



STAFF REPORT

TO: Environment & Planning Committee

FROM: Steve Markham, Policy Manager

REFERENCE: R420

SUBJECT: **SUBMISSION ON NATIONAL ENVIRONMENTAL STANDARD ON ECOLOGICAL FLOWS AND WATER LEVELS - EP08/08/05 -**
Report prepared for meeting of 28 August

1. PURPOSE OF REPORT

This report recommends adoption of a submission to the proposed National Environmental Standard on ecological flows and water levels, provided in a discussion paper earlier this year.

The purpose of the Standard is to ensure that water take decisions are made in the context of “a clear limit on the extent to which flows and water levels can be altered”, and “a clear specification of available water”, and to “provide consistency on the appropriate methods used to assess ...environmental flows and water levels”.

The submission is reasonably self explanatory, but an outline of the proposed NES can be given at the meeting.

2. RECOMMENDATION

It is recommended that the Committee **approve** the attached submission for forwarding top the Ministry for the Environment by end of August.

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TASMAN DISTRICT COUNCIL'S SUBMISSION ON "PROPOSED NATIONAL STANDARD FOR ECOLOGICAL FLOWS AND WATER LEVELS "

The Tasman District Council thanks the Ministry for the opportunity to be part of the development of a National Environment Standard (NES) for ecological flows and water levels to comment on the Ministry's Discussion Document; Proposed National Environmental Standard on Ecological Flows and Water Levels (2008).

As an introductory comment, we consider the introduction of national environmental standards (NESs), which have the force of regulation, should adhere to certain principles. An NES should be clear and unambiguous in its meaning and effect, relevant to resource management issues which justify national intervention, cost effective in administration, and not impose unintended adverse consequences for local authorities or their communities. We remain to be convinced that the current proposal will meet any of these principles and, as with previous NES proposals, we are sceptical about how the concepts will be translated into law.

GENERAL COMMENTS

1. From the outset, we would like to record our support for the objectives of the NES, as set out in the discussion document. However, we believe that the documents do not provide sufficient clarity and certainty to establish the effect of the NES within the Tasman District.
2. The Tasman District Council has had a long history of water management and has recognised and provided for the sustainable management and efficient use of water in this district through a series of water management plans and their ongoing implementation. Water management provisions have been developed and improved since the first Water Management Plan was prepared for the Waimea Plains in 1981. Since 2001 the Council has consolidated its various regional plans for water management into a District-wide water management framework in Part V of the Tasman Resource Management Plan:

(<http://www.tasman.govt.nz/index.php?PartV-Water>).
2. In particular, the Council has developed policies and rules that recognise and regulate the use of water by introducing allocation limits for specified water bodies and rationing provisions that control water taking during times of drought. It has also adopted interim water allocation measures for some water bodies where specific allocation limits have not been developed. The Council views allocation limits and rationing triggers as key water management tools and they have been an integral part of management regimes in specified parts of the district since the early 1980s and have been adopted under regional plans since 1992.

3. The Council does not have complete information about all the water bodies within Tasman District. Flows information or details about water body uses and values is incomplete for some rivers, generally those less subject to abstractive pressures. For these situations, the Council has adopted policies to give interim guidance for any decisions in relation to water permit applications. The policies apply where the demand for water abstraction is lower and where existing water body values are not threatened by the cumulative effects of water abstraction. The Council has, in effect, been using water management provisions similar to those included in the proposed NES and is well placed to comment on their effectiveness.
4. The Council's intent in its Plan is similar to that of the NES, i.e. to help direct water allocation while or until more information about the water body and its uses and values is gathered. The thresholds provided in the Council's policy provide an indicator as to the level of pressure or stress the water body is subject to. It guides decisions about priorities for further investigation and the establishment of allocation limits and rationing provisions during periods of low flow. The Council considered that a lack of certainty about both quantity or flow and any relevant water body values for these water bodies meant that specific limits could not be established by rules and that policy direction was the most appropriate method. Issues relevant to each water body can then be assessed on a case by case basis within the policy framework (which also includes directions about desired security of supply for abstractive users and other policies concerning management of adverse effects of the take).
5. The Council considers that the discussion document has not clearly accounted for the **legal effect** of a regulation that attempts to specify what decision must be made in relation to any water permit application when there is incomplete knowledge about a water body which parts of the NES apply in all circumstances to all water bodies, and under what circumstances the NES does not apply.

LACK OF CLARITY ABOUT HOW THE REGULATION IS TO APPLY IN RELATION TO EXISTING PLANS

6. It is unclear as to the extent to which the interim limits in the NES apply when there is already a water allocation regime in place in a plan. Uncertainty arises in several circumstances:
 - do the interim limits in the NES apply if a Plan has a water body flow/level regime but does not have either an allocation limit or a 'minimum flow' but rather an alternative regime that effectively manages abstraction during periods of low flow?
 - What Plan alternatives for a water body flow/level regime can be considered sufficient to supercede the interim flow/level requirements of the NES? Are there minimum degrees of protection, or are there certain types of regime formulation, that are to be sufficient?
 - If the plan regime is sufficient but as indicated, there may be a time period within which an "appropriate environmental flow regime" must be established, how is this to be determined?

- Are any existing water management provisions to be made subject to alternative technical assessments on review, when those existing management regimes are not subject to contest?

7. The Tasman District Council has a robust water management system that establishes allocation limits and triggers for rationing during times of low flow, including staged reductions as flows or levels decline. The Council Plan does not specify a 'cease take' flow as the discussion document defines as a minimum flow, but it does establish a security of supply standard for users, and policies for managing water abstraction between users when flows fall below the take reduction provisions (i.e. beyond stage three rationing). The Council considers that its approach has resulted in sustainable water allocation in a way that has been supported by its community through the Schedule 1 process.

8. The Council also has policy direction guiding applications for water permit applications from rivers without a specific flow/level regime that states that:

"the cumulative abstraction between November and April inclusive, ...from the proposed and all existing authorised takes from the river does not exceed 10 percent of the 5-year, 7-day low flow, provided that up to 33 percent of the 5-year, 7-day low flow may be allocated if the cumulative adverse effects listed in Policy 30.1.9 from the proposed take in combination with any other authorised take are avoided, remedied or mitigated"

The thresholds used are not the same as the NES and are in fact more conservative. A total allocation limit is not established. The Council does not consider that both are, in fact essential, as it states that when this threshold of allocation is approached, the allocation regime for the water body in question will be reviewed. The Council sees this allocation policy as 'interim' until such time as the abstraction pressure approaches the threshold set.

9. The discussion document states that, following commencement of the NES, when the next application to take water is made, a council determination must be made as to whether the interim limits apply or do not apply by virtue of plan provisions. This is significant, as if the interim limits apply and are to be breached by the application, then:

- The application is non-complying, and
- The technical methods as part of the NES are to be applied in the assessment of the application.

The table also shows that part application of interim limits, as above, is also possible. The potential for uncertainty and confusion is considerable.

10. By implication, flow regimes and associated allocation limits established in terms of the parameters of cease take flow, the MALF, and the annual average recharge will be the only acceptable formulation of solutions in plans to displace the default interim limits. In relation to wetlands interim limits, it is entirely unclear what scope of acceptable alternative policy solution would be possible, and there appears to be no room to move, as the interim limits are no change in existing water levels other than as authorised at commencement of the NES (and so an allocation limit of zero). The assumption under the document appears to be that there is only one possible formulation for flow or level and allocation limit specification, as given for the interim limits. This is of course not so.
11. The situation around the regions which have developed policy instruments for water allocation management is varied, as are the water body situations. There are a number of management instruments applied in practice in plans to yield both flow regimes and allocation limits that require approaches and parameters other than as specified in the interim limits in the document, for the NES. We stress that these are policy instruments including their interrelationships, and not technical methods for establishing instrumental values.
12. For all the above Tasman examples of both specific and general water body regime specifications, there is a robust or stringent level of instream protection in formal terms, and where there are variations to this outcome, there are a number of relevant influences of the management of water allocation that are we believe, effective in yielding a similarly strong level of practical protection (e.g. support by water users for water augmentation solutions).

We request that the Government undertake further discussion with regional water management practitioners to show how plan formulations other than those proposed in the draft NES, can be applied in situations of high value, high risk water bodies, to yield robust and stringent levels of instream protection

THERE IS UNCERTAINTY IN TERMS USED, INTERPRETATION AND APPLICATION.

13. There is inconsistent use of terms. For example, some parts of the discussion paper refer to “groundwater”, while others refer to “aquifers”. Aquifers are the rock body of those groundwater systems from which “economic” quantities of water are or can be abstracted. The application of the interim limits to all groundwater, as opposed to specified aquifers, would have much wider effect and have significant implications for existing and potential users and the council’s ability to implement the NES.
14. The Council would expect to be involved in any decisions about identification of specified aquifers. We are of the view that there are **no** aquifers in Tasman District that would benefit from having a NES specifying interim limits for groundwater. [state reasons]

15. Other terms that will be problematic in administration are “connected” and “adjacent” in the context of groundwater connected to adjacent surface water bodies. Some of the more difficult water management decisions at either policy or consent level relate to groundwater takes that induce river losses, with the contention revolving around the extent and significance of any stream depletion. Nothing in the discussion document clarifies the meaning of “connected” to resolve these conflicts.
16. Council also notes that to establish the allocation limit, a Council is obliged to carry out potentially significant resource investigations to determine recharge of the aquifer in advance of the next application to take water from that aquifer. Not all water takes are of that level of significance and not all aquifers are subject to significant water abstraction pressure.
17. Use of terms without definition. For example, the interim limits apply to wetlands without any clear definition of “wetland” being provided. In the absence of any such definition, councils will rely on the RMA’s definition. This would mean that the interim limits would apply to a wide range of wetlands, most of which have limited or no hydrological record to determine “existing variation”. This may also be inconsistent with the concept of ‘significant’ wetlands, which is used in some Plans. While The Tasman Resource Management Plan rules currently protect all “naturally occurring” wetlands, policy and methods note the need to identify ‘significant’ wetlands and ensure a greater level of protection for them.
18. Relative threats to wetlands. Protecting wetlands is recognised by both the TDC as a priority. However, the threat to wetlands caused by abstraction is insignificant relative to other water and land uses (e.g., the diversion and discharge of water associated with land drainage, vegetation clearance) and that there may be other (more appropriate) plan provisions that protect wetlands. It is considered that any central government initiative to protect wetlands should focus on the significant threats.
19. Impact of NES on rivers where flow is artificially controlled through dams and impoundments. This provides another example of the need for considering exemptions or alternative solutions. Impoundments whether inline or offline, variously store or release water as residual flows, and water is removed from the impoundment by takes. Residual flow regimes may breach the technically formulated interim limits. Residual flows from existing consented impoundment operations are protected for the consent duration from the formulation of the proposed interim limits, where despite a breach of the interim limit values given by technical formulation, the “total [existing] allocation” is to be the determinant of the limits that will apply. However, where damming renewals, or the next take is sought downstream of an existing impoundment, or a new impoundment is sought, then these applications may face significant hurdles. The issue here is that many impounded waterways have very little or no environmental flows, and may be intermittently flowing. The interim limits do not account for this circumstance.
20. Variation in the nature and timing of abstraction. Abstraction does not only occur during periods of low flow or level. For example, abstraction for storage purposes often occurs in winter months or at other times of high flow or level. The interim limits may not provide sufficient flexibility to enable the appropriateness of these efficient uses to be recognised and provided for.

21. Lack of certainty as to how the interim limits are to be implemented: For example, do the interim limits for rivers apply at the point of take or at some point where flow is or could be measured in the catchment? How is MALF derived if flow has not been regularly measured in the river?
22. The discussion document only distinguishes between two types of river (large and small flows). Not all rivers are suited to a MALF mechanism for determining an allocation limit. This is because:
 - Not all rivers have a MALF from which to calculate a reasonable allocation limit,
 - Some rivers lose rather than gain flow along their length.
23. The Council manages several water bodies that are seasonally dry or ephemeral. Water users currently can abstract water when it is available, often taking water at times of high flow for storage such as in the Moutere gravel-drained rivers. An allocation limit based on a MALF would unreasonably constrain takes from those rivers.
24. It also manages rivers that lose (rather than gain) water as it flows towards the sea. The Takaka River flows through a marble karst geology and loses water over much of its lower reaches. A regulation based on a MALF for this river would be inappropriate.

CONTESTABILITY

- 25 The NES cannot in its draft formulation be implemented on the next take application, without a council decision or determination on applicability of the NES and on specific water resource values where it applies. The discussion document does not elaborate on the means by which the council determinations are to be made. These determinations include:
 - the applicability of the interim limits (as against any plan level/flow regime that may supercede the interim limits); or
 - where the interim limits are determined to apply, the water body-specific values for the MALF, average annual recharge, or points of groundwater connection with rivers.

resumably such determinations are to be made public. If the determination is to be contestable, then there will be an incentive for water users and other parties to challenge council determinations because they are by their very nature uncertain and interim.

- 26 Councils will effectively end up in a situation analogous to any council's formulation of minimum flows/allocation limits being challenged through the Schedule 1 process. This will undermine the objectives of having the interim limits and increase the costs of implementing the NES.

27. Costs and benefits: Given the above issues, it is difficult to validate the costs and benefits outlined in Section 6 of the discussion document.

We request that the NES provide that where there is no relevant plan regime for flows and limits, the regional council as consent authority must make or commission a determination of the characteristics of the resource and the application of the relevant interim limits. This determination must be provided to the applicant and the public, and remain available with the consent decision.