

# Rivers and Essential Freshwater 2020

## Technical Advice Note

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

## Executive Summary

The Government's Essential Freshwater package aims to arrest the ongoing loss of riverbed habitat and values by ensuring that:

- Activities that may result in these losses are avoided if at all possible; but
- Where there is a functional need for an activity to occur, there is a clear management hierarchy that must be followed to address effects of that activity.

These matters should be addressed as part of any application for resource consent that may result in a loss of river extent or value.

## Introduction

The Government's Essential Freshwater (Action for Healthy Waterways) package came into effect 3 September 2020. As part of that package, the Government has recognised that the cumulative loss of river<sup>1</sup> habitat is an ongoing issue and has introduced provisions in the National Policy Statement for Freshwater Management 2020 (NPSFM) and the National Environmental Standards for Freshwater (NES-F) to address this issue.

## National Policy Statement for Freshwater Management 2020

Policy 7 of the NPSFM states:

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

This policy is refined by subclause (1) of 'Section 3.24 Rivers' of the NPS-FM which requires regional councils to include the following policy (or words to the same effect) into its regional plans:

*"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*

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<sup>1</sup> **River** is defined in the Resource Management Act 1991:

*"river means a continually or intermittently flowing body of fresh water; and includes a stream and modified watercourse; but does not include any artificial watercourse (including an irrigation canal, water supply race, canal for the supply of water for electricity power generation, and farm drainage canal)"*

- (b) *the effects of the activity are managed by applying the effects management hierarchy.”*

The policy specifies situations where it *may* be acceptable to have a loss of river extent or values (when there is a functional need), subject to the application of the effects management hierarchy. Section 3.24 also has additional requirements<sup>2</sup> in relation to implementation of the policy through resource consents:

- (2) *Subclause (3) applies to an application for a consent for an activity:*
- (a) *that falls within the exception to the policy described in subclause (1)<sup>3</sup>; and*
- (b) *would result (directly or indirectly) in the loss of extent or values of a river.*
- (3) *Every regional council must make or change its regional plan(s) to ensure that an application referred to in subclause (2) is not granted unless:*
- (a) *the council is satisfied that the applicant has demonstrated how each step in the effects management hierarchy will be applied to any loss of extent or values of the river (including cumulative effects and loss of potential value), particularly (without limitation) in relation to the values of: ecosystem health, indigenous biodiversity, hydrological functioning, Māori freshwater values, and amenity; and*
- (b) *any consent granted is subject to conditions that apply the effects management hierarchy.*

## Application of NPSFM

These provisions do not apply only to activities like reclamation, earthworks or erection of structures in riverbeds; they also apply to activities such as discharges and water takes. The provisions therefore have wide-ranging implications for resource consenting in and around rivers.

Consent decision makers are required to “*have regard*”<sup>4</sup> to the relevant provisions of the NPSFM and regional plans when considering applications under s104 of the Resource Management Act 1991 (RMA). This means applicants and s42A officers should undertake an assessment of these policies and whether a proposal is consistent with these provisions.

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<sup>2</sup> Guidance issued by MfE for the NSPFM 2014 (amended 2017) clarified that policies requiring plans to be amended should be treated as if they were already included in plans, as it is a matter of when those amendments will be included, not if.

<sup>3</sup> i.e. the policy required to be inserted into regional plans. The exception referenced is therefore that there is a “*functional need for the activity in that location*”.

<sup>4</sup> Section 104(1) Resource Management Act 1991

In having regard to Policy 7, the policy inserted into our plans in accordance with Section 3.24(1), and the other requirements of Section 3.24 of the NPSFM, it is therefore necessary to consider whether the proposal will avoid<sup>5</sup> any loss of extent or values<sup>6</sup> from an activity, even when plans have not been updated<sup>7</sup>. Where a loss of extent or values cannot be avoided if the activity proposed goes ahead, it is necessary to determine whether there is a “*functional need*” for an activity to occur at that location. If not, significant weight should be given to the direction to “*avoid*” the activity, and strong consideration should be given to refusing consent. If there is a functional need, only then should application of the Effects Management Hierarchy (see below) be considered.

### **What is a “functional need”?**

**Functional need** is defined in the NPSFM as:

*“the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment.”*

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<sup>5</sup> The use of the term **avoid** in a planning context has been explored in the *King Salmon* line of caselaw and should be interpreted as “prevent the occurrence of; not allow”. See *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

<sup>6</sup> **Loss of value** is defined in the NPSFM:

*“loss of value, in relation to a natural inland wetland or river, means the wetland or river is less able to provide for the following existing or potential values:*

*(a) any value identified for it under the NOF process; or*

*(b) any of the following, whether or not they are identified under the NOF process:*

*(i) ecosystem health*

*(ii) indigenous biodiversity*

*(iii) hydrological functioning*

*(iv) Māori freshwater values*

*(v) amenity”*

“*Potential values*” means that the activity must not preclude the potential for improvement in a value in the future.

**Loss of extent** is not defined but is likely to be as a result of reclamation, structures, earthworks, planting etc. which will reduce the area of riverbed.

For clarity, the acronym “NOF” in this policy refers to the National Objectives Framework as defined in the NPSFM.

<sup>7</sup> Guidance issued by the Ministry for the Environment for the NSPFM 2014 (amended in 2017) clarified that policies requiring plans to be amended should be treated as if they were included in plans, as it is a matter of when those amendments will be included, not if.

Functional need is not the same as an operational need, which is where there may be technical, logistical or operational reasons for an activity to occur at a location. Rather, functional need is that it **can only occur** in that specific environment<sup>8</sup>. Any application that will result in a loss of river extent or values (e.g. reclamation, deposition, structures, discharges of contaminants) will therefore need to demonstrate **why** the activity can only occur in that location. This is likely to require applicants to discuss what alternative locations for an activity may be available.

### **What is the Effects Management Hierarchy?**

The **Effects Management Hierarchy** as it applies to natural inland wetlands and rivers is defined in the NPSFM:

*“effects management hierarchy, in relation to natural inland wetlands and rivers, means 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) that requires that:*

- (a) adverse effects are avoided where practicable; and*
- (b) where adverse effects cannot be avoided, they are minimised where practicable; and*
- (c) where adverse effects cannot be minimised, they are remedied where practicable; and*
- (d) where more than minor residual adverse effects cannot be avoided, minimised, or remedied, aquatic offsetting is provided where possible; and*
- (e) if aquatic offsetting of more than minor residual adverse effects is not possible, aquatic compensation is provided; and*
- (f) if aquatic compensation is not appropriate, the activity itself is avoided”*

Where a functional need is demonstrated (this is a high bar given the definition in the NPSFM), section 3.24(3) of the NPSFM requires that applicants demonstrate how the Effects Management Hierarchy has been applied to any loss of extent or values of the river. This includes demonstrating how the Effects Management Hierarchy has been applied to cumulative effects and loss of potential value for ecosystem health, **indigenous biodiversity, hydrological functioning, Māori freshwater** values, natural character and amenity.

### **When should this information be provided?**

The information above (functional need, Effects Management Hierarchy assessments) should be provided with all applications for activities within riverbeds, as ultimately any works within a riverbed may result in a loss of value, if not extent.

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<sup>8</sup> See *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196 at [223] – [224]

Where that information is not provided, the application is incomplete in terms of Schedule 4 of the RMA<sup>9</sup> and the application should be returned under s88 with reference to assessments required under section 3.24 of the NPSFM.

## National Environmental Standards for Freshwater 2020

Given the direction to avoid further loss of values and extent of rivers, the National Environmental Standards for Freshwater 2020 (NES-F) also include regulations that manage the reclamation<sup>10</sup> of riverbeds (clause 57), and structures that may impede fish passage (clauses 58-74).

It is important to check these provisions (together with the provisions of any Otago Regional Council plan) to determine whether consent is required. Where consent is required, whether under a regional plan or the NES-F, it is necessary to consider the relevant policies in the NPSFM as these will have a direct impact on whether the proposed activity is likely to obtain consent.

### Reclamation versus deposition of material

There is often confusion about when land use consent is required for reclamation of a river (or lake) bed compared with a land use consent for deposition of material. The two have often been implemented as if the activities were identical, but section 13(1) of the Resource Management Act 1991 (RMA) states:

*“(1) No person may, in relation to the bed of any lake or river –*  
*...*  
*(d) deposit any substance in, on, or under the bed; or*  
*(e) reclaim or drain the bed –*  
*unless expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one) or a resource consent.”*

This indicates that the RMA does not mean the two terms can be used interchangeably. They are therefore covered separately below.

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<sup>9</sup> Schedule 4(2)(2)(a)-(c) of the RMA requires an assessment of an activity against any relevant objectives, policies, rules (and requirements, conditions or permissions in those rules), and any other relevant requirements in a document referred to in Schedule 104(1)(b) of the RMA.

<sup>10</sup> as defined by the National Planning Standards 2019.

## Definitions

While “deposit” and “reclaim” are not defined in the RMA, the National Planning Standards (November 2019) define **reclamation** as:

***Reclamation** means the manmade formation of permanent dry **land** by the positioning of material into or onto any part of a **waterbody, bed of a lake or river** or the coastal marine area, and:*

*(a) includes the construction of any causeway; but*

*(b) excludes the construction of **natural hazard** protection **structures** such as seawalls, breakwaters or groynes except where the purpose of those **structures** is to form dry **land**.*

The Oxford Dictionary defines **deposit** as:

*“The action of placing something in a specified place”*

The difference between whether a proposal is subject to s13(1)(d) (deposition) and/or s13(1)(e) is therefore a matter of degree and whether the placing of substances on the bed of a lake or river (deposition) will result in the formation of “land”<sup>11</sup>. If the deposition of material (s13(1)(d) RMA) would result in an area no longer being considered the “bed” of a lake or river, it is a reclamation under s13(1)(e) RMA. Because reclamation would reduce the extent of riverbed, given Policy 7 and the associated requirements of section 3.24 of the NPSFM, it should be avoided except where there is a functional need.

## Conclusion

This advisory note provides Otago Regional Council’s current thinking on how the Government’s Essential Freshwater package will affect consent applications related to rivers, and the need to avoid further loss of extent or value of these habitats. There are likely to be specific questions on these provisions in regard to particular proposals, so we offer one hour of free pre-application advice to help applicants. This can be arranged through a phone call to our Customer Experience team (0800 474 082). This guidance **does not** constitute legal advice and should not be relied on as such.

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<sup>11</sup> The RMA defines **land**:

*(a) includes land covered by water and the airspace above land; and*

*(b) in a national environmental standard dealing with a regional council function under section 30 or a regional rule, does not include the bed of a lake or river; and*

*(c) in a national environmental standard dealing with a territorial authority function under section 31 or a district rule, includes the surface of water in a lake or river.*