

Memorandum

To: Wolfgang Kanz
From: Megan Dever, Ian Mayhew
Date: 28 January 2021
Subject: Response to s92 request question (xx); National Policy Statement for Freshwater Management (2020)

1. Request for Further Information

A request for further information under section 92 of the Resource Management Act 1991 (RMA) was received in relation to the Wastewater Overflows Consent Application (Council Reference DW-2020-109732-00/WD-2020-109733-00).

Question (xx) requests further information in relation to the National Policy Statement for Freshwater Management (NPS-FM) 2020.

(xx) The NPS- Freshwater Management 2020 came into force on 3 September 2020 and this now requires that freshwater is managed to give effect to Te Mana o te Wai as well as amending various other provisions of the earlier NPS.

The NPS- Freshwater Management 2020 will need to be addressed as part of the hearing evidence. At this stage, we consider it would be useful for the applicant to provide commentary and assessment on the NPS- Freshwater Management 2020 taking into account the matters raised in submissions.

The purpose of this memo is to provide an initial response to this request for further information. It assesses the applicability of the NPS-FM 2020 to the Wastewater Overflows Consent Application and AEE (Application). The assessment in this memo supersedes the assessment of the 2017 NPSFM set out in the lodged consent application. We note that the NPS-FM 2020 is very recent and as such has limited guidance and case law. We are also aware that Councils around New Zealand are currently working collectively to determine how some provisions are to be applied. Accordingly, the below is a preliminary assessment and will be updated at the hearing.

2. NPS-FM 2020

2.1 Introduction

As noted above, the NPS-FM 2020 came into force on 3 September 2020, replacing the former NPS-FM 2017.

The NPS-FM 2020 is part of Central Government's Essential Freshwater package, which aims to

- stop further degradation of our freshwater;
- start making immediate improvements so water quality improves within five years; and
- reverse past damage to bring our waterways and ecosystems to a healthy state within a generation.¹

Essentially, the Essential Freshwater package seeks to bring about positive change (improvement) in freshwater quality and ecosystem health.

¹ Essential Freshwater: Overview factsheet

The NPS-FM 2020 provides national direction for the management of freshwater under the RMA. The guidance material that has been prepared by the Ministry for the Environment in support of the NPS-FM 2020 explains that:

The National Policy Statement for Freshwater Management 2020 provides national direction which regional councils translate into action on the ground through their regional policy statement and regional plans, and city and district councils through their district plans. It replaces the NPS-FM 2017.

The NPS-FM 2020 requires every regional council, in consultation with its community, to develop a plan for maintaining or improving the state of freshwater in the region. There are a number of compulsory values and attributes (measures of the state of a river or lake) that must be met, and communities can choose to go above and beyond these. Regional councils must notify their new or amended plans giving effect to the NPS-FM 2020 by 31 December 2024. The timeframe for action to achieve attribute target states is a long-term process set by councils in consultation with their communities.²

The NPS-FM 2020 is divided into a series of parts, with Part 2 comprising the objectives and policies, Part 3 providing actions required to give effect to Part 2, and Part 4 addressing timing and transitional arrangements. The appendices largely detail the National Objectives Framework (NOF), including compulsory and other values, attributes and associated attribute states and a national target for primary contact.

2.2 Te Mana O Te Wai

Central to the NPS-FM 2020 is the concept of Te Mana o Te Wai, which is described as:

‘a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.’

Te Mana o Te Wai is not a new concept, having been incorporated into the NPS-FM 2017. However, it has been clarified and given more emphasis in the NPS-FM 2020.

Te Mana o Te Wai encompasses six principles relating to the roles of tangata whenua and other New Zealanders, these are:

- *Mana whakahaere*: the power, authority, and obligations of tangata whenua to make decisions that maintain, protect, and sustain the health and well-being of, and their relationship with, freshwater.
- *Kaitiakitanga*: the obligation of tangata whenua to preserve, restore, enhance, and sustainably use freshwater for the benefit of present and future generations.
- *Manaakitanga*: the process by which tangata whenua show respect, generosity, and care for freshwater and for others.
- *Governance*: the responsibility of those with authority for making decisions about freshwater to do so in a way that prioritises the health and well-being of freshwater now and into the future.
- *Stewardship*: the obligation of all New Zealanders to manage freshwater in a way that ensures it sustains present and future generations.
- *Care and respect*: the responsibility of all New Zealanders to care for freshwater in providing for the health of the nation.

Aligned to these principles is a hierarchy of obligations that prioritises:

- (a) *first, the health and well-being of water bodies and freshwater ecosystems*
- (b) *second, the health needs of people (such as drinking water)*

² Essential Freshwater – Overview Factsheet

- (c) *third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.*

While the above provides the overarching principles in respect of Te Mana o Te Wai, Sub-part 1 of the NPS-FM 2020 requires regional councils to engage with communities and tangata whenua to determine how Te Mana o te Wai applies to freshwater bodies and freshwater ecosystems in the region (Clause 3.2(1)) and how the management of freshwater will give effect to Te Mana o Te Wai.

2.3 National Objectives Framework (NOF)

The NOF forms part of the NPS-FM 2020 and includes two additional compulsory values (in addition to ecosystem health and human health) – threatened species and mahinga kai. Elevating mahinga kai to a compulsory value promotes Māori measures of freshwater health to the same status as other biophysical values. The provisions also acknowledge that tangata whenua are the experts for the values and knowledge they hold for their local waterbodies and provide an avenue for the Te Ao Māori world view to be recognised in the freshwater management system.³

The NOF sets out 22 attributes (indicators) of freshwater health. Regional councils are required to maintain or improve all of these attributes – in accordance with limits and targets set by the community. Some of these (Attributes 1 to 10) require limits to be set in plans, while the remainder require action plans to be developed.

New attributes include sediment, dissolved oxygen, and a higher standard for E. coli contamination at popular swimming (primary contact) sites during the summer bathing season.

3. NPS-FM 2020 Assessment

3.1 Introduction

The objectives and policies of the NPS-FM 2020 are a substantial redraft of the previous NPS-FM and currently there is limited implementation guidance. In accordance with s104 of the RMA, regard must be had to any relevant provision of a national policy statement.

A large part of the NPS-FM 2020 is focussed on the implementation of the NOF at an individual freshwater management unit (FMU) level to give effect to its objectives and policies, and in particular Te Mana o Te Wai. The NOF process in Clause 3.7 (2) outlines the steps to be taken in achieving this, while Clause 3.2 (2) directs how regional councils must give effect to Te Mana o Te Wai. A key aim of the process is determine what Te Mana o Te Wai means, and how it is applied, in both the specific FMU-level and wider Gisborne context. This in turn will guide the values, objectives, attribute and limit setting process and then be applied through subsequent plan and consent processes.

The Resource Management Act 1991 (the Act) directs that Regional Councils have until 31 December 2024 to notify regional plans (or plan changes) that give effect to the NPS-FM 2020. These plans are subject to a new streamlined Freshwater Planning process, in accordance with Schedule 1 (Part 4) of the Act.

Chapter C6 Freshwater of the Tairāwhiti Resource Management Plan (TRMP) gave partial effect to the NPS-FM 2014/17, as did the Waipaoa Catchment Plan. Until such time that this Catchment Plan is updated, it is considered that the assessment against the Gisborne Urban FMU water quality objectives, limits and targets (set out in Appendix S of the Application) is still relevant.

³ Essential Freshwater: Mahinga kai and other Māori freshwater values factsheet

3.2 Objective

The single objective of the NPSFM is:

- (1) *The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:*
 - (a) *first, the health and well-being of water bodies and freshwater ecosystems*
 - (b) *second, the health needs of people (such as drinking water)*
 - (c) *third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.*

The Application as proposed will manage natural and physical resources in a way that prioritises the health and wellbeing of water bodies and freshwater ecosystems. The adverse ecological effects of wastewater overflows have been assessed by technical specialists who have advised that adverse effects of wet weather overflows are minor. Sediment sampling directly below, and away from, key wastewater outfalls did not detect adverse ecological or sediment quality effects that could be linked to wastewater discharges⁴. A large dry weather overflow into a small river can result in an exceedance of ammonia guideline values, but this is unlikely to adversely affect aquatic fauna⁵.

Overflows, both dry and wet, can contribute to degraded microbial water quality to the extent where guideline values are exceeded – with the potential to affect public health and use of fresh and marine waters. However, these aspects will be managed through appropriate response processes, as detailed in the Application.

Importantly, consent for the overflow discharges is sought on the basis of a substantial programme to ensure overflow performance is progressively improved to meet objectives and targets (see Section 4 of the Application), which are consistent with those of the Waipaoa Catchment Plan (Urban Freshwater Management Unit). As a result, the overall health and wellbeing of water bodies and freshwater ecosystems will improve over time through the progressive reduction in the frequency of overflow events and overflow volumes.

While tangata whenua and the community oppose wastewater overflows, as recognised by the KIWA Group and in submissions, Council is working with tangata whenua to integrate tikanga, mātauranga Māori, and Māori values into its management of overflows. This does not resolve the cultural issues associated with overflow discharges, but it will reduce impacts on tangata whenua values as the programme to substantially reduce overflows is implemented.

The Application also prioritises the essential health needs of people. It is a piece of core urban infrastructure which provides a sanitation service that is functionally required to service Gisborne's community. Accordingly, it is a lifeline utility specified in the Civil Defence Emergency Management Act 2002 (CDEMA) and also infrastructure providing significant benefits to the Gisborne community.

Similarly, it meets the third priority in the objective, by providing for the critical infrastructure which will enable the people and communities of Gisborne to provide for their social, economic and cultural well-being, both now and in the future. Additionally, the implementation programme (and timeframes) that have been adopted reflect that the predominant component of the stormwater ingress to the system comes from private property and that private property drainage improvements will need to be funded by private residents.

While it is recognised that overflows are not desirable, they are an inevitable consequence of the operation of a public wastewater network – particularly one that has been constructed and developed over a long timeframe as is the case in Gisborne. Substantial work has been undertaken over the past 10 or more years to improve the performance and management of this wastewater network – particularly the public component – such that its sizing and performance are on-par with best

⁴ Appendix H of the AEE

⁵ Attachment D of the s92 Response.

performance networks nationally. The programme to further reduce overflows and associated adverse effects is entirely consistent with the relevant statutory instruments and the intent of Essential Freshwater and the NPS-FM 2020, as expressed in guidance provided by Central Government.

3.3 Policies

Policy 1: *Freshwater is managed in a way that gives effect to Te Mana o te Wai.*

Gisborne District Council is yet to determine what Te Mana o te Wai means for each of its FMUs in the context of the NPS-FM 2020, through engagement and discussion with tangata whenua and communities. Until this is determined it is appropriate to consider Te Mana o te Wai as described in the NPS-FM, having the meaning set out in clause 1.3, and the hierarchy of obligations set out in the NPS-FM 2020, which is to ensure that natural and physical resources are managed in a way that prioritises firstly the health and wellbeing of freshwater bodies and ecosystems.

As documented in the Application, a collaborative engagement approach with tangata whenua has been undertaken. Tangata whenua values and interests have been identified through engagement and reflected, at a high-level, in recommended conditions of consent. Since lodgement of the application, Council has continued to engage with the KIWA Group to actively progress actions and solutions to reduce wastewater overflows and mitigate their effects.

Further, the NPS-FM 2020 seeks to improve water quality over time, and the Application is consistent with this approach. It includes a range of performance measures and targets which represent a programme for continuous improvement that will contribute to the achievement of the national target for primary contact⁶ and progressively reduce other adverse effects on fresh and marine waters.

Policy 2: *Tangata whenua are actively involved in freshwater management (including decision-making processes), and Māori freshwater values are identified and provided for.*

As detailed in the Application, Council formed and engaged with the KIWA Group in what is intended to be a long term relationship to work together to reduce overflows and their associated adverse effects on cultural values, including mahinga kai.

As summarised in the Application, overflows are opposed by tangata whenua as the discharge of wastewater to waterbodies encroaches upon core fundamental principles of customary social and spiritual rights and practices, and it affects them deeply spiritually, socially, and culturally. The KIWA Group recognised that achieving a performance of an average of 1 overflow every 2 years would be an improvement; however the overarching tapu of mixing wastewater with natural water and 'chronic' issue of tapu would remain and their aim is the elimination of all wastewater overflows.

Notwithstanding this, the KIWA Group provided a range of recommendations to help mitigate adverse effects. These informed the recommended conditions of consent in the Application, and a number of the recommendations are currently being progressed.

Accordingly while it is acknowledged that wastewater overflows are culturally offensive and continue to be opposed by tangata whenua, their on-going active and effective involvement in the implementation of the consent and the management of the wastewater network is consistent with this policy. Council's DrainWise programme seeks to achieve affordable improvements over the term of the consent. Target levels of service will continue to be reviewed over time, with the aim of implementing further improvements in the future.

Policy 3: *Freshwater is managed in an integrated way that considers the effects of the use and development of land on a whole-of-catchment basis, including the effects on receiving environments.*

⁶ Appendix 3 of the NPS-FM 2020

Policy 5: *Freshwater is managed through a National Objectives Framework to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved.*

These policies are more applicable to plan making processes and direct the implementation of the FMU process to maintain or improve the health and wellbeing of water bodies and freshwater ecosystems.

Although Council has not yet given effect to the NPS-FM 2020, the application has been assessed against the targets and limits in the Waipaoa Catchment Plan (set under the NPS-FM 2017), which includes the Gisborne Urban FMU (Taruhuru River, Waikanae Creek and tributaries). It is recognised that these urban rivers are currently degraded and have been affected by wastewater overflows (particularly microbial contaminants). As indicated in the Application, while the effects of wastewater overflows will not be totally eliminated, it is proposed to substantially reduce overflow frequencies and volumes and improve degraded water quality, consistent with these policies.

Furthermore, the Application includes a recommended condition of consent that provides for a review of the consent⁷ where:

‘a regional plan has been made operative which sets rules relating to minimum standards or water quality and in Gisborne District Council’s (as regional authority) opinion it is appropriate to review the conditions of consent in order to enable the standards set by the rule to be met’.

The purpose of this review is to:

‘insert conditions, or modify existing conditions to the extent necessary to give effect to any National Policy Statement or National Environmental Standard’.

As such, once the FMU/NOF process has been completed, conditions of consent can be updated to reflect any FMU-specific requirements as necessary.

Policy 7: *The loss of river extent and values is avoided to the extent practicable.*

Clause 3.24(1) *“The loss of river extent and values is avoided, unless the council is satisfied:*

- (a) that there is a functional need for the activity in that location; and*
- (b) the effects of the activity are managed by applying the effects management hierarchy.”*

Clause 1.7 of the NPS-FM 2020 requires three clauses to be inserted into regional policy statements and regional plans without using the Schedule 1 process, in accordance with s55(2) of the Act. As no timeframe is provided in the NPS-FM 2020, the amendments are required to be made as soon as practicable (s552D of the Act). As far as the Applicant is aware, the provisions have not yet been inserted into the TRMP, but expect that will happen as a matter of course.

The provisions included in Clause 1.7 include Clause 3.24(1) relating to rivers, which in turn relates to Policy 7. Accordingly Policy 7 and Clause 3.24(1) have been assessed together.

⁷ Condition 21, Section 9

The Applicant is aware that there are differing interpretations of Policy 7/Clause 3.24(1):

- 1) The 'loss of values' relates to only those values that are associated with the 'loss of any river extent'⁸; or
- 2) That the policy refers to either 'loss of river extent' or 'loss of (river) values' and accordingly relates to any activity, including discharges.

As such, the Applicant's current interpretation is set out below, but will be outlined further in legal submissions at the hearing, to provide for any further relevant caselaw updates. In any event, the Applicant's position is that the application is consistent with the above Policy 7 and Clause 3.24.

The Applicant's position is that as the nature of the discharges, being intermittent and for a short duration, will not result in a permanent and irreversible loss of values (as defined in the NPS-FM 2020 given that values have not yet been defined through the NOF process) but rather a temporary and infrequent reduction in values and have been avoided to the extent practicable for the following reasons:

- The public component of the wastewater network has been progressively upgraded to accommodate six-times dry weather flow – in-line with best national practice;
- As demonstrated in Section 2.6 of the Application, the overflow performance of the Gisborne wastewater network is already currently on-par with the better performing councils nationally;
- The proposed programme to address stormwater inflow will substantially reduce overflows, and minimise these as far as practicable;
- Council continues to refine its maintenance, management and response processes; and
- Council has, and continues to, work closely with tangata whenua to better integrate Māori values into the management and enhancement of the wastewater network and areas that are affected by wastewater overflows.

In addition, even if there is some loss of values, the Application is also consistent with Clause 3.24(1), because:

- 1) There is a functional need for the activity in this location (subclause (a)); and
- 2) The effects are managed by applying the effects management hierarchy (subclause (b)).

In respect of the first point, as we have indicated previously, the wastewater network is essential regional infrastructure – an effective and efficient wastewater network is fundamental and core infrastructure supporting an urban environment by transporting wastewater away from homes, commercial activities and industries and providing for its treatment and disposal. As noted above, it is a lifeline utility specified in CDEMA and also infrastructure providing significant benefits to the Gisborne community, including a critical public health function.

While it may be desirable to have zero dry and wet weather overflow discharges from the network, they are an inevitable consequence of having a wastewater network that has been developed, extended and refined over a period of more than 100 years. The discharges from the network, both dry and wet weather, occur where they do because of the location of the Gisborne urban area and the nature and function of the wastewater network:

- Dry weather overflows occur as a result of blockages and other faults and hence occur generally in the vicinity of (downstream of) where the problem occurs;
- Wet weather overflows are controlled to predominantly occur at primary and secondary overflow points. These locations have been selected where they are required to reduce pressure/flows within

⁸ 4Sight (Ian Mayhew) was the reporting planner in the hearing of the Alliance Group Mātāura Meat Processing Plant application before independent Hearing Commissioners for Environment Southland in December 2020 (Commissioners' decision pending) where this interpretation was discussed and considered. Under this interpretation, Policy 7 and Clause 3.24(1) would not apply to the Application as there is no loss of river extent (and hence associated values).

the wastewater network and to minimise the number of overflow points (and hence the extent of adverse effects).

As such, there is a functional need for the discharges in the locations they occur and, accordingly, Clause 3.24(1)(a) is met.

In respect of Clause 3.24(1)(b), the effects management hierarchy is outlined in Clause 3.21 of the NPS-FM 2020. It is an approach to managing the adverse effects of an activity on the extent or values of a wetland or river (including cumulative effects and loss of potential value) and requires that:

(a) *adverse effects are avoided where practicable*

(b) *where adverse effects cannot be avoided, they are minimised where practicable*

As discussed above, adverse effects have been avoided and minimised to the extent practicable in accordance with the past, current and proposed measures outlined in the Application.

(c) *where adverse effects cannot be minimised, they are remedied where practicable*

Notwithstanding that overflow discharges will be progressively reduced, it is not possible to entirely eliminate overflows as they relate to events (blockages/extreme rainfall) that are outside of the control of the network operator. Where overflows occur, their adverse effects are remedied and mitigated to the extent practicable through appropriate response and management processes.

(d) *where more than minor residual adverse effects cannot be avoided, minimised, or remedied, aquatic offsetting is provided where possible*

(e) *if aquatic offsetting of more than minor residual adverse effects is not possible, aquatic compensation is provided*

A key aim of the Application is to reduce wastewater overflows to a minimum, such that wet weather overflows do not occur in events up to the 50% AEP and dry weather overflows are managed to a practicable minimum. Hence it is considered that aquatic offset or compensation is not required. It is also noted that any investment in offset or compensation is investment that is not made in reducing wastewater overflows.

(f) *if aquatic compensation is not appropriate, the activity itself is avoided*

Discharges from the wastewater network cannot be entirely avoided.

In summary, if it is determined that this policy applies to the Application, then it is considered that the application meets the two 'tests' of Clause 3.24(1) and hence can be approved.

Policy 9: *The habitats of indigenous freshwater species are protected.*

No physical works or loss of habitat is proposed or likely to result from the operation of the wastewater network.

Coast and Catchment Limited were commissioned to undertake an assessment of the ecological effects of wastewater overflows (Appendix H to the Application). They concluded that sediment sampling directly below, and away from, key wastewater outfalls did not detect adverse ecological or sediment quality effects that could be linked to past wastewater overflow discharges. Substantially reducing wet weather overflow frequency and volume and maintaining dry weather overflows at a practicable minimum, as proposed in the application, will reduce already undetectable ecological effects.

Policy 12: *The national target (as set out in Appendix 3) for water quality improvement is achieved.*

The national target is to increase proportions of specified rivers and lakes that are suitable for primary contact and also to improve water quality across all categories. The categories are based on water quality in terms of the two human contact attributes, E. coli and cyanobacteria (planktonic).

The aim of the application is to reduce the frequency and duration of wastewater overflows, which will positively contribute to the swimmability of Gisborne's rivers. This is consistent with the national aim of increasing proportions of rivers that are suitable for primary contact.

Policy 15: *Communities are enabled to provide for their social, economic, and cultural well-being in a way that is consistent with this National Policy Statement.*

As has been described above, the wastewater network is essential regional infrastructure and a lifeline utility that is fundamental to the social, economic and cultural well-being of the Gisborne community. The Application provides for the ongoing operation of this network, subject to a range of management and maintenance requirements and a programme of progressive improvement which collectively ensure overflows and associated adverse effects are managed to a practicable minimum, in accordance with the requirements of the Act, the NPS-FM 2020 and the TRMP.

4. Resource Management (National Environmental Standards for Freshwater) Regulations 2020

The National Environmental Standards for Freshwater (NES-F) were gazetted at the same time as the NPS-FM 2020. While not requested as part of the s92 request, for completeness we have also reviewed the applicability of the NES-F to the Application.

We conclude that there are no standards and rules *in Part 3: Standards for other⁹ activities that relate to freshwater* of the NES-F that apply to the Application. The rules apply to wetlands, the reclamation of rivers and fish passage across specified structures. No discharges of wastewater to wetlands, stream reclamation or structures managed for fish passage are proposed as part of the overflow discharge application.

Accordingly, the Application does not require consent under the NES-F.

5. Summary

The NPS-FM 2020 has been enacted in response to central government concerns that the improvement in freshwater quality and associated ecosystem health was not occurring as intended under the previous NPS-FM 2017. The new NPS provides more stringent requirements and shortened timeframes for regional councils to implement the NOF at an FMU level to:

- Halt the decline in freshwater;
- Drive improvements in water quality and ecosystem health.

It is considered the Application is entirely consistent with this aim. The proposed management approach outlined in the Application seeks to:

- Reduce wet and dry weather overflows, and associated adverse effects, and continue to manage these to a practicable minimum at a rate that is affordable to the community;
- Continue to work with tangata whenua to integrate tikanga, mātauranga Māori, and Māori values into its management of overflows and the wide network;
- Provide a high level of reporting and transparency to ensure that there is a high level of visibility in respect of this important issue; and
- Provide for review processes that enable FMU-specific outcomes to be brought into the consent, should it be appropriate to do so.

Overall, it is considered that the Application is consistent with the requirements of the NPS-FM 2020.

The Application does not require consent under the NES-F.

⁹ Part 2 applies to farming activities; Part 3 applies to activities other than farming in relation to wetlands, reclamation of rivers and fish passage across specified structures.