to achieve the goals of the NPSFM. Additionally, where regional councils have concerns over land use proposals that have implications for water quality, they have the ability to make submissions on proposed district plans and alterations to district plans. The councils may make submissions on notified resource consent applications as well. These are other examples of the way the present law is able to achieve the same outcome as the NPSFM.

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[8] Proposed National Policy Statement for Freshwater Management – Section 32 Evaluation

[9] *Carter Holt Harvey and Other v. Waikato Regional Council* EnvC Decision No. A123/2008

Water Allocation

The NPSFM does not specifically address the matter of water allocation. It seems that identification of 'notable values' required under the NPSFM is intended to guide the decision-making process for water allocation. The difficult issue that remains unanswered by the NPSFM is not what the relevant values are (that much is seldom in dispute) but rather, which values are to prevail in the event of conflict, or how are they to be balanced between competing uses of a resource. Local Authorities are seldom left in doubt about the values that people and communities ascribe to waterways. Submission rights allow people to express the values they associate with water bodies. It is the reconciliation of competing values that proves difficult. The NPSFM does not assist with conflict resolution.

Changes to Regional Policy Statements and Plans

The NPSFM has identified a time line within which regional and district councils must have initiated changes to their respective policy statements and plans. The Committee believes the timeline to be unrealistically ambitious. Variations to plans will be contentious. The timeline requires any changes to be made to subordinate plans to be notified within 40 days of the RPS becoming operative. In order to comply with the Act's requirements (such as First Schedule consultation and section 32), district councils would have to formulate their plan changes before the regional policy statement or plan changes are finalised, and any changes in these documents are likely to affect what the district plan changes will entail. The Committee believes that the process of changing subordinate documents should not have to be initiated until prior policy statement and plan changes have been finalised and all appeals resolved.

Undermining the Separate Functions of Regional Councils and Territorial Authorities

The NPSFM calls into question the continuing relevance of the separate functions of regional councils and territorial authorities. Water management highlights the overlap between the functions of each council. The NPSFM seeks integrated and coherent management of water by effectively duplicating the functions of regional councils. It appears that the Government believes that the division of functions has not served water management well and change is required. If that approach is warranted, then it points to a need for a wider reconsideration of the structure of local government.

The Committee wishes to be heard in support of its submission.

Should you have any questions please contact the Committee's secretary, Diana Brown, by phone (04) 463 2967, or email diana.brown@lawsociety.org.nz.

Yours sincerely

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Convener, Environmental Law Committee