

Technical Advice Note (25 September 2020)

Essential Freshwater – Initial thinking on impacts for consent processing

Disclaimer: This memo does not constitute legal advice and should not be relied upon as such.

Executive Summary

The National Policy Statement for Freshwater Management 2020 (NPSFM 2020) and the Resource Management (National Environmental Standards for Freshwater) 2020 (NES-F 2020) took effect on 3 September 2020. In terms of consenting this means that:

- Applications for resource consent lodged on or after 3 September 2020 must include an assessment of the relevant provisions of these documents to be received under s88 of the RMA.
- Where applications are already in process, but have not considered the new NPSFM 2020, we are likely to require this under s92 of the RMA. If additional consents are also required under the NES-F 2020, it is likely these will be requested under s91 of the RMA prior to deciding the current application.
- The significance of adverse effects for notification decisions are informed by the NPSFM 2020. Whether a proposal prioritises the health and well-being of waterbodies and freshwater ecosystems is relevant in assessing the significance of an adverse effect; and
- Decision makers must “*have regard to*”¹ the relevant provisions of the NPSFM 2020 and NES-F 2020 when making final decisions on consent applications. These need to be ‘weighed’ against other matters in s104 of the RMA, but the NPSFM 2020 carries ‘considerable weight’ and inconsistency with the hierarchy of obligations is likely to mean consent should be declined.

Introduction

On 3 September 2020, Central Government’s Essential Freshwater (Action of Healthy Waterways Package) took effect. This included new freshwater standards and regulations and supplementary amendments to the Resource Management Act 1991 (RMA). The overall objectives of Essential Freshwater are to:

- *Stop further degradation of our freshwater*
- *Start making immediate improvements so water quality improves within five years*

¹ Section 104(1) RMA

- *Reverse past damage to bring our waterways and ecosystems to a healthy state within a generation.*²

The Essential Freshwater package signals a significant change in how we deal with activities affecting freshwater. Instrumental in implementing that significant change is the fundamental concept of *Te Mana o te Waip*³ and a requirement to engage with tangata whenua to determine what Te Mana o te Wai means at a local scale. That engagement, as well as conversations with the rest of our community, will take time and ultimately will result in a formal RMA planning process to be notified prior to 31 December 2024.

In the meantime, there is a requirement to continue processing resource consents. Of the new standards and regulations, the new National Policy Statement for Freshwater Management 2020 (NPSFM 2020) and the Resource Management (National Environmental Standards for Freshwater) 2020 (NPS-F 2020) will have the greatest impact on consent processes. Central to implementing these documents is Te Mana o te Wai and the associated hierarchy of obligations.

This memo provides Environment Canterbury’s initial thinking on how these documents are likely to impact the different decision stages of the consenting process, and what is likely to be required and considered at each step. We also recognise that implementation of Essential Freshwater is a rapidly evolving space and that this initial guidance is likely to change, as we have continuing conversations with Ngāi Tahu and papatipu rūnanga and receive ongoing guidance from Central Government.

Section 88 and the NPSFM 2020 and NES-F 2020

Schedule 4 (2)(1)(g) of the RMA requires applications to include:

“an assessment of the activity against any relevant provisions of a document referred to in section 104(1)(b).”

Any application that involves freshwater in some way, whether in terms of an effect on freshwater (e.g. from a discharge, or land use) or in terms of a water permit, should therefore include an assessment against the provisions of the NPSFM 2020 and NES-F 2020. This will affect both rural and urban activities.

² Ministry for the Environment. Essential Freshwater: Overview Factsheet, September 2020. <https://www.mfe.govt.nz/publications/fresh-water/essential-freshwater-overview-factsheet>

³ **Te Mana o te Wai** refers to the fundamental importance of water. It recognises that protecting the health of freshwater also protects the health and well-being of the wider environment. Implementation is informed by six principles (Mana whakahaere, Kaitiakitanga, Manaakitanga, Governance, Stewardship, Care and Respect) and a hierarchy of obligations that are to be prioritised in implementing the NPSFM 2020. This hierarchy – in order - is:

- the health and well-being of water bodies and freshwater ecosystems;
- the health needs of people (such as drinking water); and
- the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

If this information is not provided with the application, we may determine it to be incomplete, and if we do, it *must* be returned under s88 of the RMA.

What is required in terms of an assessment of the NPSFM 2020?

Over the last decade, Environment Canterbury has progressively engaged in a series of plan changes to give effect to, first the NPSFM 2011, and then the NPSFM 2014. Applications which recognised, but did not include detailed assessments of, these national policy statements were typically accepted so long as they had appropriately considered the Canterbury Land and Water Regional Plan (LWRP). This is because the LWRP had already given effect to those higher order documents, and therefore consistency with the LWRP also (typically) meant consistency with the NPSFM it was prepared under. This is no longer the case. The NPSFM 2020 post-dates all of Environment Canterbury's plans and, as a later-in-time piece of national direction, carries considerable weight in consent decision-making.

This means that applications now need to include a robust consideration of the provisions of the NPSFM 2020 prior to being accepted. Relevant provisions in the NPSFM 2020 will include:

- the objective and policies (Part 2 NPSFM) which give effect to the fundamental concept of Te Mana o te Wai (Part 1.3 NPSFM) and the associated hierarchy of obligations; and
- some of the implementation provisions (Part 3 NPSFM) that apply to consenting of specific types of activities⁴.

In practice, applications should demonstrate *how* and *why* the applicant considers the proposed activity is consistent with the hierarchy of obligations (expressed in the NPSFM 2020 Objective), and with managing freshwater in accordance with the concept of Te Mana o te Wai (Policy 1). We acknowledge this may be difficult as the local approach to Te Mana o te Wai is yet to be developed, however careful consideration of the relevant Iwi Management Plans will be useful in determining how certain NPSFM 2020 policies should be applied in any given situation.

NES-F 2020

The NES-F 2020 does not contain objectives or policies but includes 'rules' permitting or requiring resource consent for specific activities. Applications need to identify whether any activities in their proposal are permitted (Schedule 4 (3)(a) RMA) or require resource consent (Schedule 4 (2)(1)(e) RMA) under the NES-F 2020.

The NES-F regulates the following matters:

- farming activities (including feedlots, stockholding areas, agricultural intensification, intensive winter grazing, and the application of synthetic nitrogen fertiliser);
- activities related to wetlands;

⁴ For example, activities related to wetlands and rivers where the NPSFM 2020 has detailed direction on when consents affecting wetlands and rivers can be granted, and what matters needed to be demonstrated (e.g. application of the effects management hierarchy defined in the NPSFM 2020).

- the reclamation of rivers (including streams); and
- activities that affect fish passage (e.g. culverts, weirs, dams etc.).

Where the NES-F 2020 is relevant this may lead to the following situations:

- consent is required under the relevant regional plan (and/or any proposed regional plan) and not the NES-F as it will either permit or not address the activity;
- consent is required under the NES-F for the activity and not under the relevant regional plan (and/or any proposed regional plan);
- consent is required under both the NES-F and the regional plan (and/or any proposed regional plan) and under the most restrictive activity status; or
- consent is required under both the NES-F and the regional plan (and/or any proposed regional plan) and the regional plan consent has already been obtained (e.g. a Farming Land Use Consent where the applicant now needs a consent to increase the amount of dairy farm land under the NES-F).

The NES-F also has requirements limiting when consents can be granted, and specific conditions that must be included on consents for some activities (e.g. structures in watercourses). Applicants should assess how their proposals meet those requirements.

How does Essential Freshwater affect applications in process before 3 September 2020 that have not been decided?

If an application was lodged prior to 3 September 2020 it is unlikely to have considered the NPSFM 2020 or NES-F 2020, as they wouldn't have had legal effect. Irrespective of that, it is a requirement of the RMA (i.e. s104(1)(b)) to have regard to these documents when making the substantive decisions on applications. In addition, while not referred to directly in the notification provisions (s95A-G RMA), the objectives and policies of the new NPSFM 2020 will often *inform* when the adverse effects of applications are likely to mean notification (either public or limited) is necessary.

While we had initially thought we would be able to continue to decide applications currently in process without going back to applicants (i.e. by undertaking that assessment as part of the decision-making step), following a more thorough review of the NPSFM 2020 and the potential flow-on effects on notification and grant/refuse decisions, we now consider it is necessary and appropriate to seek additional information (as outlined above under the s88 requirements) from applicants on these matters.

Requests for assessment against the provisions of the NPSFM 2020

In most cases we will request this assessment under s92 of the RMA (which allows us to request further information). In situations where a s92 request has already been made and/or where the impact of the NPSFM 2020 is complex, an extension of timeframes (under s37 of the RMA) is likely to be appropriate as it is in *"the interests of the community in achieving an adequate assessment of the effects of a proposal, policy statement or plan"* (s37A(1)(b) RMA).

We will typically ask applicants to agree to this extension in the first instance (i.e. under s37A(2)(b) RMA) as we consider that it will benefit both them, and the community. The use of a s37 extension for applications already in process is to provide time to determine how applications sit against the new national direction and/or how they might need to be modified to better address the hierarchy of obligations and Te Mana o te Wai.

If we didn't ask for further information or requested further information wasn't provided, and instead proceeded with the application as it stands, there would be a higher likelihood that we would need to notify and/or refuse it given that there would not be a detailed assessment of the NPSFM 2020 and how the proposal gives effect to Te Mana o te Wai and the hierarchy of obligations.

The NES-F 2020 and additional consent requirements

As noted above, the NES-F 2020 has introduced new provisions which may require additional consents prior to proposals currently in process being able to proceed. As decision makers must have regard to the NES-F 2020 when making their decisions, where a consent is required under the NES-F 2020 and is necessary to determine whether a proposal can proceed the extra application will be requested using s91 of the RMA. This will place the current application 'on hold' until the new application has been received. For example, if the application in process is for a dairy effluent discharge related to a dairy conversion/expansion, consent is likely to be required under the NES-F 2020 for the "*Conversion of land on farm to dairy farm land*" (regulations 18-19 of the NES-F 2020)) and it would be appropriate to request that additional application under s91 of the RMA.

Where the NES-F 2020 application is not necessary in order to process the current application (i.e. it could be processed independently), but will still be needed, we will ask whether applicants would like to make the additional application now so that it can be considered at the same time as the current proposal. This is likely to be cheaper for the applicant (as the applications can be considered together in one report), but will require that the applicant agree to extend the timeframes of the current application (under s37 of the RMA) until they can proceed together.

Notification (s95A-95G RMA) and the NPSFM 2020

Notification decisions must follow the 'steps' set out in s95A (public notification) and s95B (limited notification) of the RMA. While inconsistency with the provisions of an NPS (or regional plan etc.) is not a reason for notification, consideration of those provisions can inform when an adverse effect might mean notification on the basis of adverse effects (Step 3 of either s95A or s95B of the RMA) is appropriate⁵. While in some cases there is alignment between Environment Canterbury's plans and the NPSFM 2020 (e.g. the integrated management approach, ki uta ki tai, is embodied in the LWRP and also required by Te Mana o Te Wai as articulated by the NPSFM 2020), in other cases there is divergence in what is appropriate.

⁵ *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673 at [82]; *Kawau Island Action Incorporated Society v Auckland Council* [2018] NZHC 3306 at [112].

This means it is important to consider the provisions of both our regional plans and the NPSFM 2020 when assessing whether the effects of an activity may trigger the need for notification. In particular, the hierarchy of obligations in the NPSFM 2020 Objective is relevant to considering the significance of adverse effects, even where the NPSFM 2020 environmental bottom lines have not been included in our plans, i.e. whether an application prioritises:

- Firstly, the health and well-being of water bodies and freshwater ecosystems;
- Secondly, the health needs of people (such as drinking water); and
- Thirdly, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

This may require consideration of how water quality and quantity limits were set (e.g. were they set to achieve environmental limits or capped at current levels of activity/consented allocation?), as well as whether those limits are achieving the hierarchy of obligations in practice (i.e. what is the current state of the receiving environment and how is it tracking?). Environment Canterbury is currently working on ways to make this information more easily available. As noted earlier, the relevant Iwi Management Plans will also be useful in determining how certain NPSFM 2020 policies should be applied in any given situation.

The substantive decision (s104), the NPSFM 2020 and the NES-F 2020

The requirement in s104 of the RMA to “*have regard to*”⁶ means to give genuine attention and thought to the subject (in this case the provisions of the NPSFM 2020 and the NES-F 2020). This is not as strong as the requirement to give effect to an NPS in a regional policy statement or plan, and the provisions and direction of the NPSFM 2020 may be rejected or accepted only in part⁷. In effect, the provisions of the NPSFM 2020 and NES-F 2020 must be ‘weighed’ against the other matters specified in s104 RMA.

Weighting of the NPSFM 2020

Where our plans and the NPSFM 2020 are fully aligned (e.g. around the integrated management approach, ki uta ki tai), it is unlikely that consideration of the NPSFM 2020 and our regional planning framework will result in a different conclusion about whether an activity is appropriate. If there is inconsistency or conflict between our planning framework and the NPSFM 2020 provisions however, the NPSFM 2020, given its status as national direction that post-dates our planning framework, then this should be given greater weight than our current framework. In addition, given the NPSFM 2020 direction to engage with tangata whenua to determine what Te Mana o te Wai means locally, it is appropriate that considerable weight is also given to the provisions of Iwi Management Plans.

Ultimately while regard must be had to all the matters in s104 (e.g. regional policy statements and plans, adverse and positive effects, “other relevant matters” (e.g. principles of natural

⁶ Section 104 RMA

⁷ *New Zealand Fishing Industry Association Incorporated v Ministry of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at [15].

justice)), where a proposal will not or is unlikely to achieve the hierarchy of obligations, decision makers are likely to have to consider refusing consent on that basis.

Consideration of the NES-F 2020

While the NES-F 2020 does not contain objectives and policies, it does put additional limits on when some applications can be granted (e.g. clause 24⁸), and/or limits on durations (e.g. clause 34(4)⁹), that are not immediately apparent from the specific 'rules'.

In addition, the NES-F also has requirements that would apply to both consents granted under the NES-F and/or under a regional rule (e.g. clause 64(2)(b)¹⁰). It is therefore important to ensure that decisions appropriately consider the provisions of the NES-F.

Conclusion

As previously stated, this memo provides Environment Canterbury's initial thinking on how the NPSFM 2020 and NES-F 2020 will impact the different stages of the consenting process. Implementation of Essential Freshwater is a rapidly evolving space however, and our initial approach is likely to change, particularly as our understanding of Te Mana o te Wai matures through discussions with Ngāi Tahu, papatipu rūnanga, and with further guidance from Central Government.

We will continue to provide as much guidance in this space as possible and encourage those affected in this space to engage with us to try and make the consent process as streamlined as possible. We offer one hour of free pre-application advice, and this can be arranged through a phone call to our Customer Services team. Finally, as previously noted, this guidance does not constitute legal advice and should not be relied upon as such.

⁸ Clause 24 prevents consent being granted for agricultural intensification managed under the NES-F if it would result in:

“... an increase in—

(a) contaminant loads in the catchment, compared with the loads as at the close of 2 September 2020; or

(b) concentrations of contaminants in freshwater or other receiving environments (including the coastal marine area and geothermal water), compared with the concentrations as at the close of 2 September 2020.”

⁹ Clause 34(4) limits the duration of any consent granted under clause 34(2) for the application of synthetic nitrogen fertiliser to no more than 5-years.

¹⁰ Clause 64(2)(b) requires that resource consents for weirs contain conditions specifying the information in clause 64(3) be provided to the regional council within 20 working days after the consented activity is finished.