

THE LONG WADE HOME

Changing the Freshwater Management Framework



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Freshwater management is a 'long game' project. Even when uninfluenced by human activities and consumption, nature dictates the rate at which water is filtered through subterranean systems, and depleted water bodies recharged. Each drop has a long wade home through the cycle back to where it began.

Freshwater advocates for swimmable rivers seek aspirational targets, on the basis that lenient transition periods will cause irreparable cumulative damage. Industry groups and councils can focus closely on the present day bottom line, to the detriment of future generations and the lag in effects of pollution and overconsumption on the environment. The balance is a careful one, and one which deserves New Zealand's attention and input.

The Government has released the next phase of its freshwater management 'long game', in the form of a consultation document entitled *Next Steps for Freshwater*. The document is another step in a process which began in earnest with the creation of the Land and Water Forum in 2009. This article provides an overview of the discussion document and some of the key questions posed in that document. We then move on to discuss a recent commissioners' decision on the Land and Water Plan for Canterbury – another matter (at least in terms of the Plan itself) that has been a fairly long time in the making.

FRESHWATER CONSULTATION; NEXT STEPS

In February, the Minister for the Environment, Hon Dr Nick Smith, and the Minister for Primary Industries, Hon Nathan Guy, jointly produced a consultation document called *Next Steps for Freshwater*. The document sets out the Government's proposed next steps toward improving freshwater management in New Zealand, and seeks feedback on its proposals.

The document recognises that pressure on freshwater systems, from land use changes and population growth, is becoming increasingly

evident. The sources of this pressure vary. Pollution from diffuse sources includes agricultural land use, urban sewerage plants and pipes, and increased run-off from impermeable roofs and roads. Consumptive water takes have also increased due to factors such as irrigation and denser urban populations.

In some places, water take limits are met or exceeded and water quality is declining. These matters together not only limit the availability of water both for industry and community consumptive uses, but also threaten Te Mana o te Wai – the ability of water to sustain life and biodiversity and in turn to meet our recreational and cultural needs.

The document seeks a more sophisticated approach to water quality aspirations, accounting for natural fluctuations in water quality (such as those arising from high rainfall events), as well as the time, costs and impacts of making changes toward improved water quality on communities, councils, iwi and businesses. The document seeks to spread costs evenly over sectors and generations.

The key proposals are as follows:

- Amend the National Policy Statement for Freshwater Management 2014 (NPSFM) to improve direction on:
 - Exceptions to national bottom lines for catchments with significant infrastructure;
 - Using the Macroinvertebrate Community Index as a mandatory monitoring method;
 - Applying water quality attributes to the intermittent closing and opening of lakes and lagoons;
 - What it means to 'maintain or improve overall water quality'.
- Exclude stock from water bodies through regulation.
- Require more efficient economic use of freshwater and good management practice.
- Strengthen Te Mana o te Wai as the underpinning platform for community discussions on fresh water.
- Improve iwi/hapu participation in freshwater governance and management.
- Better integrate water conservation orders (WCOs) with regional water planning and allow for increased iwi participation and decision-making on WCOs.
- Set up the 'Next Steps for Freshwater Improvement Fund'.

We comment on a few of these in more detail below.

MAINTAIN OR IMPROVE OVERALL WATER QUALITY

The matter of what Objective A2's aspiration to 'maintain or improve overall water quality' actually means has been exercising minds in the legal world since 2014, including cases which we have discussed in previous articles. In recognition of the lack of clarity on the meaning of the objective, Next Steps seeks to clarify two matters of concern.

Firstly, that the 'overall' relates to a freshwater management unit (FMU), not a region or the whole nation. Secondly, that fluctuation of an FMU within an attribute band fulfils the requirement to 'maintain'.

In the past, councils have looked to specific numerical values rather than the applicable attribute band in measuring whether water quality had declined. This proposal clarifies the Government's intended geographical scope of the 'maintain or improve' objective, and the purpose of attribute bands. It is noted however that cross-boundary issues (such as the approach to water bodies that extend beyond regional boundaries) are not as yet addressed.

IWI RIGHTS AND INTERESTS IN FRESHWATER

A significant portion of the consultation document relates to assessing iwi rights and interests in fresh water. The proposals include:

- Including a purpose statement in the NPSFM to provide 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;
- Requiring regional councils to reflect Te Mana o Te Wai in their implementation of the NPSFM;
- Amending the RMA to establish provisions for a new form of rohe (region or catchment) based agreement between iwi and councils for natural resource management, called a 'mana whakahono a rohe' agreement. The agreement would set out how iwi and councils are to work together in relation to all natural resource related matters. Essentially this is a potential alternative to the iwi participation agreements proposed in the Resource Legislation Amendment Bill 2015; and
- Amending the RMA to require WCOs to more fulsomely address iwi concerns.

STOCK EXCLUSION

This proposes a national regulation to exclude dairy cattle on milking platforms from waterbodies by 1 July 2017, and other stock types at later dates. Exclusion must occur on dairy support land owned by dairy farmers by 2020, but land grazed by third parties has an extra five years to 2025. This proposal is echoed in the Resource Legislation Amendment Bill 2015, and so may see the light of day sooner than other proposals.

FRESHWATER IMPROVEMENT FUND

The Freshwater Improvement Fund takes the \$100 million over 10 years (2014-2024) committed by the Government to buy and retire riparian margins of farmland to create environmental buffers for waterways, and broadens the focus of the funding.

The new fund focuses on supporting projects which will help water users' move to managing use within water quality and quantity limits to deliver clear environmental benefits. For example, the economic benefits of irrigation projects will not be funded, but where irrigation schemes are designed to provide significant environmental benefits, they may receive funding to support the positive environmental outcomes.

The proposal sets 10 criteria for funding. The environmental focus of the funding is clear in one of the criteria particularly – that "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".

CROWN IRRIGATION INVESTMENTS LIMITED

The Freshwater Improvement Fund is complemented by government funding to Crown Irrigation Investments Limited, which has a mandate and \$400 million equity funding to invest in irrigation schemes which are environmentally sustainable and will provide economic benefits to New Zealand.

HAVE YOUR SAY

As *Next Steps* is a consultation document, the Government is seeking responses from all interested parties. Appendix 2 of the document is a set of 18 questions which relate to the decision at the heart of each proposal, and can be seen as a guide for submissions on the proposals. Submissions are due by 5pm Friday 22 April 2016, and can be made at www.mfe.govt.nz/consultation/next-steps-fresh-water.

RECENT CASES

REPORT AND RECOMMENDATIONS OF THE HEARING COMMISSIONERS, PROPOSED PLAN CHANGE 2 TO THE CANTERBURY LAND AND WATER REGIONAL PLAN

On 4 February 2016, Environment Canterbury announced that it was accepting the recommendations of the independent commissioners on Plan Change 2 (PC2) to the Canterbury Land and Water Regional Plan (LWRP), and published its decision online.

PC2 applies to the catchment of the Hinds River and the plains between the Rangitata and Ashburton Rivers. It is an area of 1380km², and is in the Ashburton District.

We do not attempt to summarise PC2 in its entirety here, but encourage you to read the decision if you are interested.

Here we discuss some legal determinations made in the decision which will be of relevance to future plan changes, including other Environment Canterbury Plan Changes which are progressing through the hearing process.

[National Policy Statement for Freshwater Management 2014](#)

PC2 was prepared before the NPSFM 2014 came into effect, but was notified after it came into effect. The commissioners considered the 2014 NPSFM to the extent that submissions had focused on that version, but noted that PC2 did not give complete effect to the 2014 NPSFM, and the council would need to review the LWRP in accordance with its staged implementation plan, prepared under Policy E1 of the 2014 NPSFM.

[Part 2 of the Resource Management Act 1991](#)

Following the decision of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Company* [2014] NZSC 38, the panel made its decisions on PC2 in the context of the applicable superior planning documents (such as the Regional Policy Statement and the NPSFM), but without making direct reference to the purposive sections of Part 2, RMA. This is likely to be the manner in which plan changes are decided from now and is the process recommended by the Environment Court in the recent *Appealing Wanaka* case.¹

'Overs and unders' in water management

Much like the question posed in the consultation document discussed above, the panel considered whether Objective A2 of the NPSFM allowed a council to manage 'overall water quality' on a regional basis, permitting water quality to drop in some catchments, so long as it was improved elsewhere. The panel reviewed two recent decisions of the Environment Court (Ngati Kahungunu and Puke Coal) and one recent decision of the High Court (on the Tukituki plan change).

Interestingly, the panel did not strictly follow the decision of the Environment Court in Ngati Kahungunu, which had stated that the 'unders and overs' approach was "fatally flawed".

The panel considered that, given the wording had not changed between the 2011 and 2014 versions of the NPSFM, and given the 'pragmatic' approach taken by the Environment Court in Puke Coal, there was no inherent conflict between providing for further land use intensification while still giving effect to Objective A2 of the NPSFM.

Prohibited Activity Status for Water Transfers

Some submitters argued that it was legally impermissible to assign a prohibited activity status to the transfer of water permits.

The panel concluded that as the transfer of water permits is to be treated like an application for resource consent, then assigning one of

the full range of activity statuses permissible for resource consents, including prohibited, was appropriate and permissible.

The transfer of water permits (both surface water and groundwater) within the over-allocated 'Valletta Groundwater Allocation Zone' is prohibited under PC2 while limits are not being met.

Economic Viability Considerations

Interestingly, the panel held that there is a distinction between physical viability of rules and economic viability of rules:

[296] We can accept that a rule constraining farming activity that is physically incapable of being obeyed might well be ineffective and should be revised. But a constraint that is physically capable of being complied with, though at an economic cost that may contribute to imperilling the viability or profitability of the business, is not similarly open to challenge.

Appeals

Three appeals have been filed in the High Court against the PC2 decision, by Barrhill Chertsey Irrigation Limited (2 March 2016), Combined Canterbury Provinces Federated Farmers (4 March 2016), and Rangitata Diversion Race Management (3 March 2016). **WNZ**

¹ *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139 at paragraphs [53] and [54].