



Ministry for the  
**Environment**  
Manatū Mō Te Taiāo

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Ministry for Primary Industries  
Manatū Ahu Matua



15 JUL 2013

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18 JUL 2013  
Office of Hon Amy Adams

To: Hon Amy Adams, Minister for the Environment  
Hon Nathan Guy, Minister for Primary Industries

**Freshwater Reform: approach to consultation on NPS amendments**

Other Dept Tracking Number:	B12-979	MfE Tracking Number:	13-B-01248
Date Submitted:	10 July 2013	MfE Priority:	Urgent
Security Level:	IN CONFIDENCE	Number of Attachments:	None
Action Sought:	Agreement	Response/Signature Needed by:	29 July 2013

**Water Reform Directorate Contacts**

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**Executive Summary**

1. The purpose of this paper is:
  - a. to provide you with information on the process for consulting on, considering and finalising the proposed amendments to the National Policy Statement for Freshwater Management (NPS-FM); and
  - b. to provide information on the decisions the Minister for the Environment must make under section 46A of the Resource Management Act 1991 (RMA); and
  - c. seek agreement from the Minister for the Environment on the process to be used.
2. After preparing proposed amendments to a National Policy Statement (NPS), the Minister for the Environment must choose between two processes for consulting on, considering and finalising a proposed (amended) NPS:
  - a Board of Inquiry process set out in sections 47 to 52 of the Resource Management Act 1991 (RMA); or
  - an alternative process established by the Minister for the Environment in accordance with section 46A(1)(b) of the RMA.
3. Officials recommend that an alternative process be used for the proposed NPS-FM amendments. This process is likely to be shorter than the Board of Inquiry process, making it easier for these amendments to progress in line with the timeframe proposed in *Freshwater reform 2013 and beyond*. It is also consistent with the high level of input already received from key stakeholders via the Land and Water Forum (the Forum) and the National Objectives Framework (NOF) Reference Group; and the Government's desire to stay close to the Forum's recommendations when implementing changes to the existing NPS-FM.
4. To meet the requirements under section 46A(1)(b), officials recommend that the Minister for the Environment establish the process that includes the following steps:

- release the documents for consultation<sup>1</sup> and notify the public in the week beginning 2 September 2013;
  - accept submissions from the release date until 12 October 2013;
  - hold public meetings, hui and technical workshops during the submission period;
  - officials analyse submissions (with the support of the NOF Reference Group and other expert panels as officials consider appropriate) and consider elements in section 51 of the RMA;
  - based on the above analysis and consideration, officials prepare report and recommendations to Minister for the Environment;
  - the Minister for the Environment considers the report in accordance with section 52 of the RMA;
  - the Minister for the Environment may make changes as she thinks fit, or withdraw all or part of the proposed amended NPS-FM;
  - the Minister for the Environment recommends that the Governor-General approve the amended NPS-FM; and
  - issue and notify the amended NPS-FM in accordance with section 52(3).
5. We consider that this process meets the statutory requirements set out in section 46A(1)(b).
  6. Where possible, officials will seek to avoid clashes between the NPS-FM consultation, the expected select committee submission process for the 2013 Resource Management Bill, and the nationwide council seminars for implementing the changes resulting from the 2012 Resource Management Bill.
  7. To inform officials' advice and facilitate public buy-in to the proposals, we seek your agreement to include members of the NOF Reference Group and other expert panels involved in the development of the proposed NPS-FM amendments in the following ways:
    - support officials in analysing submissions, as officials consider appropriate
    - support the consultation process, including communicating to the public on the proposed NPS-FM amendments, and participating in discussions at the technical workshops, hui and public meetings.
  8. Officials will provide you with a briefing on the potential role of the Land and Water Forum small group in the technical workshops [13-B-01252 refers].

<sup>1</sup> The documents for consultation include:

- Proposed NPS-FM (including tables partially populated with values, attributes and minimum states);
- discussion document on the proposed NPS-FM amendments;
- Section 32 evaluation;
- scientific and economic studies relating to the proposals;
- NOF Reference Group's report of October 2012; and
- redacted Cabinet papers relating to the proposals.

## Situation Analysis

### *Background on development of proposals to amend NPS-FM*

9. The National Policy Statement for Freshwater Management 2011 (NPS-FM) requires regional councils to set objectives and limits for all freshwater bodies by 2030.
10. The April 2012 report of the Land and Water Forum and further work by an officials-led Reference Group recommended that a National Objectives Framework (NOF) be created to support regions in setting objectives and limits.
11. In March 2013, the Government released the paper *Freshwater reform 2013 and beyond*, which includes the proposal to establish a NOF, and sought comments from the public on the overall direction of the water reform package. Feedback received during this public engagement on the NOF was generally positive. You plan to seek Cabinet agreement to release for consultation draft amendments to the NPS-FM that would implement these proposals as regulation.
12. Officials recommended that Cabinet agreement to release detailed proposals for consultation be sought in late August 2013, **WITHHELD UNDER SECTION 9 (2)(F)(IV) OF THE OIA**. The proposals to be included in the consultation include:
  - a NOF and process for its use in objective-setting by councils;
  - national bottom lines that need to be met over time in all water bodies (unless there is a justified exception);
  - the values that communities must manage for (compulsory values) and those that they may consider managing for (optional values);
  - the values, attributes and minimum states that are to be used to populate the NOF initially, including national bottom lines for ecosystem health and human health;
  - an exceptions regime, which includes criteria for when exceptions from national bottom lines may be permitted;
  - the requirement for regional councils to account for all water takes and all sources of the contaminant(s) to be managed, when setting and managing within limits; and
  - clarification of some matters in the NPS-FM, e.g. the coastal interface (particularly managing the impacts of fresh water on estuaries), and definitions of 'freshwater objectives' and 'limits'.
13. Officials recommended that public consultation on these proposals commence in early September 2013, once Cabinet agrees to the release of the proposals to amend the NPS-FM [13-B-01028 and B-12-872 refer].

### *Overlap with other processes*

14. If the public consultation on the proposed NPS-FM amendments is to be held between early September 2013 and mid-October, there will be overlap with other engagement processes as follows:

Process	Indicative timetable
Select committee submission stage for the Resource Management Bill 2013	September 2013
Nationwide council seminars for implementing changes from the 2012 Resource Management Bill and providing	Early to late September 2013 (over 3-4 weeks)

an update on the 2013 Bill (in 16 locations)	
Local body elections	12 October 2013

15. The timing of the upcoming local body elections means that some councils may not be formally constituted until very late in 2013. Consequently, if the consultation on the proposed NPS-FM amendments were not undertaken before 12 October 2013, meaningful engagement with all regional councils would not be possible until early 2014, which would mean that the amended NPS-FM could not be in force until mid-2014.
16. In the light of the overlapping timeframes of the processes associated with the resource management reform, some key stakeholders, namely regional councils and RMA practitioners, might struggle to meaningfully engage in all processes if the consultation on the proposed NPS-FM amendments were to close by the end of September 2013.

#### *Engagement with iwi and stakeholders to date*

17. In developing the key components of the NPS-FM amendments (including establishing a NOF and setting national bottom lines), targeted stakeholders have been engaged early in the policy development process.
18. The concept of a NOF and national bottom lines originated from the Land and Water Forum, which involved a wide range of stakeholders. Since then, officials have worked with representatives from iwi, regional councils, primary industries, NGOs and scientists via the NOF Reference Group and other expert groups. In October 2012, the NOF Reference Group provided a report that further developed the recommendations of the Forum [12-B-01558 refers]. The involvement of the NOF Reference Group in the development of the NOF is ongoing.
19. In addition to engagement with key stakeholders, the Government engaged with the general public through releasing the paper *Freshwater reform 2013 and beyond* in March 2013 and seeking comments from the public (as well as key stakeholders).
20. In line with our agreed protocol, engagement with the Freshwater Iwi Leaders Group and Iwi Advisers has included engagement on the development of the NOF. The Iwi Advisers have also supported the Iwi Science Panel.

#### **Advice**

21. This section focuses on the decisions the Minister for the Environment (the Minister) must make under section 46A and the process officials recommend the Minister for the Environment adopt under section 46A(1)(b).

#### *Board of inquiry process or alternative process?*

22. Once a proposed National Policy Statement (NPS) (or in this case, an amendment to an NPS) is prepared, the Minister for the Environment has to choose between two processes for consulting on, considering and finalising a proposed NPS, either:
  - a Board of Inquiry process set out in sections 47 to 52 of the RMA; or
  - an alternative process established by the Minister for the Environment in accordance with section 46A(1)(b) of the RMA.
23. Under the Board of Inquiry process, in summary, the Minister for the Environment appoints a Board of Inquiry and may set the terms of reference for the Board. The board then runs notification, submissions, and hearing processes in accordance with the process in the Act. The Board then reports back to the Minister for the Environment to make a decision. The existing NPS-FM was developed using this process.

24. In the last Board of Inquiry process, significant changes were made by the Government to the version recommended by the Board of Inquiry to align it with the Government policy on water reform.
25. An alternative process can be carried out by officials (as for the 2011 proposed National Policy Statement on Indigenous Biodiversity), but the Minister for the Environment can appoint another person or group to the task (e.g., to use a collaborative process involving multiple stakeholders). Should the alternative process be chosen, officials recommend that it be carried out by the Water Reform Directorate.
26. When choosing between the two processes, the Minister for the Environment may consider a range of factors identified in section 46A(2), including:
- the advantages and disadvantages of having the proposed national policy statement made quickly;
  - the extent to which the policy in the proposed national policy statement differs from the policies in national environmental standards, other national policy statements, regional policy statements, and regional or district plans;
  - the extent and timing of public debate and public consultation that took place on the policy before the proposed national policy statement was prepared; and
  - any other relevant matter.
27. It is expected that an alternative process carried out by the Water Reform Directorate would be shorter than a Board of Inquiry process. Under the Board of Inquiry process, extra time would need to be spent on setting up the Board of Inquiry and managing liaison between the Board of Inquiry and the Minister for the Environment. Members of the Board of Inquiry could also need some extra time to acquire an understanding of the issues relating to the NPS-FM. Past experience suggests that a Board of Inquiry process could take about 15 months. Extra time may also be needed at the end of the process if the Board's recommendations are not aligned with the Government's policy direction.
28. An analysis of the matters set out in section 46A(2) is summarised in the table below.

Consideration under section 46A(2)	Points relevant to the process for the NPS-FM amendments
Advantages of quick process (s46A(2)(a))	<ul style="list-style-type: none"> <li>• The NPS-FM is already operative and officials consider that the NOF will make its implementation more consistent and efficient and based on sound information.</li> <li>• Councils could spend less time on revising their plans, given that some councils have already started setting freshwater objectives and limits.</li> <li>• The Government has committed to deliver an amended NPS-FM under the timeframe proposed in <i>Freshwater reform 2013 and beyond</i>.</li> </ul>
Disadvantages of quick process (s46A(2)(a))	<ul style="list-style-type: none"> <li>• Less time for public engagement</li> <li>• Less time for the NOF Reference Group to consider and test the proposals before public consultation. This may reduce the group's ownership of the proposals.</li> </ul>

How different is it from other existing policies (s46A(2)(b))	<ul style="list-style-type: none"> <li>The proposals build on rather than change the policy direction already established in the existing NPS-FM, i.e. a limits-based approach to freshwater management.</li> </ul>
The extent and timing of prior public debate and public consultation (s46A(2)(d))	<ul style="list-style-type: none"> <li>There has been extensive engagement with key stakeholders over a long period of time (as discussed in the Situation Analysis section).</li> <li>The Forum deliberated on the matters underpinning the NOF for a considerable period.</li> </ul>
Other relevant matter(s46A(2)(d))	<ul style="list-style-type: none"> <li>There are additional costs and administration involved in appointing and supporting a Board of Inquiry.</li> <li>The NPS-FM amendments are only one part of a much wider water reform package. It will be easier to maintain a consistent approach across all elements of the reform if officials carry out the process.</li> </ul>

29. Balancing these factors, officials recommend that an alternative process led by the Water Reform Directorate be chosen for the amendments to the NPS-FM.

*Requirements for alternative consultation process*

30. If the Minister for the Environment chooses the alternative process under section 46A(1)(b) of the RMA, she must establish, and then use, a process that:

- gives the public adequate time and opportunity to make a submission on the statement (section 46(1)(b)(i)); and
- requires a report and recommendations to be made to the Minister for the Environment on the submissions and the subject matter of the statement (section 46(1)(b)(ii)); and
- incorporates sections 51<sup>2</sup> and 52<sup>3</sup> of the RMA as if they referred to the persons leading the alternative process rather than the Board of Inquiry (section 46(1)(b)(iii)).

31. Officials recommend that the Minister for the Environment establish the following process in accordance with section 46A(1)(b):

- release the documents for consultation and notify the public in the week beginning 2 September 2013;
- accept submissions from the release date until 12 October 2013;

<sup>2</sup> Section 51 of the RMA provides for the matters that the person(s) leading the consultation process (e.g. Board of Inquiry or officials) must consider, and the requirement that a report and recommendations be made to the Minister for the Environment.

<sup>3</sup> Section 52 of the RMA provides that the Minister for the Environment must consider the report and recommendations made by the person(s) leading the consultation process. It also specifies the Ministerial discretion in changing or not changing the national policy statement, and sets out the public notification requirements after the approval of the NPS.

- hold public meetings, hui and technical workshops during the submission period;
- officials analyse submissions (with the support of the NOF Reference Group and other expert panels as officials consider appropriate) and consider elements in section 51 of the RMA;
- based on the above analysis and consideration, officials prepare report and recommendations to Minister for the Environment;
- the Minister for the Environment considers the report in accordance with section 52 of the RMA;
- the Minister for the Environment may make changes as she thinks fit, or withdraw all or part of the proposed NPS-FM;
- the Minister for the Environment recommends that the Governor-General approve the NPS-FM; and
- issue and notify NPS in accordance with section 52(3).

#### *Timeframe*

32. Achieving the timeframe outlined in *Freshwater reform 2013 and beyond* would require Cabinet to agree to NPS-FM amendment proposals for consultation in late July. However, as per our previous advice [B-12-872 and 13-B-01028 refer], this may be too early for Cabinet to make well-informed decisions because:
- the preliminary results from the Waikato economic impacts study will not be available until early to mid August 2013; and
  - some members of the NOF Reference Group have signalled that they would like more time to consider and debate scientific input before finalising their advice to officials.
33. Taking into account the timing of the processes for the resource management reform and local body elections, officials recommend that consultation on these proposals be held from the week beginning 2 September to 12 October 2013. To avoid significant delay in introducing and implementing the proposed NPS-FM amendments, this is the longest possible timeframe for consulting on these amendments.
34. Officials consider that a consultation period of four to six weeks, combined with standard public notification processes, should give the public adequate time and opportunity to make a submission on the proposed NPS-FM, given that officials have been actively engaging with key stakeholders throughout the process of developing the NPS-FM amendments, particularly the NOF. The key features of the NPS-FM were also included in the March 2013 public engagement. Therefore, the proposed consultation period is consistent with the requirement under section 46A(1)(b)(i).

#### *Approach to engagement with iwi*

35. Section 46A(1)(b) of the RMA does not state explicitly the requirements for engagement with iwi under the alternative process. However, when the Government undertook to establish formal engagement with Iwi Leaders on freshwater reform, both Iwi Leaders and Ministers were clear that the Government would also engage more widely with iwi/Māori on the reforms, as Iwi Leaders do not represent the interests of all Māori.
36. We recommend that hui be held in the first three weeks of September 2013 in 10 locations, including Kaitaia, Whangarei, Hamilton, Rotorua, Gisborne, Napier/Hastings, Whanganui, Wellington, Nelson and Christchurch. These locations are recommended, based on the following factors:
- natural groupings of iwi in terms of geography, historical and contemporary cultural affinities

- shared environmental issues and common/similar interest in particular water bodies e.g. Waikato River, Rotorua Lakes
  - most iwi being roughly within two hours drive of a hui.
37. The purpose of hui will be to disseminate information and facilitate public discussion. They will not be formal hearings. Officials will invite iwi to make written submissions on the NPS-FM amendments. Notes of oral presentations from iwi will also be taken at the hui.

*Approach to engagement with key stakeholders and the public*

38. Under the RMA, there is no requirement for public meetings to be held for the purpose of consulting on national policy statements. However, section 46A(1)(b)(i) requires that the public be given adequate time and opportunity to make a submission under the alternative process for consultation.
39. During the public engagement on the *Freshwater reform 2013 and beyond* in March, many submitters expressed an interest in seeing the details of the NOF. Also, as the proposed NPS-FM amendments will have a significant impact on communities in the long term, it is important for communities to understand how these amendments will affect them. With a good understanding of the NOF, communities would be able to actively engage with councils in setting freshwater objectives and limits in regional plans, thereby promoting better decision-making at a regional level.
40. In our view, holding a further round of public engagements will also contribute to building constructive community conversations about freshwater management.
41. To facilitate public engagement, officials recommend that public meetings be held to disseminate general information on the proposed NPS-FM amendments. Officials also recommend that technical workshops targeted at key stakeholders (such as the New Zealand Freshwater Sciences Society, regional councils and the Land and Water Forum small group member organisations) be held.

*Documents to be released for consultation*

42. To help the public understand the proposed NPS-FM amendments and facilitate public debate, officials recommend that the following documents be made available both in hard copy and on the Ministry for the Environment's website (which the Ministry for Primary Industries will link to):
- Proposed NPS-FM (including tables partially populated with values, attributes and minimum states);
  - discussion document on the proposed NPS-FM amendments;
  - Section 32 evaluation;
  - scientific and economic studies relating to the proposals;
  - NOF Reference Group's report of October 2012; and
  - redacted Cabinet papers relating to the proposals.
43. As usual, the relevant regulatory impact statement will be published on Treasury's website.

*Involvement of NOF reference group and other panels*

44. Subject to your approval, officials intend to ask members of the NOF Reference Group and other expert panels (already involved in the development of the NOF) to be involved in the process for the proposed NPS-FM amendments in the following ways:
- support officials in analysing submissions, as officials consider appropriate.

- support the consultation process, including communicating to the public on the proposed NPS-FM amendments, and participating in discussions at the technical workshops, hui and public meetings.
45. Officials consider that the involvement of these groups would inform officials' advice and would facilitate public buy-in to the proposals.

### **Risks and Mitigations**

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46. The main risk associated with the proposed process is that the overlap of the NPS-FM consultation with local body elections and the other public engagement processes for the resource management reforms may affect the ability of some groups, particularly council staff and councillors, to engage. To mitigate this risk, officials across the Ministry for the Environment will coordinate with each other to avoid clashes of public engagement exercises as much as possible.

### **Financial, Regulatory and Legislative Implications**

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47. Section 46A(4) provides that any NPS made under the alternative process established by the Minister for the Environment in accordance with section 46A(1)(b) is a regulation for the purposes of the Regulations (Disallowance) Act 1989. This means that it must be laid before the House of Representatives which may, by resolution, disallow the regulation or any provisions of it. If the Board of Inquiry process is chosen, then the instrument is not a regulation for the purpose of the Regulations (Disallowance) Act.

### **Next steps**

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48. To allow the NPS-FM consultation to commence in the week beginning 2 September 2013 as recommended, you will need to seek Cabinet agreement to the consultation process and the NPS-FM amendments by late August. As we have discussed, this is scheduled for the Cabinet Economic Growth and Infrastructure Committee (EGI) on 21 August 2013.
49. Officials will provide you with draft Cabinet materials well in advance of Cabinet Committee Meetings.
50. Officials will also provide you with further advice on the details of the consultation process, including options for your direct involvement.

## **Recommended Action**

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### **We recommend that you:**

- a) **Note** that there are two different options for consulting on, considering and finalising the proposed NPS-FM amendments:
  - a. a Board of Inquiry process set out in sections 47 to 52 of the RMA; or
  - b. an alternative process established by the Minister for the Environment in accordance with section 46A(1)(b) of the RMA.
- b) **Note** that if the Minister for the Environment chooses the alternative process under section 46A(1)(b) of the RMA, she must establish, and then use, a process that:
  - gives the public adequate time and opportunity to make a submission on the statement (section 46(1)(b)(i)); and
  - requires a report and recommendations to be made to the Minister for the Environment on the submissions and the subject matter of the statement (section 46(1)(b)(ii)); and
  - incorporates sections 51 and 52 of the RMA as if they referred to the persons leading the alternative process rather than the Board of Inquiry (section 46(1)(b)(iii)).

### **We recommend that Minister Adams:**

- c) **Agree** that an alternative process carried out by the Water Reform Directorate be used for the proposed NPS-FM amendments.

**Yes / No**

- d) **Agree** that the Minister for the Environment establish and use the following process:
  - release the documents for consultation and notify the public in the week beginning 2 September 2013;
  - accept submissions from the release date until 12 October 2013;
  - hold public meetings, hui and technical workshops during the submission period;
  - officials analyse submissions (with the support of the NOF Reference Group and other expert panels as officials consider appropriate) and consider elements in section 51 of the RMA;
  - based on the above analysis and consideration, officials prepare report and recommendations to Minister for the Environment;
  - the Minister for the Environment considers the report in accordance with section 52 of the RMA;
  - the Minister for the Environment may make changes as she thinks fit, or withdraw all or part of the proposed NPS-FM;
  - the Minister for the Environment recommends that the Governor-General approve the NPS-FM; and
  - issue and notify NPS in accordance with section 52(3).

**Yes / No**

**We recommend that you:**

- e) **Agree** that the following documents be made available both in hard copy and on the Ministry for the Environment's website (which the Ministry for Primary Industries will link to):
  - a. proposed NPS-FM (including tables partially populated with values, attributes and minimum states)
  - b. discussion document on the proposed NPS-FM amendments
  - c. section 32 evaluation
  - d. scientific and economic studies relating to the proposals
  - e. NOF Reference Group's report of October 2012
  - f. redacted cabinet papers relating to the proposals.

**Yes / No**

- f) **Agree** that members of the NOF Reference Group and other expert panels already involved in the development of the NOF be asked to support officials in analysing submissions, as officials consider appropriate.

**Yes / No**

- g) **Agree** that members of the NOF Reference Group and other expert panels already involved in the development of the NOF be asked to support the consultation process, including communicating to the public on the proposed NPS-FM amendments, and participating in discussions at the technical workshops, hui and public meetings.

**Yes / No**

- h) **Note** officials will provide further advice on the details of the consultation process, including options for Ministerial participation.

**Yes / No**

Kay Harrison (Director)  
**Director, Water Reform Directorate**

**Date**

Hon Amy Adams  
**Minister for the Environment**

**Date**

Hon Nathan Guy  
**Minister for Primary Industries**

**Date**

<b>Minister's feedback on quality of briefing note:</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
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