

11 July 2022

Ministry for the Environment
Wellington

By email: WetlandsTeam@mfe.govt.nz

Re: Exposure draft of amendments to the National Policy Statement for Freshwater Management 2020

1 Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the exposure draft of proposed amendments to the *National Policy Statement for Freshwater Management 2020 (NPS-FM)*.
- 1.2 This submission has been prepared with input from the Law Society's Environmental Law Committee.¹

2 Interpretation (clause 1.4(4))

- 2.1 Clause 1.4(4) defines a reference in the NPS-FM to a zone. Clause 1.4(4)(b) states that, for local authorities that have not yet implemented the Zone Framework Standard of the National Planning Standards, a reference to a zone means "a reference to the nearest equivalent zone". The meaning of Clause 1.4(4)(b) would be clearer if it was reworded to read "a reference to the nearest equivalent type of zone".

3 Transparent decision-making (clause 3.6)

- 3.1 Clause 3.6 proposes to place obligations on regional councils to record, in respect of decisions made under the NPS-FM, the matters considered, the decisions reached, and the reasons for those decisions. This requirement is additional to the obligations placed on regional councils when making or changing regional policy statements or plans under the Resource Management Act 1992 (**RMA**).
- 3.2 In preparing and making these regional policy statements and plans, regional councils must undertake evaluations under sections 32 and 32AA of the RMA. The decisions made under the NPS-FM will already be reflected in these regional policy statements and plans, and so it would be appropriate to require regional councils to record those decisions, with reasons, in their section 32 and 32AA evaluations.

¹ More information regarding this Committee is available on the Law Society's website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/environmental-law-committee/>.

3.3 The Law Society therefore recommends amending clause 3.6 by inserting the following new subclause (2A):

- (2A) When decisions made under this National Policy Statement are to be implemented in regional policy statements or plans, the regional council must include the matters set out in subclause (2) in its evaluations made under section 32 and section 32AA of the Act.

4 Definition of “natural wetland” (clause 3.21)

4.1 Clause 3.21 provides a definition of the term “natural wetland”. This definition excludes wetlands that meet the following criteria (set out in subclause (d)):

- (a) The wetland is within an area of pasture (subclause (d)(i));
- (b) The wetland has “ground cover comprising more than 50% exotic pasture species (as identified in the National List of Exotic Pasture Species)” (subclause (d)(ii)); and
- (c) The wetland is “not known to contain threatened species” (subclause (d)(ii)).

4.2 Assessments will be required to establish the nature and extent of ground cover under proposed subclause (d)(ii), and the absence of threatened species under subclause (d)(iii). In neither case is any assessment methodology prescribed. This omission is undesirable, and could lead to inconsistencies in assessments and outcomes.

4.3 The Law Society therefore recommends prescribing mandatory assessment protocols, and including cross-references to these protocols in the definition of “natural wetland”.

5 Definition of “aquatic compensation” (clause 3.21)

5.1 The definition of aquatic compensation in clause 3.21(2) is to be amended by introducing the word “measurable” before “conservation outcome”.

5.2 The use of the term “measurable” aligns the definition of “aquatic compensation” with the definition of “aquatic offset”,² and suggests there must be a quantifiable measurement of a conservation outcome. However, we note that there may be other valid non-quantitative forms of assessment.³ It is therefore desirable to clarify, in relation to the definitions of “aquatic compensation” and “aquatic offsets”, whether “measurable” includes non-quantitative forms of assessment.

6 Principles for aquatic offsetting and aquatic compensation (appendices 6 and 7)

6.1 Appendices 6 and 7 use some similar, but uncertain terms. This is particularly the case for clause 2 in both appendices 6 and 7, which determine when aquatic offsetting and aquatic compensation are not available. We recommend defining critical words and phrases used in these appendices, including the terms “irreplaceability” and “vulnerability” in clauses 2(a).

6.2 We also note that the phrase “no technically feasible options” in clause 2(c) of both appendices appears to omit cost as a consideration. We invite officials to consider whether cost should be recognised as a relevant consideration (noting that cost is a material

² Clause 3.21(2) of the NPS-FM.

³ For example, the term “attribute” is defined in clause 1.4(1) of the NPS-FM to mean a “measurable characteristic (numeric, narrative, or both)”.

consideration in determining whether an option is “reasonably practicable” under section 32 of the RMA).

- 6.3 The phrase “like-for-like” in clause 3 of appendix 6 is ambiguous. On the face of it, it suggests that biodiversity value or type be replicated in exactly the same manner and configuration. For example, if a stream bed with a rocky cascade, inhabited by frog species, is reclaimed, then the offset must also comprise a rocky cascade, and not an equivalent habitat just as attractive, or even more attractive to that frog species. Clarification of the concept of “like-for-like” is required.
- 6.4 Clause 3 of Appendix 6 requires a “quantitative loss/gain calculation”. This is difficult to establish at the consenting or plan change stage of a project due to practical difficulties in collecting adequate information, and problems in constructing reliable models to predict outcomes. Experience suggests this is often a hurdle which cannot be surmounted. It would be preferable to adopt a more practical approach, whereby the “no net loss/net gain” outcome can be demonstrated other than by a quantitative calculation. We recommend amending clause 3 to state:
- “The proposal demonstrates that the offset will achieve no net loss and preferably a net gain in indigenous biodiversity, as measured by type, amount and condition, both at the impact and offset sites.”
- 6.5 Lastly, we note that there is a typographical error in clause 8 of appendix 6, which states “... *the calculated gains are achieved within the consent period consent period...*”. The second reference to “consent period” should be deleted.

7 Next steps

- 7.1 We would be happy to discuss this feedback further, if that would be helpful. Please feel free to contact me via the Law Society’s Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Nāku noa, nā



Frazer Barton
Vice-President