

Submission

By



to the

Ministry for the Environment

on the

**Proposed amendments to the National Policy
Statement (NPS) for Freshwater Management 2011
A discussion document**

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**PROPOSED AMENDMENTS TO THE NATIONAL POLICY STATEMENT FOR
FRESHWATER MANAGEMENT 2011 – A DISCUSSION DOCUMENT
SUBMISSION BY BUSINESSNZ¹**

1.0 INTRODUCTION

- 1.1 BusinessNZ welcomes the opportunity to comment on the proposed amendments to the National Policy Statement (NPS) for Freshwater Management 2011 (the discussion document).
- 1.2 It almost goes without saying that water plays a significant role in many sectors of the New Zealand economy. BusinessNZ is therefore concerned that policy decisions about the allocation and use of water should be soundly based, supporting the development of business and the economy while at the same time providing for the social, environmental and cultural goals of New Zealanders.
- 1.3 It is also important to ensure that the costs and benefits of specific freshwater objectives are internalised as far as practicable to produce optimal or efficient outcomes. In order for individuals and communities to make rational decisions about water use and freshwater objectives, they should ideally bear the costs (and benefits) associated with specific water use (or non-use) options.
- 1.4 The proposed amendments to the NPS are intended to ensure that in setting freshwater objectives and limits, regional councils take into account all water takes and all sources of contaminants. The proposed amendments introduce a National Objectives Framework (NOF) to support and guide the setting of freshwater objectives in regional plans which includes a choice of national values for fresh water, attributes to be managed for each of the values, and an iterative process for the setting of freshwater objectives.
- 1.5 In addition, the proposed amendments establish two compulsory national values – ecosystem health and human health (for secondary contact recreation such as boating and wading) – with national bottom lines providing the minimum level acceptable for freshwater objectives. For waterways that currently breach bottom lines, regional councils and communities will need to plan to improve quality over time; timeframes for adjustment may be long. For narrowly defined situations where bottom lines would not be met, even in the long-term, there is a framework for deciding on bottom line exceptions.
- 1.6 Any standard setting must be based on sound science, with decision-makers as informed as possible about potential economic implications. While at a conceptual level, gradually adding to a NOF would appear a logical approach to addressing local conditions (along with setting bottom lines for eco system and human health), there are many issues to be considered to ensure that outcomes are satisfactory.

¹ Background information on BusinessNZ is attached as Appendix 1.

- 1.7 BusinessNZ is pleased with the level of scientific effort directed to ensuring a credible analysis in establishing bottom lines. This, along with the effective measurement of both water takes and discharges in respect to both water quantity and quality, is fundamental to ensuring an effective and efficient future water management regime going forward, enabling water to achieve its highest-valued use.
- 1.8 Issues that BusinessNZ considers fundamental to the current reform process are outlined below. They include:
- Appropriate “bottom lines” for the National Objectives Framework (NOF)
 - Security of tenure and clear specification of water rights to encourage efficient investment
 - Compensation to users whose water rights are affected
 - The importance of retaining appeal rights

2.0 **DISCUSSION**

Appropriate “bottom lines” for the National Objectives Framework (NOF)

- 2.1 BusinessNZ applauds the discussion document for its scientific approach to defining mandatory “bottom lines” for ecosystem and human health. Clearly, the setting of bottom lines has to reflect the wider impact on economic growth of any such regime. Good economic analysis must be available where the limits set may have implications for existing and future users of water.
- 2.2 While the discussion document and accompanying analysis suggests that, by and large, most catchments currently meet proposed bottom lines for both ecosystem and human health, there will be debate as to whether such bottom lines are reasonable, given potential economic implications for some districts, as outlined in the discussion document and accompanying supporting material. It is concerning that there are *“No current nationwide economic impact studies on the costs and benefits of meeting bottom lines.”* (p.42 Proposed amendments to the National Policy Statement for Freshwater Management 2011 – section 32 evaluation).
- 2.3 The ability or inability of regions to meet bottom lines for ecosystem and human health is extremely important but of more pressing importance when setting such limits is that they should be supported by sound science.

- 2.4 BusinessNZ supports the setting of bottom lines for both ecosystem and human health – indeed they are fundamental to the provision of an effective water allocation and use regime over time – nevertheless the question remains whether New Zealanders are prepared to make the trade-offs necessary for such bottom lines to be achieved. And are there other “bottom lines” that would be more appropriate?
- 2.5 Any mechanism for addressing environmental externalities needs to be targeted appropriately to location and scale as generally a one-size-fits-all approach will not be desirable. Obviously this could involve the possibility of a cap and trade on discharge which might be appropriate at a catchment level. An appropriately designed cap and trade regime could provide a mechanism to allocate discharge rights to landowners who value them most highly, although it is accepted that there would be some establishment and implementation costs in developing a discharge cap and trade for each catchment.
- 2.6 A cap and trade regime would obviously need to reflect the costs and benefits of implementing such an approach based on a wide range of environmental and economic factors.
- 2.7 With a framework of this kind there is a strong case for initially allocating existing rights to discharge on an historical basis to ensure the value of existing investments is protected. This is consistent with grandparenting existing rights to water and also with the approach taken to allocating fisheries’ rights under the Individual Transferable Quotas (ITQs) framework adopted in the mid-1980s.
- 2.8 The discussion document states that it will necessary, in some cases, to accept that in a few areas bottom lines will not be achievable (even over the long-term) due to natural factors beyond the influence of human-induced activity (e.g. thermal activity). In other cases, it is suggested that significant time frames may be needed to take account of the adjustments necessary to bring water quality (or quantity) up to ecosystem or human health bottom lines. And it is accepted that there may be still further cases where it will be unrealistic to achieve bottom lines for ecosystem or human health, even over the long-term.
- 2.9 While BusinessNZ fundamentally agrees with the conceptual structure of a National Objectives Framework (NOF) and the reality that it may be unrealistic in some situations to even achieve bottom lines over the long term as outlined in para 2.8, the discussion paper provides no clear analysis of how such conclusions will be reached, beyond assuming the “community of interests” will arrive at some sort of a consensus position. Nor is there any analysis of the environmental and/or economic implications of continued breaches of bottom lines. Much more thinking is required as to when bottom lines may be breached, in what sort of situations and to the trade-offs which may be necessary or in some cases, desirable. Even with the best of intentions, collaborative processes do not always result in agreed outcomes, particularly where the costs and benefits of changes do not fall equally on individuals,

businesses or communities. Freshwater objectives' decisions which may have national benefits but local costs exemplify the potential difficulty of setting reasonable limits.

Security of tenure and clear specification of water rights to encourage efficient investment

- 2.10 Property rights and enforcement of same are fundamental pillars of a market economy. Without reasonable security from confiscation by the state or others, the incentive on individuals and businesses to invest and build up productive assets is severely weakened.
- 2.11 While clearly a water user does not have the right to ownership of the actual water resource, resource consents do give the user the right to take, dam or divert water. To this extent, a resource consent is a property right. Moreover, water permits are recognised and valued as rights, particularly where there is an increasing demand for water. Therefore semantics aside, water consents are water rights, as reflected in the large infrastructure investments undertaken in New Zealand - electricity generation, large scale irrigation schemes, manufacturing, processing, mining etc. In many cases the value of consents for agricultural irrigation has been capitalised into land values.
- 2.12 Clearly investors would not invest in the kind of schemes referred to if they considered their rights to future water could be jeopardised. And it is certainly the case that some investments have been delayed or simply abandoned because of uncertainty over existing and future water property rights. To secure future investment in water infrastructure, current property rights to water need to be enhanced, ensuring greater certainty of future use.
- 2.13 While under the Resource Management Act (RMA) water permits are issued to users for periods of up to 35 years (but often for much shorter periods), there is the ability of authorities to review permits and modify/change the conditions during their tenure if new information comes to hand. This to some extent creates uncertainty for users and more particularly for anyone intending to invest in long-life assets with high sunk costs.
- 2.14 While conceptually, BusinessNZ supports the adoption of a National Objectives Framework (NOF) to better reflect local community objectives, potentially, the existence of such a framework could seriously curtail the rights of existing (and future) water users to take and use water, particularly in the absence of any form of compensation for loss.
- 2.15 BusinessNZ notes that under the proposed National Objectives Framework (Policy CA1(f) – p.58), every regional council will need to consider:
 - “i. the current state of the freshwater management unit, and its anticipated future state on the basis of past and current resource use;*

- ii. *the spatial scale at which freshwater management units are defined;*
- iii. *the limits that would be required to achieve the freshwater objectives;*
- iv. *any choices between the values that the formulation of freshwater objectives and associated limits would require;*
- v. *any implications for resource users, people and communities arising from the choice of freshwater objectives and associated limits including for action, investment, ongoing management changes and any social and economic implications;*
- vi. *the timeframes required for achieving the freshwater objectives, including the ability of regional councils to set long timeframes for achieving targets; and*
- vii. *such other matters relevant and reasonably necessary to give effect to the objectives in this natural policy statement, including Objective A2” - page 59.*

2.16 While the above could be considered a safeguard against radical changes to the use or non-use of water resources, BusinessNZ considers there are considerable (and ongoing) risks to current users in respect to security over the future use of an established water right.

Compensation to users whose water rights are impacted upon

2.17 There appears to be nothing stopping new objectives being added to the NOF at any stage, jeopardising the ability of existing users to operate their businesses in an efficient manner. The complete absence of any mention of compensation for such regulatory takings is particularly concerning as is the discussion document’s emphasis on appropriate timeframes as the principal mechanism for implementing change.

2.18 The absence of any general requirement for water users to be compensated for any reduction in their allocations as a result of the proposed NOF could encourage some sections of the community to try and impose unreasonable restrictions on current (or potential water users). Those advocating tighter controls on either the amount of water used (or discharged) would know full well that they did not have to pay for any adverse impacts on users. Therefore the costs of imposing new freshwater objectives could fall on a select few with the benefits captured by a (different) select few but at little, if any, cost to themselves. Consequently, in making decisions on objectives, BusinessNZ would recommend the use of non-market valuation techniques to try and quantify the benefits and costs associated with different propositions – e.g. willingness to pay surveys and the like to reflect better what people are prepared to pay for achieving different freshwater objectives. In the absence of such analysis, there is a risk of individuals supporting more and more

objectives (or fewer and fewer as the case may be), knowing that third parties will bear the cost.

- 2.19 The possibility referred to above, reinforces the need to internalise the costs and benefits of specific freshwater objectives as much as possible to produce optimal or efficient outcomes. Individuals and companies should bear the full costs associated with their behaviour (i.e. costs should be internalised); individuals will over-consume (or demand higher standards) if they can shift costs on to third parties. In order for individuals and communities to make rational decisions about water use and freshwater objectives, they should ideally bear the costs (and benefits) associated with specific water use (or non-use) options. As currently drafted, the proposed NPS essentially provides the option of extended timeframes for achieving improved water quality, ultimately sheeting the costs home to existing users.
- 2.20 It is fundamental that regional councils, when implementing plans, should pay due regard to the impact of their decisions on current and future users, highlighting the need for merit appeals against council decisions where a decision may adversely impact on current users. This issue is discussed in more detail below.

The importance of retaining appeal rights

- 2.21 The discussion document is clearly supportive of the work of the Land and Water Forum (LWF) and in particular, of the use of more collaborative processes in determining the way forward.
- 2.22 Encouraging consensus-building is a laudable objective in developing the National Objectives Framework (NOF) but in BusinessNZ's view, it also has its dangers. The possible effects of plan changes on potential property rights and investment mean there is a need for full appeal rights against regional council decisions; appeal rights are fundamental to ensuring transparency, acting as a safety valve against inconsistent or ill-thought through plans.
- 2.23 Regional councils will be required to look at the potential impacts of decisions on existing users before making any changes but even so, BusinessNZ considers appeal rights crucial to ensuring the rights of all users are clearly understood and the economic implications examined in an impartial manner.
- 2.24 Appeal rights are even more important since a number of significant and contentious issues have not been addressed in the discussion paper but are to be considered later in the process. These include:
- *Duration of permits*
 - *Alternative tools for allocation of freshwater*
 - *Options for allocating permits on expiry*
 - *Transfer or offsetting mechanisms for water quality*
 - *Incentives for efficient water use (both for quality and quantity): for example, pricing and standards.*

- 2.25 BusinessNZ considers it would be extremely premature to restrict appeal rights without first developing a coherent response to all the above issues since these will impact on the property rights of existing and potential future water users.
- 2.26 The reasons for supporting merit appeal rights are outlined below but not necessarily listed in any order of importance.
- The prospect of scrutiny (appeals) will likely encourage primary decision-makers to make better and more careful decisions in the first place.
 - Appeal decisions can often lead to better and higher-quality outcomes given a “fresh look at the issues”.
 - Some regulators have very wide powers that leave them, in effect, the rule makers. It is simply wrong that they should act as final judge and jury on the application of their own rules.
 - The risks of excessive individual influence on decisions are reduced by the right to take a lower level decision to an outside body.
 - There is more confidence in the integrity of the law, and support for it, when there is at least one full right of appeal.
 - The parties crystallize the key issues better on their second run through a case.
 - The more elevated view of the appellate court makes it easier to extract principles of general application with decisions more likely to be stated in terms which allow people to predict how the law will work in future.
 - Appeal rights provide protection for property rights and thus create the conditions for investor confidence and economic growth.
- 2.27 These are all important issues. Inferior decisions generate uncertainty. Poor decisions force businesses into expensive second best work arounds to cope with the risk of uncertainty or arbitrary intervention. Poor precedents threaten investment and economic growth even though the costs imposed cannot be measured and their source may not be recognised. The difference between high quality predictable decisions and low quality ad hoc readings can be enormous for a small economy like New Zealand.

APPENDIX 1

BACKGROUND INFORMATION ON BUSINESSNZ

BusinessNZ is New Zealand's largest business advocacy organisation.

Through its four founding member organisations – EMA Northern, Employers' Chamber of Commerce Central (ECCC), Canterbury Employers' Chamber of Commerce (CECC), and the Otago-Southland Employers' Association (OSEA) – and 76 affiliated trade and industry associations, Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, BusinessNZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation (ILO), the International Organisation of Employers (IOE) and the Business and Industry Advisory Council (BIAC) to the Organisation for Economic Cooperation and Development.