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Proposed amendments to the National Policy Statement for Freshwater Management 2011

1. The New Zealand Law Society appreciates the opportunity to comment on the *Proposed amendments to the National Policy Statement for Freshwater Management 2011: A discussion document, 2013* (discussion document). This submission has been prepared with assistance from the Law Society's Environmental Law Committee. This submission focuses on issues relating to consistency between the proposals in the discussion document and the legislative framework, and some potential implementation difficulties.

General comments

Process for Amending the National Policy Statement for Freshwater Management

2. The Law Society is concerned about the intended process for amending the National Policy Statement for Freshwater Management (NPS-FM). Prior to 2005, the Minister was required to appoint a Board of Inquiry to inquire into, and report on, any proposed national policy statement.¹ Submissions were filed, a hearing was held, matters were considered and a report and recommendations were made to the Minister. The Minister was required to consider the report and any recommendations and was entitled (but not required) to make any changes to the proposed National Policy Statement (NPS) "that he or she thinks fit."² The same procedure was used for any review, change or revocation of a national policy statement.³

¹ Section 47(1).

² Section 52(1) prior to 2005 Amendment Act.

³ Section 53 prior to 2005 Amendment Act.

3. An alternative process for developing and amending an NPS was introduced in 2005 by the Resource Management Amendment Bill 2005. Initially, the Bill proposed that the Board of Inquiry process be replaced by an entirely new process.⁴ The proposed new process provided the Minister with a potentially unchecked discretion and allowed little scope for public participation in the development of any new NPS.⁵ The change aimed to provide more flexibility in the way NPS's were developed, to provide a quicker and less costly process.⁶
4. The proposal to replace the Board of Inquiry process was however not supported by the Select Committee that considered the Bill. The Select Committee recommended that the Bill be amended to retain the Board of Inquiry process and to ensure that while the alternative process would be available it would only be used in appropriate circumstances. Amendments were made to fetter the unchecked ministerial discretion regarding which process to follow, to provide better transparency and to ensure adequate scope for public participation.⁷
5. Section 46A of the Resource Management Act (RMA) now allows the Minister to choose between the Board of Inquiry process or the alternative process. In the alternative process there is no hearing of submissions, and the Board of Inquiry is replaced by a single person.
6. Section 46A(2) of the RMA provides as follows when the Minister is considering which process to follow:
 - (2) When choosing between subsection (1)(a) and subsection (1)(b), the Minister may consider the following matters:
 - (a) the advantages and disadvantages of having the proposed national policy statement made quickly:
 - (b) the extent to which the policy in the proposed national policy statement differs from the policies in—
 - (i) national environmental standards; and
 - (ia) other national policy statements; and
 - (ii) regional policy statements; and
 - (iii) regional or district plans:

⁴ Select Committee commentary on the Resource Management Amendment Bill

⁵ Select Committee commentary on Stage 2 of the Resource Management and Electricity Legislation Amendment Bill

⁶ Ministry for Environment Information Sheet

⁷ Select Committee commentary on Stage 2 of the Resource Management and Electricity Legislation Amendment Bill

- (c) the extent and timing of public debate and public consultation that took place on the policy before the proposed national policy statement was prepared:
 - (d) any other relevant matter.
7. The alternative process could not be used if the proposed NPS included a provision that directed specific provisions to be included in a document, without notification or hearing, under clause 16 of Schedule 1.⁸ This restriction was subsequently repealed in 2009.⁹
 8. Four national policy statements have been put in place since 2005: the NPS on Electricity Transmission in 2008, the NPS for Renewable Electricity Generation in 2011, the New Zealand Coastal Policy Statement in 2010, and the NPS for Freshwater Management in 2011. All four were developed using the traditional Board of Inquiry process, rather than the alternative process.¹⁰ The alternative process therefore has not been used to date and remains untested.
 9. The discussion document indicates that the Minister has chosen to use the alternative process to amend the NPS-FM. However, no rationale or explanation is provided, and there is no evidence that the Minister has considered the matters in section 46A(2)(a) and (b). Matters in section 46A(2)(a) and (b) are relevant in this context. In particular there is no discussion of the need for the NPS to be amended quickly and nor is there discussion about the extent of difference between the NPS and the documents listed in section 46A(2)(b).
 10. Unlike an NPS prepared under the normal process, an NPS prepared under the alternative process is not a Legislative Instrument (formerly known as a “regulation”) for the purposes of the Legislation Act 2012 (s46A, RMA). Instead, it takes effect as a disallowable instrument that is not a legislative instrument (referred to now as an “Other Instrument”, and formerly known as a “deemed regulation”).¹¹ The Regulations Review Committee Report of 1999¹² noted that deemed regulations are not subject to the same controls as traditional regulations and expressed concern about the increasing number of statutes which authorise the making of delegated legislation outside of the traditional regulation-making process.

⁸ Sections 46A(3) and 55(2A)(b), as introduced in 2005.

⁹ Section 46 of 2009 Amendment Act.

¹⁰ Ministry for the Environment website

¹¹ The difference between a Legislative Instrument and an Other Instrument is that Other Instruments are not in general drafted by the PCO. They are made by Ministers, officials, or organisations, rather than the Executive Council on the recommendation of Cabinet.

¹² Regulations Review Committee: Inquiry into Instruments Deemed to be Regulations; An examination of delegated legislation (I.16R) 1999

11. The Law Society questions the decision to follow the alternative process in this instance. As noted above, the Minister has not made clear the reasons for adopting the alternative process and the Law Society questions its use in light of the significant amendments signalled in the discussion document. The nature of the proposed amendments and the matters in section 46A(2) of the RMA indicate that the alternative process for amending the NPS-FM is not appropriate.
12. The Law Society also notes that a Board of Inquiry was formed in 2010 for the implementation of the NPS for Freshwater Management (NPS-FM) and queries why there is a different process to be adopted for subsequent amendments to the same document. The use of the alternative process for these amendments to the NPS-FM creates an unfortunate precedent for “the further suite of freshwater management reforms [that] will follow...”.¹³

Options for providing further national direction (Section 3 of the discussion document)

13. The proposed National Objectives Framework (NOF), and amendments to the NPS-FM to implement the NOF, are one option for meeting the Land and Water Forum’s (LAWF) recommendation of establishing a national objectives framework to assist local authorities in setting freshwater objectives under the NPS-FM.
14. However, the Law Society considers some aspects of the proposed amendments to the NPS-FM go beyond the scope of what should properly be included in an NPS under section 45 of the RMA. That is, some of the proposed amendments are intended essentially to operate as rules or regulatory “bottom lines”, rather than objectives or policies. Such matters may be better addressed in a companion (or joint) National Environmental Standard (NES), rather than included by way of amendment to the NPS-FM.
15. Section 45 describes the purpose of an NPS as follows:

The purpose of national policy statements is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act.
16. Section 43 prescribes the regulatory power for making an NES as follows:

¹³ New Zealand Government, “Proposed Amendments to the National Policy Statement for Freshwater Management 2011 – A discussion document” (2013) at 7.

- (1) The Governor-General may, by Order in Council, make regulations, to be known as national environmental standards, that prescribe any or all of the following technical standards, methods, or requirements:
 - (a) standards for the matters referred to in section 9, section 11, section 12, section 13, section 14, or section 15, including, but not limited to—
 - (i) contaminants:
 - (ii) water quality, level, or flow:
 - (iii) air quality:
 - (iv) soil quality in relation to the discharge of contaminants:
 - (b) standards for noise:
 - (c) standards, methods, or requirements for monitoring.
- (2) The regulations may include:
 - (a) qualitative or quantitative standards:
 - (b) standards for any discharge or the ambient environment:
 - (c) methods for classifying a natural or physical resource:
 - (d) methods, processes, or technology to implement standards:
 - (e) exemptions from standards.

17. Reading sections 45 and 43 together, the power to make an NPS is limited to stating “*objectives and policies for matters of national significance*”. This does not extend to setting “*technical standards, methods or requirements*”. That is the province of an NES.
18. The proposed amendments include “attributes” that will establish national bottom lines for the compulsory values. These numeric attributes will operate as compulsory technical standards or requirements, and trigger a management regime for waterways that do not meet the national bottom lines.
19. In the Law Society’s view, the proposal to incorporate national bottom lines, and the related exceptions to those bottom lines, may be outside the lawful scope of an NPS as provided for in section 45. Even if incorporating the national bottom lines in an NPS is lawful, the Law Society considers it would be more efficient and effective and would be good practice for such matters to be addressed in an NES rather

than an NPS, where they are intended to operate as regulatory standards (with appropriate exemptions) rather than high level policy and objective guidance (as an NPS is supposed to provide).

20. Introducing regulatory standards under the guise of an NPS is likely to cause confusion and debate as to the correct status and application of the national bottom lines for ecosystem and human health the Government wishes to implement. This is particularly so when there is a more appropriate and effective vehicle (an NES) available for introducing such regulations. The draft Regulatory Impact Statement (RIS) states that the water quality attributes to achieve a particular value will be set in the NPS-FM, and therefore *“cannot be challenged”*. The RIS anticipates this would accordingly reduce the costs of the planning process for regional councils, and transfer some of that cost to central government. However, as noted in the RIS, an NPS cannot set rules and regulations. The Law Society accordingly considers that the attributes, and in particular the bottom lines, could still be challenged through the planning process.
21. The Law Society recommends that dealing with the compulsory values (and their associated exceptions) via a companion NES (rather than amendment to the NPS-FM) would be more effective, and avoid such debate. This does not appear to be an option that has been given sufficient (if any) consideration to date.
22. A national guideline would not be sufficient to address the concerns raised above in relation to water quality attributes and national bottom lines. Guidelines are voluntary, and this option would neither ensure national consistency of freshwater objectives and policies nor reduce challenges to regional planning documents developed to give effect to the NPS-FM.
23. The RIS records that an NES was one of the options considered in the initial development of the NOF *“because it was thought that bottom lines might be best implemented as a standard”*. The conclusion was (and it has therefore been acknowledged) that an NES offered a suitable vehicle for the technical aspects of the NOF, such as national bottom lines for ecosystem and human health (and their associated exceptions). Likewise, the section 32 evaluation accepted the compulsory national values could be addressed via an NES, in noting that *“[i]f a National Environmental Standard (NES) were to be used, it could only regulate the two values defined as compulsory national values because they are the only values held by all water bodies in the country”*.

24. However, the NES option was discarded at an early stage (and therefore not pursued as one of the available options in section 5.2.1.3 of the section 32 evaluation), as it did not address the problem of establishing a process for formulating objectives in regional plans to give effect to the NPS-FM.
25. The Law Society is concerned that the RIS does not address the option of a joint NPS and NES, and no reasons are given as to why a combination of options was not considered.
26. The Law Society acknowledges that the RMA does not presently explicitly provide for a joint NPS-NES (although the Government has signalled this may be addressed in the next round of RMA reforms). However, equally, there is nothing in the RMA that precludes development of a companion NPS and NES, which both address the same subject matter. We note, for example, that there is already both an NPS and NES regarding electricity transmission. This option does not appear to have been considered.
27. The Law Society suggests that another solution is to amend the NPS-FM to include a menu of national values that regional councils can use to set objectives *and* to make an NES-FM to set the numeric attributes and the minimum acceptable states (or bottom lines) for the compulsory values.
28. As noted in the RIS and section 32 evaluation, an NES is the better option for these technical aspects of the NOF. An NES would compel action at council level to address minimum acceptable states for water bodies, and is the best option to establish exceptions to the national bottom lines for the compulsory values. Of course councils would remain able to set more stringent water quality limits for certain water bodies than those prescribed in the NES (if the NES allows for this), in accordance with section 43B of the RMA.
29. The Law Society notes that its proposed solution is consistent with the LAWF recommendations. The second report of the LAWF concluded that *“a national instrument, such as for example a National Environmental Standard, is necessary to give effect to [national objectives of the NPS-FM].”* The LAWF recommended that the NES should *“set national minimum state objectives (‘bottom lines’) in respect of a limited range of indicators, including biometric, physico-chemical, physical, human health and fish productivity ones.”* The discussion document proposes to set those attributes or bottom lines by amending the NPS-FM. The Law Society suggests that an NES is a more appropriate vehicle to address the recommendations of the LAWF.
30. An NES would also meet the LAWF recommendation seeking *“increased agility in the planning process”*. It would be no more difficult to amend and update an NES (for example to add new values and

attributes as the science evolves), than it would an NPS. Further, section 44A of the RMA requires regional councils to amend their regional plans (as necessary) to be consistent with an NES, without following the Schedule 1 process. By contrast, regional plan changes to give effect to the compulsory values aspects of the proposed NPS-FM amendments would have to follow the Schedule 1 process in accordance with section 55(2C) of the RMA, given the attributes and bottom lines for the compulsory values are not “objectives and policies” of the NPS-FM.

Proposed amendments to the National Policy Statement for Freshwater Management (Section 4 of the discussion document)

Sections 4.1 and 4.7: Accounting for and Monitoring Water Quality and Quantity

31. Accounting for water quantity and quality, and monitoring progress against freshwater objectives over time, are essential features of a robust and effective national objectives framework.

32. The Law Society acknowledges the work that has been done to scope the options and demands associated with freshwater accounting.¹⁴ Increased freshwater accounting and monitoring requirements will inevitably involve increased costs for agencies tasked with those activities, which may be passed on, to a greater or lesser extent, to other participants in resource management processes. The Law Society does not consider that these anticipated costs detract from the need for appropriate and consistent accounting for freshwater quantity and quality, and monitoring of the impact of activities (approved or otherwise) on the achievement of freshwater objectives. The Law Society notes that efforts have been made to allow some flexibility as to how the proposed accounting and monitoring requirements are satisfied, including by inserting the concept of proportionality in Policy CC1(b). That flexibility should allow regional councils to moderate some of the costs that would otherwise be associated with more rigidly framed freshwater accounting and monitoring requirements.

33. The Law Society's more specific comments on Proposals 4.1 and 4.7 are set out below. They are divided into three parts:
 - Concern about the use of the NPS-FM to compel accounting and monitoring activities by regional councils.
 - The suggestion that mandatory accounting and monitoring requirements could usefully extend to a greater range of factors than is currently proposed, subject to cost/benefit analysis and technical feasibility.

¹⁴ Reflected, for example, in the NIWA publication *Regional Council Freshwater Methodologies: Accounting systems and limit setting* (September 2013).

- Comments on the proposed language of Objectives CB1, CC1 and their related policies.

Concern about the use of the NPS-FM to compel accounting and monitoring activities by regional councils

34. In general terms, proposed Objectives CB1, CC1 and their related policies require regional councils to establish and implement plans and systems for:
- the monitoring of progress towards the achievement of freshwater objectives; and
 - accounting for freshwater quantity and quality in freshwater management units (FMUs), to enable the setting/reviewing of freshwater objectives and limits.
35. These proposed objectives and policies differ from the norm in that they do not establish principles that are intended to 'trickle down' to subservient planning instruments, such as regional policy statements and regional/district plans.
36. In contrast, Objectives CB1, CC1 and their related policies directly impose accounting and monitoring requirements on regional councils. While the information gathered through those activities will subsequently be employed in the setting/reviewing of freshwater objectives and limits, the accounting and monitoring activities are not matters that can be implemented through the insertion of appropriate provisions in subservient planning instruments. Instead, they demand specific actions that regional councils must carry out directly.
37. It is debatable whether direct requirements of this nature can legitimately be imposed through an NPS. This is the Law Society's principal concern with Proposals 4.1 and 4.7. While the point is arguable, the Law Society is concerned that it does not appear to have been addressed in the section 32 evaluation¹⁵ nor in the draft Regulatory Impact Statement (RIS).¹⁶
38. The issue arises from sections 45 to 55 of the RMA, which outline the purpose, development, and implications of national policy statements.
39. The purpose of national policy statements is to state *objectives and policies* for matters of national significance that are relevant to achieving the purpose of the RMA: section 45(1).

¹⁵ Ministry for the Environment *Proposed amendments to the National Policy Statement for Freshwater Management 2011 - Section 32 evaluation* (November 2013).

¹⁶ Ministry for the Environment *Draft Regulatory Impact Statement: Proposed amendments to the National Policy Statement for Freshwater Management 2011* (Undated, Doc ID 000001395943).

40. The RMA does not identify expressly the permissible 'contents' of an NPS. That is distinct from the approach taken to other superior planning instruments, such as national environmental standards,¹⁷ New Zealand coastal policy statements,¹⁸ or regional policy statements.¹⁹ That can be taken as a legislative indication that an NPS is intended to have a broad and flexible ambit. However, it also means that there is no statutory clarification of what is/is not permissible in terms of the statement of *objectives and policies*.
41. Section 55 of the RMA deals with the implications for national policy statements for local authority planning instruments. It primarily envisages the amendment of local authority planning instruments – with a greater or lesser degree of specificity depending on the terms of a national policy statement – to give effect to the provisions of a national policy statement.
42. Section 55(3) also states:
- A local authority must also take any other action that is specified in the national policy statement.
43. That indicates that an NPS may require local authority actions that go beyond the amendment of subservient planning instruments. However, there is an implicit limit on the scope of the directions that may be given through a national policy statement: namely, they must be imposed through legitimate *objectives and policies*.
44. The last point above begs the question as to the permissible scope of *objectives and policies*. Neither term is defined in the RMA, although they are distinguished from 'rules' and 'methods'.²⁰ The Court of Appeal has stated that a policy (in the context of a proposed regional policy statement) may be highly specific: *Auckland Regional Council v North Shore City Council* [1995] NZRMA 424 (CA). However, the Court of Appeal also recognised – and did not disturb – the Planning Tribunal's earlier finding in the first instance proceeding²¹ that the provisions of a regional policy statement cannot be used to cut across the monitoring obligations set out in section 35 of the RMA.

¹⁷ RMA, section 43A.

¹⁸ RMA, section 58.

¹⁹ RMA, section 62.

²⁰ See for example section 62(1)(e) of the RMA.

²¹ *Re an Application by North Shore City Council* [1995] NZRMA 74 (PT), at 94-96.

45. Section 35 sets out local authorities' general duties to gather information, to monitor, and to keep records. In particular, section 35(2) specifically provides:
- (2) Every local authority shall monitor—
 - (a) the state of the whole or any part of the environment of its region or district—
 - (i) to the extent that is appropriate to enable the local authority to effectively carry out its functions under this Act; and
 - (ii) in addition, by reference to any indicators or other matters prescribed by regulations made under this Act, and in accordance with the regulations ...
46. The reference to regulations in section 35(2)(a)(ii) correlates with section 360(1)(hk) of the RMA, which states:
- (1) The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:
 - ...
 - (hk) prescribing, for the purposes of section 35(2)(a)(ii),—
 - (i) indicators or other matters by reference to which a local authority is required to monitor the state of the environment of its region or district:
 - (ii) standards, methods, or requirements applying to the monitoring, which may differ depending on what is being monitored.
47. These provisions arguably suggest that the appropriate vehicle for coercive requirements around local authority freshwater accounting and monitoring is regulations made in accordance with section 360(1)(hk) of the RMA, rather than through the vehicle of an NPS. The Law Society considers that freshwater accounting can tenably be described as a form of 'state of the environment' monitoring, which is squarely within the scope of section 360(1)(hk).
48. The Law Society concludes that there is a risk of challenge to the legality of Objectives CB1, CC1 and their related policies. The Law Society acknowledges that there is a low likelihood of such a challenge. Even then, the issue would be arguable. However, it is nonetheless a matter we draw to the Ministry's attention for further consideration.

Extension of mandatory accounting and monitoring requirements to a greater range of factors than is currently proposed

49. Objective CC1 is fundamentally intended to:

... improve information on freshwater takes and sources of freshwater contaminants ...

The reference to 'sources of freshwater contaminants' in this formulation suggests that freshwater accounting systems may relate to matters beyond the instant state of a water body: i.e. they may also extend to activities/inputs that have an indirect effect on the instant state of a water body (e.g. land use activities within a catchment that involve the discharge of contaminants to land in circumstances where they may enter water).

50. The Law Society considers that this aspect of Objective CC1 is not clearly translated into supporting Policies CC1 and CC2. Both policies take a flexible approach to the development of freshwater accounting and information retention/provision systems. That flexibility possibly provides scope for accounting for matters beyond instant water quality/quantity levels. However, the lack of any specific reference to that broader type of accounting means that it may not be carried out – or potentially may be treated as a supplementary or optional accounting matter – by local authorities.
51. If proposed part CC of the NPS-FM is intended to require the broader type of accounting signalled by Objective CC1, the Law Society considers that this should be expressly reflected in supporting Policies CC1 and CC2.

Comments on the proposed language of Objectives CB1, CC1 and their related policies

52. There is a degree of overlap between the monitoring and accounting activities in proposals 4.1 and 4.7, particularly with respect to Policies CB1 and CC1(b).
53. It appears that Policy CB1 is intended to be broader in scope than Policy CC1. If that is correct, freshwater accounting under Policy CC1 is merely one factor to take into account when developing a monitoring plan in accordance with Policy CB1.
54. In light of the potential for uncertainty around the relationship between these policies, the Law Society considers that Policy CB1 could usefully be augmented by a cross-reference to Policy CC1 (and potentially Policy CC2). The purpose of the cross-reference would be to acknowledge the relevance of freshwater accounting information in the context of local authority monitoring plans.

Modification of Policy CC2

55. Policy CC2 relates to the form requirements for information gathered under Policy CC1. The Law Society considers that there is some ambiguity in Policy CC2 as currently drafted. For convenience, the proposed language of Policy CC2 is set out below:

Policy CC2

By every regional council taking reasonable steps to ensure that information gathered in accordance with Policy CC1 is available in a suitable form for the freshwater management units where freshwater objectives and limits have been set; and that:

- (a) in terms of information relating to a freshwater quality accounting system established under Policy CC1, the information shall relate to at least five yearly intervals; and
- (b) in terms of information relating to a freshwater quantity accounting system established under Policy CC1, the information shall relate to at least one year intervals.

56. The words 'suitable form' presumably mean 'suitable form to achieve the goals outlined in Objective CC1(a) to (c)'. On one interpretation, Policies CC2(a) and (b) appear to be intended to establish maximum time periods that must be used when reporting freshwater accounting information. However, there is some ambiguity about that. In particular, the meaning of the words 'shall relate to' is unclear. These policies could potentially be interpreted as an indication of the frequency with which accounting data must be obtained/recorded, rather than an expression of how reporting information should be presented. Determination of the frequency with which freshwater accounting data is collected appears to be the proper subject of Policy CC1, rather than Policy CC2.²²
57. The Law Society also considers that the language of Policies CC2(a) and (b) could be further clarified by replacing the words 'at least' with a more specific formulation. In light of these issues, the Law Society suggests that the language of Policies CC2(a) and (b) be revisited to make the intended meaning clearer. An example of an alternative formulation of Policy CC2(a) is set out below:

²² If this interpretation is incorrect, it reinforces the presence of an ambiguity in Policy CC2 that ought to be corrected.

... in terms of information relating to a freshwater quality accounting system established under Policy CC1, the information shall be presented with reference to intervals of no more than five years.

Section 4.2: National Objectives Framework

58. Overall, the Law Society is in favour of the introduction of a National Objectives Framework (NOF) to support and guide the setting of freshwater objectives and regional plans. The NOF provides a useful framework or menu for choosing values and attributes to protect the freshwater environment and should assist in achieving greater national consistency in regional plan making. We have a number of concerns, however, about some of the detail of the proposals contained in the discussion document.
59. Future amendments to NPS-FM in 2016 and 2019 are foreshadowed. From a process perspective, it seems appropriate that a formal amendment process is being contemplated, and the assumption must be that this would be conducted so as to meet the RMA's requirements regarding amendment to an NPS.
60. There is some process risk however, that if future amendments are not progressed for any reason there would in effect be only a partial NPS in place, with much of the detail of the framework missing. For example, in relation to ecosystem health, it is noted that "critical attributes" are not yet populated, and this underscores the risk of ending up with 'half an NPS'. It needs to be remembered that regional councils must give effect to an NPS as it is for the time being. If it is contemplated that the NPS will be amended through an iterative process, then at each step in the process, the council will be required to review its plans.
61. A similar observation can be made about the lack of attributes around wetlands. Wetlands are different from other water bodies (e.g. lakes and rivers) in that the "vulnerable nature of these ecosystems" (p20 of the discussion document) is in large part caused by wetland loss (i.e. conversion from a wetland water body into terrestrial land through drainage activities). The vulnerability arises as much from quantitative loss of wetlands (reduction in number of wetlands, or extent of wetlands existing), as from qualitative loss (i.e. decline of water quality within wetlands). There are objective tools that can measure rates of wetland loss within regions available at present, so the attributes for wetland loss are available now, and ought to be included in the NPS.
62. One of the intentions behind the amendments to the NPS appears to be to achieve greater consistency between regions in terms of how freshwater issues are managed. An objective of the NOF is to provide

an approach to establishing freshwater objectives for national compulsory and other values that is nationally consistent while recognising regional and local circumstances.

The definition of Freshwater Management Unit (FMU) is important in this respect. An FMU is defined as “the water body, multiple water bodies or any part of a water body determined by the regional council as the appropriate spatial scale for setting freshwater objectives and limits and for freshwater accounting and management”.

63. Accordingly, councils will have a wide degree of discretion as to how they define a freshwater management unit, and there does not appear to be any guidance about the extent to the spatial scale. More familiar terms such as ‘catchment’ and/or ‘water body’ have not been used.
64. The process of objective-setting looks to be particularly onerous for small/medium sized councils with large geographical areas to administer. This may lead to FMUs being defined at greater than the optimum spatial scale, i.e. multiple catchments and water body types being grouped into a single FMU for ease of management purposes. This could undermine the objective in the NPS of achieving consistency in the management of freshwater issues, as the objectives are to apply at the scale of the FMU.
65. The Law Society recommends that consideration be given to developing a set of assessment criteria and/or non-statutory guidance to assist councils in determining the appropriate scale of the FMU, and to encourage best practice. Such criteria would be designed to promote consistency of approach and assist council decision making.
66. It is unclear how a range of objectives will be defined for diverse water bodies within an FMU, for example that might include lowland wetlands and lakes and rivers, but also upland streams, lakes etc, where the values of those water bodies, and the pressures on them, may vary significantly. It is also not clear how the NPS deals, for example, with water in a geothermal form, or in frozen form (snow and ice). Presumably these water bodies would also be part of an FMU.
67. Objective A2 provides that overall water quality within a region is required to be maintained or improved. However, it does not follow that water quality throughout FMUs will be maintained or improved. This is particularly so if a large spatial scale is selected, encompassing for example a number of catchments, or even single large catchments. Significant degradation of waterways could occur,

while maintaining 'overall' water quality across a region depending on whether trade-offs occurred, and if so, what metrics were used in assessing them.

68. There is an absence of guidance in the draft NPS on how assessment of the maintenance or improvement of 'overall' water quality in a region will occur. Again, further guidance or methodology could assist in achieving consistent best practice across regions. Good science will also need to inform policy development.

Section 4.3: Compulsory values in the NPS-FM

69. The Law Society's view is that if compulsory values are provided, they should be set as standards in an NES-FM. We support the compulsory values identified in the NPS (ecosystem health, and secondary contact for recreation), but it also needs to be made clear that there are other 'critical attributes for ecosystem health' that have not yet been populated.
70. There is a risk that consent authorities and plan drafters will take the view that meeting the compulsory national values identified is sufficient to protect ecosystem health. Individual councils will need to address other critical parameters until such time as critical attributes have been developed, and populated into the NPS by way of an amendment.
71. With regard to Appendix 1, it is unclear how compulsory national values and national values have been identified or categorised as such. From a legal perspective, Part 2 of the RMA would suggest that a number of national values ought to be compulsory national values, in the sense that they relate to matters which, if they are present in relation to the water body in question, the RMA requires to be 'recognised and provided for', or at least 'had particular regard to' when giving effect to the overall sustainable management purpose of the RMA.

Section 4.4: National Bottom Lines

72. The Law Society has no comment on whether there should be numeric bottom lines for attributes of the compulsory values. However, if such numeric bottom lines are provided, they should be set as standards in an NES-FM. (See our comments above).
73. The Law Society considers that an NES-FM could provide a transitional regime for implementing the national bottom lines which could be reflected in the objectives adopted by regional councils to give effect to the NPS-FM.

Section 4.5: Exceptions to National Bottom Lines

74. Proposed Policy CA.1 requires every regional council to develop freshwater objectives for all freshwater management units by applying a specified process. Proposed Policy CA.2 requires the freshwater objectives for the compulsory values to be set at or above the national bottom lines for all freshwater management units, except in limited circumstances. Appendix 3 is intended to be a list of freshwater management units eligible for exceptions under Policy CA2(c). The discussion document notes:

APPENDIX 3: Freshwater management units eligible for exceptions under Policy CA2(c) [new amendment]

[Note: Appendix 3 will list freshwater management units eligible for exceptions under Policy CA2(c). Freshwater management units would be added to this list following further public consultation and an amendment to the National Policy Statement. The freshwater management units on the list will be those affected by significant existing infrastructure, such as hydroelectricity generation or drinking water dams. Policy CA2(c) and this appendix are subject to consultation through section 4.5 of the discussion document]

75. Although the Law Society supports public consultation in relation to FMUs that are to be included in Appendix 3, the issue needs to be considered in light of the Law Society's submission concerning whether the national bottom lines are an appropriate subject for an NPS rather than an NES. If national bottom lines are incorporated in an NES as we recommend, then exemptions to compliance with such regulations would need to be provided within those regulations. The process by which an FMU might be exempted from national bottom lines through an NES is not articulated in the Act since the process is by way of Order in Council. The Law Society expects FMUs that will be candidates for exemption are likely to be identified through Regional Council monitoring and Plan preparation processes.

Section 5: Implementation

76. A number of local authorities have already advanced Regional Plans in response to the operative NPS-FM. In relation to the Waitaki catchment, a Regional Plan was prepared under the Resource Management (Waitaki Catchment) Amendment Act 2004. The Plan prepared under that Act by the Board is operative, but is now also subject to review on the same basis as any Plan prepared under the principal Act (refer section 14(1)(b) of the Resource Management (Waitaki Catchment) Amendment Act 2004).

77. The operative NPS-FM does not specify a compulsory methodology for giving effect to the NPS-FM. Local authorities must simply be satisfied that any Regional Plan that might have already been prepared has, in substance, given effect to the NPS-FM. The process that led to that result is immaterial.
78. The proposed amendments to the NPS-FM introduce a compulsory methodology for setting fresh water objectives, to which Appendices 1 and 2 then apply. It therefore appears to the Law Society that a Regional Council that already has a Regional Plan in place in response to the operative NPS-FM (or in the case of Waitaki, formulated under its own Act) will be required to commence the process again using the methodology specified in proposed Part CA. Thus the compliance issue for councils is not just one of substance (achieving fresh water quality or quantity objectives already set) but one of process – has their Regional Plan been formulated using the compulsory process set out in Part CA? The Law Society's view is that however meritorious (or not) existing Plans may be, they will not give effect to the required methodology, and will have to begin again.
79. The Law Society is aware that in other areas of reform, the Government has been anxious to reduce cost and duplication in RMA processes. The proposed amendments in this discussion document may have the unintended consequence of adding substantial cost to regions which have already adopted Regional Plans that comply with the substantive requirements of the operative NPS-FM.

Conclusion

80. If you wish to discuss this submission further, please do not hesitate to contact the convenor of the Law Society's Environmental Law Committee, Phil Page, through the committee secretary Jo Holland phone (04 463 2967, or email jo.holland@lawsociety.org.nz).

Yours faithfully,

A handwritten signature in black ink, appearing to be 'Chris Moore', with a long horizontal flourish extending to the right.

Chris Moore
President