

Land and Water Forum Commentary on the Ministry for the Environment's 'National Policy Statement for Freshwater Management Implementation Review'

9 June 2017

Introduction

1. The Ministers for the Environment and for Primary Industries, Hon Dr Nick Smith and Hon Nathan Guy, have asked the Land and Water Forum to comment on the 'National Policy Statement for Freshwater Management Implementation Review' by the Ministry for the Environment (MfE). This comprises a 'National Themes Report' and a 'Regional Overview' on each regional council.
2. The Forum's comments need to be seen in the context of its own report on implementation, and the expectation created by the preamble of the National Policy Statement for Freshwater Management (NPS-FM) that the Minister would seek "an independent review of the implementation and effectiveness of this national policy statement in achieving all of its objectives and policies and in achieving the purpose of the Act, no later than 1 July 2016."
3. This commentary is based around the 'National Themes Report', and a thematic assessment of the associated draft 'regional overview' reports MfE has prepared on each regional council.¹ These have not yet been finalised, but some discussion on them is useful.

Summary

4. MfE's review complements the Forum's review of the NPS-FM. There are several areas where the views of the MfE report and the Forum align. There are also differences of emphasis. Our main points about the MfE review are:
 - The national themes report is strongest in commenting on the way that councils are undertaking plan development through community and iwi engagement, and the way that territorial authorities are responding (or not) to the NPS-FM. It provides a range of useful observations about implementation issues, and some 'where to next' suggestions.
 - The national themes report notes (and the Forum agrees) that it is unacceptable for regional councils to wait until the dust settles for further regulations to be passed, or further information gathered – they must implement the NPS-FM now.
 - Many councils are not addressing urban water quality as a priority, instead prioritising rural catchments (even where councils include major urban areas). This is problematic, as while they are comparatively small, urban areas have some of the poorest water quality.

¹ References to regional councils also include unitary authorities.

- The review echoes the Forum's concerns about the different methodologies and interpretations being used to set limits in plans. National consistency on methodology would be beneficial, and it is crucial for the government to further develop the data, tools, models and accounting systems needed to set water quality limits.
- The national themes report discusses the distortion of regional priorities caused by including only some important water quality attributes in Appendix 2 of the NPS-FM - in particular that this deflects resources away from priorities for some catchments where sediment is a significant issue, and towards nutrients.
- The Forum agrees that there must at the outset of any collaborative process be transparency about the role of any collaborative group, how the council proposes to deal with its recommendations, the role of council staff, and how decisions will be translated into a planning document.
- The review does not address the effectiveness of the NPS-FM and whether there any problems with the NPS-FM itself that might cause implementation difficulties.
- Neither the national themes report nor the regional overviews provide a systematic analysis of how councils are addressing each of the NPS-FM's policy and objectives.
- The report should also have discussed how plan provisions and non-regulatory measures are being integrated to achieve policies and objectives, and how council on-ground implementation is progressing.
- The national themes report underplays the importance of central government support and direction. The thrust of the report indicates that government support and direction are broadly on track, whereas the Forum has stated that greater central government leadership is essential and that support must be more thorough, usable and timely.
- Finally, the national themes report does not provide an overall assessment of whether the sets of activities being carried out to implement the NPS-FM are 'on track' to meet the intention of the NPS-FM as expressed in its objectives, and what the critical issues are that might prevent that occurring. We note that the Ministry's review is not the type of independent review of implementation and effectiveness referred to in the preamble to the NPS-FM. There would have been value in such a review along these lines.

MfE's report is not an Independent Review

5. The Forum does not think that the MfE report is the independent review mentioned in the preamble to the NPS-FM. In his conversations with the Forum, the Minister has indicated that he shares this view. MfE is the key provider of policy advice to the Ministry on the NPS-FM, and the Government's key agency for involvement in implementation, including working with regional councils - it is not independent. The two references to the independent review in the Overview and Methodology parts of the MfE report are therefore misleading, as they clearly infer that this review is in some way the independent review.

6. The Forum still believes that an independent review is needed. While in many respects we are at an early stage in changing freshwater management in New Zealand, getting the foundations right is important. An independent review would be able to 'test the water' of progress in regional freshwater planning, including reviewing the role of central government, assessing what is working well and where improvements might be needed, and providing a systematic review of the way that the fundamentals of better water management under the NPS-FM are being developed.
7. Such a review should be genuinely independent and should include comment of the Ministry and government policy where appropriate. Independence on the part of the reviewer also frees them from the need to maintain good relationships with the actors under review. In order to do its work effectively, MfE depends on having good relationships with councils. At a minimum this creates a perception that it may not be able to be free and frank.

Discussion of the review's findings

8. Even though it is not an independent review, the report provides a wide range of useful observations about NPS-FM implementation – this material would be helpful for informing an independent review. The report's main focus and its strongest part, is the ways that councils are engaging with stakeholders, iwi and communities during their freshwater planning. We have used the report's main headings as a focus for our comments.

NPS-FM implementation progress

9. The report usefully discusses the progress made by regional councils in developing plans that implement the NPS-FM. Those that have made the most progress are Horizons, Otago, Canterbury and Waikato. Those that have made relatively less progress have been hampered by: a focus on housing affordability (Auckland), their cautious approach designed to avoid litigation because of future NPS-FM changes (Taranaki) and the gathering of scientific and technical data (Southland). In the case of Auckland, it is necessary for central government to clarify how its economic, environmental and social goals align – in particular how NPS-FM implementation can be expedited while addressing housing challenges and a rapidly growing population.
10. The report notes (and the Forum agrees) that it is unacceptable for regional councils to wait until the dust settles for further regulations to be passed, or further information gathered – they must implement the NPS-FM now. The reluctance by some councils to start now has implications – for example, problems may become larger and future adjustment steps might need to be more drastic. The Forum has suggested that Government could help overcome this reluctance by adopting a more regular, predictable and transparent process for NPS-FM updates and moving away from the more ad hoc way it is done now.
11. MfE reports that most councils have chosen their most challenging catchments to work in first. The exception is Southland, which has prioritised less complicated ones while they compile the necessary data, and learn from the other processes, so they are in a better position to tackle the harder catchments later. Many councils are not addressing urban water quality as a priority,

instead prioritising rural catchments (even where councils include major urban areas). This is problematic, as while they are comparatively small, waterbodies in urban areas have some of the poorest water quality, and can influence water quality in coastal areas and in other parts of catchments.

12. Reasons given to MfE for this lack of emphasis are that there are competing priorities, such as urban development, and technical challenges in implementing limits in an urban environment. The Forum agrees that managing urban water quality is hard and needs further work, including clarifying where the NPS-FM requirements sit in relation to the promotion of urban development, and doing more work on practical tools for addressing urban water quality. As with water management in rural areas, this is likely to be from a mix of tighter controls on (stormwater and wastewater) discharges, an enhanced focus on the quality of infrastructure over time, better practice (urban GMP, including building on the measures in the Auckland Unitary Plan), using economic instruments where appropriate, and adopting different land use practices (for example, water sensitive urban design). Greater leadership and guidance by MfE in this area is needed.
13. The review notes that councils are setting Freshwater Management Units (FMUs) of various sizes and from different perspectives. MfE considers that differences in approach are appropriate given the differences in physical environment and pressures from region to region. The Forum notes that FMU size has important implications for how the requirement to 'maintain or improve' overall water quality is applied – bigger FMUs allow more flexibility, and can be used to 'game' the system. In its submission on the Clean Water consultation document, the Forum makes some recommendations on how communities should draw up FMUs and manage the 'overs and unders' issue thrown up by 'maintain or improve' within them.

Achieving the objectives of the NPS-FM

14. The report notes that councils are finding it more difficult to set water quality limits than water quantity limits - because the latter is seen as more of a technical exercise and the former more values driven. The Forum is not entirely convinced by this line of reasoning. Water quality is also influenced by water quantity considerations (quantum, flow regimes etc.). Setting limits for contaminants is arguably more technical, but the data, tools, models and accounting systems are not as well developed yet. This is why it is crucial for the government to act quickly to further develop these essential components – some key steps are outlined in the 'knowledge' section of the Forum's commentary on implementation of the NPS-FM.
15. Water quantity limits and minimum flows/levels have been set for most of the country, but council assessments indicate over-allocation is relatively widespread, due to initial allocation being based on faulty assumptions and a lack of technical information. This again reinforces the importance of good quality data, science and models. The report further notes that most councils are reluctant to review consents to claw back over-allocation due to a perceived legal risk. The government must address this problem in order to effectively tackle over-allocation.
16. The report also mentions additional water storage as a way of addressing over-allocation, but notes that: there are significant regulatory and legal requirements; that it is challenging to get

irrigator uptake and funding; that the projects are controversial due to potential environmental risks; and there is a perceived conflict of interest as regional councils are acting as environmental regulators and regional development agencies. The review does not analyse these issues. Now that these issues have been identified, they must be addressed.

17. When it comes to water quality limits, MfE's report echoes the Forum's concerns about the different methodologies and interpretations being used to set limits in plans. Problems with using OVERSEER in regulation are also discussed – it notes that the Taranaki Regional Council is unwilling to use it as it does not think it will be defensible in court. In areas where nitrogen load limits have been proposed councils have differed in their initial allocation methods. They are also finding it difficult to allocate between new and existing users. While it is possible that different methods may be better suited to different situations, it is likely that some sort of national consistency on aspects of allocation methodology would be beneficial. MfE suggests that region-wide default limits may be appropriate, but in the Forum's view spatial variability makes this difficult and potentially inefficient. Improving the approach to nitrogen load limits taken in plans requires: gathering more data and developing an approach toward attenuation; resolving iwi rights and interests issues; and developing a national framework to help with negotiating the equity trade-offs within catchments.
18. The distortion of regional priorities caused by including only some important water quality attributes in Appendix 2 of the NPS-FM is raised - in particular that this deflects resources away from priorities for some catchments like sediment, and towards nutrients. This is an issue that the Forum's commentary addresses through suggesting that in the short-term government direct MfE to work with councils to ensure appropriate objectives for sediment, copper and zinc are set in regional plans where relevant in an FMU. In the longer-term, MfE should expedite its work on developing attributes for these contaminants. National regulation of vehicle brake pads and building materials must also be considered as a way of dealing with these contaminants at source.

Community engagement and collaboration

19. The report notes that councils have undertaken, or are planning to undertake, some form of collaboration or enhanced consultation process. This is important – getting community understanding of water management challenges and timeframes, and involving land users in implementation methods, are critical elements of water planning and implementation. The report also notes the different approaches councils have taken to collaboration.
20. The speed of collaborative groups tends to be limited by the members with the least knowledge, and new entrants don't get up to speed quickly enough. This points to the importance of induction, training and resourcing of all collaborative participants to ensure a good outcome – the Forum's commentary makes some helpful suggestions here. MfE's report also states that some view membership in a collaborative group as a second, unpaid, full-time job, and suggest that unpaid collaborative group members should be reimbursed.
21. Both MfE and the Forum have noted the importance of keeping the wider community informed about the goings-on in the collaborative process. MfE suggests that central and local

government should work together to develop a formal system for collaborative groups to use for this. Some collaborative groups and individuals do a better job of keeping their communities informed – so at a minimum sharing some examples of approaches that work well would be of benefit.

22. The importance of background scientific research is also noted – the Forum has suggested that a standardised list of basic freshwater information needs is published, so councils can compile all this work before collaborative groups or other planning processes get underway. The report also notes that councils tend to want to wait for the resolution of treaty settlement processes before embarking on freshwater planning – this is something else for the Government to address.
23. Some groups feel that the RMA Schedule 1 process hinders full engagement of some members, who prefer to use the subsequent hearings process to further their interests and aspirations. Falling back on litigation can undermine the collaborative process, as the group's consensus can be unpicked. The Forum does not think that the final shape of the collaborative planning track in the Resource Legislation Amendment Act 2017 will resolve this issue.

Engaging with iwi and hapū

24. The report makes some good observations about councils' engagement with iwi and hapū. The involvement of iwi and hapū, the identification of tangata whenua values, and the incorporation of Mātauranga Māori are important aspects of freshwater planning and management.
25. The report notes the difficulties the wider community has in understanding iwi/hapū rights and interests. It also states that councils have a wide variety of ways of engaging with iwi, and, while acknowledging that a region-by-region approach is necessary, helpfully suggests some of the factors that led to better engagement. The report canvasses a variety of 'co-governance' or 'co-management' models that have been put in place.
26. The report notes dissatisfaction expressed about the performance of four councils over engagement with iwi/hapū, and the challenges that iwi and hapū (and councils) face in resourcing effective input into the planning process. The report states council views that the difficulties in identifying and reflecting some cultural values in plans is due to the intangibility of these concepts. These difficulties speak to the need to develop some basic guidance material to assist non-Māori to engage on these issues. It also possibly reflects in some councils a lack of capability to engage with Māori, despite it being a core RMA expectation. MfE further suggests that formal relationship agreements should be developed between councils and iwi/hapū.

Engaging with territorial authorities

27. The report notes the importance of regional and territorial authorities working together to manage fresh water – because territorial authorities are major water users and have a significant role in freshwater management in a region. The quality of the relationships between regional and territorial authorities varies around the country and some territorial authorities have been slow to understand what is required of them. The Forum shares the concern expressed by MfE over this given the relationships between urban design and planning, infrastructure provision,

and freshwater planning. There could have been greater comment on the way that territorial authorities' infrastructure investment decisions are driven by the Local Government Act, with less emphasis on the Resource Management Act and the NPS-FM.

28. The perception of rural stakeholders – being frustrated that cities aren't 'pulling their weight' – is noted, as are the problems smaller territorial authorities face with limited resources and small rating bases. MfE suggests that work be done on improving urban communities' understanding of their impact on water quality. The Forum agrees with this. It also believes that a more active role by central government is needed to help work through the infrastructure funding issues faced by smaller territorial authorities.

Decision making

29. The report discusses the related issues of how councils make decisions following a collaborative group process, and how collaborative processes are influenced by appeal processes. The Forum agrees that there must at the outset of any collaborative process be transparency about the role of any collaborative group, how the council proposes to deal with its recommendations, the role of council staff, and how decisions will be translated into a planning document.
30. While the report also supports more agile planning by councils it does not respond to councils' concerns that the RMA does not allow a more agile process. The Forum has previously made recommendations on the need for greater planning agility, and proposed how this might happen under a collaborative process. This recommendation has not been advanced by the government.

Capacity and capability for freshwater planning

31. The report notes the challenges faced by councils, stakeholders and communities in resourcing the implementation of the NPS-FM. This resourcing covers a range of areas – monitoring, science and other knowledge acquisition (e.g. Te Ao Māori, farm systems, economic impact analysis), regional council staff facilitation and technical skills, and the time and other costs faced by stakeholders and community representatives in collaborative and enhanced consultative processes.
32. There is nationally a lack of freshwater scientists, modellers and economists and councils must compete for the same small pool of experts. This makes it difficult for smaller, poorer councils to attract the needed expertise. This issue highlights the importance of getting as much of the framework for models and science decided at a national level to save councils from having to do all this work themselves. Measures to share information and approaches between councils will also aid here, and the Forum has made some suggestions on how to do this, including by consolidating and rationalising the various freshwater web portals.
33. The Forum has also suggested that there needs to be greater central government facilitation and coordination to make better use of the capacity that exists.

Information

34. Successful implementation of the NPS-FM requires better information, whether scientific, economic, social or cultural. For many councils, the NPS-FM means they have had to improve the quality of their water management information. The report makes some observations about areas where further work is needed, including in respect of Mātauranga Māori, economic analysis, and councils being clear about the level of information that might be needed for decisions to be made.
35. The Government should address the important data, information and modelling priorities by developing a national catchment accounting framework and finalising and implementing the draft Water Information Strategy (WIS). Ensuring existing information is more freely available and accessible – including by consolidating and rationalising freshwater information portals – must also be progressed.

Plan implementation

36. The report comments on some of the implementation challenges facing councils and communities, and provides some examples of successful non-regulatory improvement initiatives. Importantly, it addresses the issue of timeframes for achieving plan objectives. It comments on compliance and enforcement issues, and suggests that councils consider developing an implementation strategy to ensure that collective regulatory and non-regulatory initiatives will lead to desired freshwater outcomes.
37. The Forum thinks that this section is a little light. Councils, communities and national sector organisations are all thinking about how to respond to the challenges of better water management through the best mix of regulation, catchment initiatives and non-regulatory measures. The report does touch on this, but not to the extent necessary. Recognising that this is early days, it could still have commented on the merits of the different approaches being discussed, and the on-ground implementation that councils, sectors and communities are considering and using. The resource implications of this, and the possible response (greater coordination and prioritisation) could have been addressed, as could how and whether councils were proposing to assess the success of these initiatives during the timeframe of the plan and over the length of the plan's objectives.
38. The report discusses the importance of compliance and enforcement, notes the huge increase in resources needed and notes the problems councils face in being responsible for both compliance enforcement and working cooperatively with landowners. This is an issue faced by all regulators, and accentuates the need for good quality regulation, and a compliance framework that focuses resources on the right groups in the right way. The review does not go into detail about the different compliance approaches being used by councils.
39. The Forum has suggested that the government look at measures to improve the resourcing, capacity and capability of the extension system to assist with 'on the ground' implementation of both regulatory and non-regulatory initiatives.

40. The report should also have discussed the benefits of an implementation strategy at a national as well as a regional level – as recommended by the Forum.

Government direction and support

41. These sections set out the steps that the Government through MfE's Water Directorate has taken to support NPS-FM implementation. The thrust of the report suggests that government direction and support is on track.

42. This is the review's most significant departure from the views of the Forum. The Forum's commentary on NPS-FM implementation sets out that the Forum is concerned at the lack of leadership being displayed by central government in improving water management. This lack of leadership is reflected in several ways and implies the need for a much more transparent and active role by the Ministry in directing, coordinating and facilitating progress within a clear, logical and detailed implementation strategy.

Comments on the regional overviews

43. The regional overviews have not yet been finalised, so this commentary does not address each of them individually. We do however provide these general comments on their structure, content and presentation. This is done as the performance of regional councils in implementing the NPS-FM is crucial.

44. The regional overviews, when complete, will provide information on:

- The current state of major freshwater resources
- The regional freshwater management context
- Each council's approach to implementing the NPS-FM
- Whether each council is achieving the objectives of the NPS-FM
- Community and iwi/hapū engagement
- Capacity and capability
- Information
- Plan implementation
- Conclusions and recommendations.

45. As of yet, the information on the current state of the freshwater resources is missing from the regional overviews, so the Forum cannot comment on it, except to say that we think that this information is very valuable and we endorse its inclusion.

46. Across all the topics in the regional overviews, we think the information and its presentation are too discursive rather than objective, analytical and evaluative. This is discussed further below.

What the review should have done better

47. The review makes some useful points in a number of areas. It does however fall short in some key respects. The Forum expected that the review would have addressed a wider range of issues, and in more depth. We would have expected a full review of NPS-FM implementation to have at least covered:
- the current state of fresh water in each region (this may be included in the regional chapters when they are finalised)
 - how each council is reflecting or proposing to reflect each of the objectives and policies of the NPS-FM in its plans, including the way that they address the national values
 - how councils are going about the task of involving communities in freshwater management planning and implementation
 - how each council is implementing or proposing to implement the objectives and policies in their plans 'on the ground'
 - the (likely) impact of each council's policies on the NPS-FM's objectives and values
 - whether any problems in the requirements or text of the NPS-FM have been identified that make the job more difficult for councils and stakeholders, or constrain the ability of councils to manage fresh water optimally
 - whether the direction and assistance from government agencies and the Minister has been adequate to support NPS-FM implementation
 - some comment about the place of the NPS-FM and its implementation in the context of the overall water management reforms, including whether sequencing of the different elements was leading to implementation issues
 - an overall assessment about whether the sets of activities being carried out to implement the NPS-FM are 'on track' to meet the intention of the NPS-FM as expressed in its objectives, and what the critical issues are that might prevent that occurring.
48. The MfE review has a narrower scope than this, in several respects. The report does not set out whether there are issues with the clarity, drafting or framework of the NPS-FM that might lead to implementation issues. One such example is how councils are interpreting the requirement in Objective A2 that the "overall quality of fresh water in a region is maintained or improved". While the Government is consulting on a variation to this Objective, councils, sector groups, iwi and communities have to implement the NPS-FM and deal with the uncertainty around it. Other examples include defining 'outstanding freshwater bodies', and the reasons behind the different treatment of over-allocation in Objectives A2c and B2.
49. Uncertainty can lead not only to legal risks (the courts will be asked to settle them), but they can create delays and uncertainty in community processes, lead to implementation risks, and increase compliance costs.
50. Neither does the MfE report address the likely impact of the policies and plans that councils are developing. This is perhaps understandable given the early stage many councils are in with their

freshwater management planning, but several councils (Canterbury, Horizons, Waikato) have either completed or notified plans, or stated that their previous plan is mostly in line with the NPS-FM. Some sort of analysis of the overall adequacy of plans in meeting the objectives of the NPS-FM would have been useful. The regional overviews do contain discussions of each council's approach to implementing the NPS-FM. Although these provide useful information, they do not do so in a systematic way. The sections in the regional overviews on achieving the objectives of the NPS-FM usually have subheadings for FMUs, limit-setting, and allocation (and sometimes other topics), but these headings are inconsistent between the regional reports. Ideally there would have been a more granular look - policy by policy - in each region, which would allow some comparisons between regions and evaluations of progress to be made.

51. The scope of the review only partially discusses the way timing and sequencing of NPS-FM implementation has been affected by the timing and sequencing of government policy development. There is some discussion on the implications of the timing of guidance and NOF development, but this is the exception. There is no discussion about the implications of having no stated policy, for example for allocation and the role of industry Good Management Practice, and how a lack of government policy in these areas is affecting both plans and land users.
52. Despite references to the independent review envisaged in the preamble to the NPS-FM, the review does not discuss outcomes. It does not try to assess the effectiveness of the NPS-FM, nor does it try to assess whether the range of activity, plans and non-regulatory activity being carried out will lead to NPS-FM objectives being achieved in an efficient way. While it is early in the piece, it would have been useful to make some form of overall assessment. Most, but not all, of the regional overviews have a section on plan implementation. It would have been useful to link the policies and objectives of the NPS-FM to the content of the plan and then link that to implementation activity on the ground in a way that allowed the totality of implementation to be evaluated and comparisons between councils made, but this has not been done.
53. Even within the scope of what the review was intending, the Forum would have expected it to be more systematic and analytical. The review does not:
 - provide a 'nuts and bolts' analysis through a systematic look at whether and how operative plans, notified plans, council statements, or community engagement processes address or propose to address each policy and objective of the NPS-FM. The report's methodology set out in page 13 indicates that a detailed questionnaire was sent to each council. Among other things, the questionnaire asked how each Objective and Policy was being implemented, but analysis of that questionnaire does not obviously appear in either the national themes report or the draft regional overviews. Even for those NPS-FM policies that are transitional in nature (A4 and B7) there is no systematic assessment of the effectiveness with which each council has reflected them in their regional plans, or the way they have been implemented 'on the ground'
 - systematically identify the information needs and information gaps specific to each region, or evaluate the quality of information used in their freshwater planning
 - analyse the different approaches being taken by councils to set limits, consider which approach might be best, and set out the benefits or otherwise of more national consistency

- provide an evaluation of significant issues – for example, the report does not address how councils are dealing with their obligations to protect the significant values of outstanding freshwater bodies and wetlands.
54. The review bases its findings largely on research and interviews carried out during 2016. This means that not all recent events (for example the Environment Court's decision on the Horizons' One Plan) have been incorporated.
55. The regional overviews discuss the ways councils have engaged with communities, iwi, and hapū and canvas the views of various parts of the community on the quality and extent of this engagement. MfE has issued its own guidance – 'Making collaborative groups work' – against which an evaluation could have taken place. An evaluation of the different approaches would have been helpful as it could have informed how councils engage in the future – i.e. by discussing the merits and problems of different approaches, and indicating councils should 'do this, not that'.
56. The capacity and capability sections in the regional overviews discuss the specific capability and capacity challenges and the views of council and stakeholders as to capacity and capability. Comparisons between councils' capability and capacity cannot easily be drawn using these reports, nor would it be easy to use this information to target extra central government resources.
57. The conclusion and recommendations sections in the regional overviews provide some comments from officials on the approach to implementation in the regions. These take the form of observations and suggestions for improvement. They are useful, but not systematic and are not easily comparable across regions.
58. One other point is important. The review does not sufficiently address the way that councils are handling the transition - addressing issues of concern/over-allocation in the period between the promulgation of the NPS-FM and the production of plans giving effect to it. There is some concern that water quality deterioration might be occurring in this transition period, making the job of reducing over-allocation harder in the future. The report does not provide an assessment of council action/proposed action and how they might 'hold the line'.