

Attachment 11:

**Legal Opinions Provided by Wynn Williams to Environmental Southland of
the Alliance Mataura Resource Consent Application and NPS FM.**

MEMORANDUM

Date: 11 December 2019
To: Alex Erceg (Environment Southland)
From: Mike Doesburg, Alyssa Langford

INTERPRETATION OF “SUBSTANTIALLY FREE”

1. Alliance Group Limited has lodged an application for resource consent to authorise the discharge of cooling water and treated wastewater to the Mataura River (**Application**).
2. Clause 7(1)(a) of the Water Conservation (Mataura River) Order 1997 (**Mataura WCO**) provides that a discharge permit must not be granted for any discharge to the Mataura River unless (among other things) the discharge is substantially free from suspended solids, grease and oil. This requirement is also reflected in the proposed Southland Water and Land Plan (**pSWLP**).¹
3. In order to assist the Council’s processing of the Application, you have asked for our advice on how “substantially free” should be interpreted.

Analysis

4. Clause 7(1)(a) of the Mataura WCO provides that:²
 7. **Provisions relating to discharges**
 - (1) A discharge permit must not be granted and a regional plan must not be made for any discharge into the protected waters if the effect of the discharge would be to breach the following provisions and standards:
 - (a) Any discharge is to be substantially free from suspended solids, grease, and oil;
 - ...
5. In the context of the Application, the essential question is at what point does a discharge cease to be “substantially free” from suspended solids, grease, and oil? In other words, what concentration of suspended solids, grease and oil are permitted? It is important that the bounds of the term “substantially free” are understood, as clause 7(1)(a) of the Mataura WCO acts a jurisdictional bar to the grant of consent.³
6. The term “substantially free” is not defined in the Mataura WCO, nor in the Resource Management Act 1991 (**RMA**). As the Mataura WCO is an “enactment”, it is subject to the Interpretation Act 1991 (**Interpretation Act**) and the principles of statutory interpretation.⁴

¹ For surface waterbodies classified as either Mataura 1, 2, or 3, the Appendix E Receiving Water Quality Standards require that “[a]ny discharge is to be substantially free from suspended solids, grease, and oil”.

² Water Conservation (Mataura River) Order 1997, cl 7(1)(a).

³ Under section 217(2)(a) of the RMA, the Council cannot grant a water permit that is contrary to a restriction in a water conservation order.

⁴ Interpretation Act 1999, s 29.

Principles of statutory interpretation

7. Section 5(1) of the Interpretation Act provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose. The starting point must always be the text of the provision in question. However, it is well established that in construing the provisions of an enactment, the plain, ordinary meaning of the words must, where possible, be applied, together with a purposive interpretation, having regard to the total context of the words and purpose of the enactment.⁵ Relevant factors include:
 - a. The text of the relevant provision in its immediate context;
 - b. The purpose of the provision;
 - c. The context and scheme of the Act and other indications in it;
 - d. The history of the Act; and
 - e. Any other permissible guides to meaning.
8. These factors must each be considered in turn, with the starting point being the text of the relevant provision. Only in cases where the plain and ordinary meaning of the provision is clearly contrary to its statutory purpose, or the social policy behind the provision, or otherwise produces some injustice, absurdity, anomaly or contradiction are the subsequent interpretation aids considered.

Plain and ordinary meaning

9. “Substantially” is defined in the Concise Oxford English Dictionary as:⁶
 1. to a great or significant extent.
 2. for the most part; essentially.
10. “Free” is defined in the Concise Oxford English Dictionary as:⁷
 4. (free of/from) not subject to or affected by: *an area free from weeds.*
11. Given these definitions, we consider that, on the plain and ordinary meaning of the words, the phrase “substantially free” from suspended solids, grease, and oil means any discharge should be ‘for the most part or significantly not affected by’ suspended solids, grease, and oil. Analysis of the text alone does not provide clarity about the degree of discharge that is permitted or restricted by the Maitua WCO.

Text in the light of its purpose

12. The purpose of water conservation orders is described by section 199 of the RMA as to “recognise and sustain”:
 - (a) outstanding amenity or intrinsic values which are afforded by waters in their natural state:
 - (b) where waters are no longer in their natural state, the amenity or intrinsic values of those waters which in themselves warrant protection because they are considered outstanding.

⁵ *Franti v Kapiti Environmental Action Inc* (2008) 8 ELRNZ 1 (HC).

⁶ Angus Stevenson and Maurice Waite *Concise Oxford English Dictionary* (12th ed, Oxford University Press, Oxford, 2011).

⁷ Angus Stevenson and Maurice Waite *Concise Oxford English Dictionary* (12th ed, Oxford University Press, Oxford, 2011).

13. In the current context, this includes the outstanding fisheries and angling amenity features of the protected waters of the Mataura River.⁸ In our opinion, the purpose of protecting an outstanding fishery and angling amenity features suggests that the Mataura WCO should be given an interpretation that favours environmental protection. Accordingly, we consider that it is appropriate to take a conservative approach to the interpretation of the phrase “substantially free”.
14. Based on the text and in the light of the purpose of the Mataura WCO, in our opinion, “substantially free” means that the discharge contains only very low concentrations of suspended solids, grease, and oil. It does not require that the contaminants are not measurable. But given the Mataura WCO’s purpose of protecting an outstanding fishery and angling amenity features, a discharge will be “substantially free” of suspended solids, grease, and oil when the concentration is such that there would be no adverse effect on water quality in the protected waters.

Context and scheme of the Mataura WCO

15. The context and scheme of clause 7(1)(a) is relevant to its interpretation. Clause 7(1) provides a restriction on the grant of discharge permits or the making of regional rules that authorise certain discharges. Clause 7(1)(a) applies to all parts of the Mataura WCO’s protected waters. In contrast, clauses 7(1)(b)-(d) provide specific restrictions in relation to specific parts of the protected waters.
16. Because clause 7(1)(a) acts as a jurisdictional bar to the grant of resource consents, whether a discharge is “substantially free” of suspended solids, grease, and oil must be capable of objective determination. Otherwise, clause 7(1)(a) would reserve an unlawful discretion to the Council. This supports the definition we have outlined above.

History of the Mataura WCO

17. Clause 7 was not included in the original draft Mataura WCO. It was added while the Mataura WCO was before the Planning Tribunal and was based on a similar clause in the National Water Conservation (Rakaia River) Order 1988 (**Rakaia WCO**).
18. No discussion is provided in the decisions related to the Mataura WCO or Rakaia WCO. This is likely because the test of whether a discharge was “substantially free” from suspended solids, grease or oil was used in the Water and Soil Conservation Act 1967.⁹ Accordingly, the history of the Mataura WCO does not provide assistance with the interpretation of “substantially free”.

Case law

19. We have searched for case law that defines “substantially free” in the context of a water conservation order or the Water and Soil Conservation Act 1967. We have been unable to find any authority that defines when a discharge is “substantially free” of a contaminant. However, we have found examples of particular discharges that have been found to be “substantially free” of certain contaminants:
 - a. In *Minister of Conservation v Gisborne District Council*, the Planning Tribunal referred to evidence that a wastewater discharge to surface water was substantially free of suspended solids and total fat:¹⁰

Dr Cooper was abundantly clear in his evidence when he said that, irrespective of the improvements that may be achieved in the quality

⁸ Water Conservation (Mataura River) Order 1997, cl 3.

⁹ Water and Soil Conservation Act 1967, s 21(3A)(c).

¹⁰ *Minister of Conservation v Gisborne District Council* A106/91, 8 July 1991 at p 17-18.

of the effluent, the criteria for discharge into the marine environment in an area classified other than SE would not be satisfied unless the company installed secondary treatment - which would involve costs of the order earlier mentioned. In his view, the only technically viable treatment would be a chemical treatment process. By such a process, BOD reductions in the effluent of approximately 70% would be expected, with suspended solids and total fat concentration of less than 150g/m³ and 75g/m³ respectively. The colour of the effluent would also be markedly different, in that the number of faecal coliforms would be reduced by approximately 99%. Such a discharge would be substantially free of suspended solids, grease and oil and not disturb the integrity of an SD classification.

- b. In *Huakina Development Trust v Waikato Valley Authority*, the Planning Tribunal accepted (in absence of contrary evidence) that a discharge of 30g/m³ suspended solids was “substantially free”:¹¹

Then, Mr Woodward expressed his opinion that, for the purposes of section 21(3A) of the Act, the proposed discharge will be substantially free of suspended solids; that after a reasonable mixing the classification standards which, in this case, are a final classification of D, can be met; and that, combined with all other discharges in the receiving water, again after reasonable mixing, the classification standards can be maintained. He was the only witness to give evidence on these matters. He was not challenged on them in cross-examination, and we have no reason to doubt the opinions he gave. We did question him about his statement concerning the proposed discharge being substantially free of suspended solids, which, of course, is a requirement of the statute. His evidence is that the concentration of solids in the proposed discharge is likely to be 30 grams per cubic metre. In his opinion, this is “substantially free”. Again we have no evidence to the contrary, and no reason to doubt him on this.

20. Although only two examples, these cases provide an indication of the concentration of contaminants that are permissible for a discharge to be “substantially free” of suspended solids, grease, and oil. While these examples are not definitive, they indicate that concentrations of less than 150g/m³ of suspended solids, and less than 75g/m³ of fats, are acceptable.

Conclusion

21. Applying the principles of statutory interpretation, we consider that the phrase “substantially free” means to be “for the most part or significantly not affected by” something. Given the purpose of the Matura WCO, we consider this contemplates a very low concentration of contaminants, such that they would not give rise to adverse effects on water quality in the protected waters. It does not require the discharge to be entirely free of suspended solids, grease, and oil or that such contaminants are undetectable in the discharge.
22. Some guidance may be taken from the concentrations accepted by the Planning Tribunal under the Water and Soil Conservation Act 1967. These cases indicated that concentrations of 30g/m³ and 150g/m³ of suspended solids, and a concentration of 75g/m³ of grease and oil, in a discharge would still be considered “substantially free”.
23. The Application proposes a discharge with a median Total Suspended Solids concentration of 67g/m³ and median oil and grease concentration of 13g/m³. Given

¹¹ *Huakina Development Trust v Waikato Valley Authority* C19/86 [1986] NZPT 87.

our opinion detailed above, we consider that it is likely that the Environment Court would find the discharge to be “substantially free” of suspended solids, grease and oil. However, we recommend that the Council seek input from a water quality expert about the level of contaminants that would have no detectible adverse effect on the Mataura River (having regard to the rate of flow at the point of discharge and following reasonable mixing).

24. Please contact us if you would like to discuss this further.

Wynn Williams

MEMORANDUM

Date: 23 October 2020
To: Aurora Grant (Environment Southland)
From: Mike Doesburg
Copy: Ian Mayhew (Principal Planning and Policy Consultant, 4Sight)

ALLIANCE MATAURA RESOURCE CONSENT APPLICATION:

1. Environment Southland is processing Alliance Group Limited’s (**Alliance**) application for resource consents to take and use water; discharge water and wastewater; and use an existing weir structure (including the associated damming and diversion), for its meat processing plant in Matura (**Application**).
2. You have asked for our advice on aspects of the Application. In particular, you have asked for our opinion on the following questions:
 - a. Is Alliance’s existing discharge permit part of the “existing environment” for the purpose of assessing the application?
 - b. Does clause 3.24 of the National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**) apply to discharges to water? If so, what qualifies as a “functional need” as referred to in that clause?
 - c. Is Policy A4 of the National Policy Statement for Freshwater Management 2014 (**NPSFM 2014**) relevant and applicable given the NPSFM 2014 has been superseded by the NPSFM 2020? If so, how should that policy be weighted when considering the Applications?
 - d. Given the effects management hierarchy in the NPSFM 2020, is the cost of alternative discharges (e.g. to land) something Environment Southland can consider if proposing to grant consent for a discharge to water with a longer consent term?
3. We address each question in turn below.

Existing environment for the Alliance discharge

Is Alliance’s existing discharge permit part of the “existing environment” for the purpose of assessing the application?

4. Under section 104 of the RMA, a consent authority must have regard to “any actual and potential effects on the environment of allowing the activity”. What constitutes the “environment” is an important part of that assessment. “Environment” has a broad definition under the RMA and has been the subject of a substantial body of case law. It is well understood that the “environment” includes the environment as it may be modified by permitted activities and the implementation of resource consents which have been granted and where it appears likely that those consents will be implemented.¹
5. The assessment can be difficult where existing activities are being reconcented. Until recently, there were differing lines of authority on whether regional resource consents that were being replaced should be considered as part of the

¹ *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

“environment”. However, in *Ngāti Rangī Trust v Manawatu-Whanganui Regional Council*, the High Court confirmed that the correct approach is the “environment” should be considered as if the activity being consented is ceasing.

6. Accordingly, in our opinion, the Application should be assessed as if the current Alliance discharge is not occurring. This means that the effects of the discharge on the Maitara River must be considered in their entirety, rather than those effects being discounted as already being present in the environment.

Clause 3.24 of the NPSFM 2020

Does clause 3.24 of the NPSFM 2020 apply to discharges to water? If so, what qualifies as a “functional need” as referred to in that policy?

7. The NPSFM 2020 took effect on 3 September 2020, so is relevant to the processing of the Application.
8. Clause 3.24 of the NPSFM 2020 requires regional councils to insert a policy in their regional plans that states:

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.
9. The effects management hierarchy, functional need and loss of value (in relation to rivers) are defined concepts in the NPSFM 2020.²
 10. To assist with our consideration of this issue, Mr Mayhew provided the following context in relation to Policy 7 of the NPSFM 2020:

In respect of Policy 7 of the NPS[FM 2020], the following excerpts from the Section 32 evaluation may be of some relevance to the legal review. This appears to indicate that the intent of the policy was directed at stream loss/modification, rather than the effects of discharges.

Section 32:

Policy 7 specifically targets the unacceptable loss and degradation of New Zealand’s rivers (a term which is defined in the RMA to include streams). Targeted activities include piping, diversion, and reclamation of streams and rivers. The purpose is to retain river and stream extents and associated values to the extent practicable.

and

The key to implementing Policy 7 is restricting the ability for applicants to obtain resource consents for piping, diversion, and reclamation activities, and placing additional conditions on consents. Strong policy direction will ensure offsetting or compensation is applied (but only as a last resort). A specific reclamation rule in the NES-F also complements this policy (this rule is evaluated separately in section 8.0 of this report but should be read together with this section).”

11. The NPSFM 2020 is a regulation as defined in the Interpretation Act 1999 and is therefore subject to that Act. Section 5 of the Interpretation Act 1999 provides that

² NPSFM 2020, clause 3.21.

the meaning of an enactment must be ascertained from its text and in light of its purpose. For the NPSFM 2020, the purpose is expressed in:

- a. the fundamental concept of the NPSFM 2020 – Te Mana o te Wai;³
 - b. the objective;⁴
 - c. the policies;⁵ and
 - d. the scheme and arrangement of the NPSFM 2020.
12. In our opinion, text of the policy required by clause 3.24 is broad. It requires that the loss of river extent and values is avoided (unless certain criteria are met). The policy's application is not explicitly limited to only certain activities (e.g. reclamation, drainage or in-stream structures). The definition of "loss of values" in relation to rivers is similarly broad and is not limited to certain activities.⁶
13. The fundamental concept, objective and relevant policies of the NPSFM 2020 are all targeted at ensuring the health and well-being of water bodies are prioritised and protected. The NPSFM 2020 also directs that freshwater is managed in an integrated way.
14. In our opinion, clause 3.24 should be interpreted as applying to all activities that may adversely affect the extent and values of rivers, including discharges as well as reclamation, drainage and in-stream structures. We consider that a narrower interpretation (i.e. that clause 3.24 applies only to physical changes to rivers) requires a strained reading of clause 3.24 and the definition of "loss of values".
15. We acknowledge the comments in the section 32 report for the NPSFM 2020 that Policy 7 (which clause 3.24 appears to implement) intends to restrict piping, diversion and reclamation activities (any, by implication, not include discharges). However, we consider that the drafting of clause 3.24 (and Policy 7) does not reflect that limited intent.
16. In terms of what constitutes a "functional need" under clause 3.24, that term is defined in clause 3.21 as:
- functional need** means 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
17. In our opinion, the definition is clear that an activity will have a functional need to locate in a river if that is the only environment that it can occur in. Practical or economic matters are not relevant. For example, a culvert for a road will have a functional need if the road must cross the river. However, we consider that water and wastewater discharges are unlikely to have a functional need to locate in a river.
18. Further, the definition of "functional need" is derived from the National Planning Standards. The National Planning Standards also include a definition for "operational need", which incorporates an economic element:
- operational need** means the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints.

³ NPSFM 2020, at 1.3.

⁴ NPSFM 2020, at 2.1.

⁵ NPSFM 2020, at 2.2.

⁶ NPSFM 2020, at 3.21.

19. In our opinion, the decision to use the narrow term “functional need” rather than broader term “operational need” was deliberate. It explicitly excludes consideration of technical, logistical or operational issues, which would include economic considerations.
20. We are conscious that, if strictly applied, the policy in clause 3.24 is highly restrictive. As it is untested and no real guidance has been provided by the Ministry for the Environment,⁷ we recommend that the section 42A report:
 - a. provides an overview of the issue with clause 3.24, including that it was introduced after the application was lodged, is not addressed in the application and assessment of environmental effects and there is no real guidance from MfE;
 - b. outlines the available interpretations and the implications of those interpretations;
 - c. comments briefly on whether the proposal is contrary or not contrary to the policy in clause 3.24 and applies the policy when assessing the proposal against the “gateway” in section 104D(1)(b) of the Act; and
 - d. has regard to the policy in clause 3.24 as part of the overall assessment under section 104 of the Act.

Policy A4 of the NPSFM 2014

Is Policy A4 of the NPSFM 2014 relevant and applicable given the NPSFM 2014 has been superseded by the NPSFM 2020? If so, how should that policy be weighted when considering the Applications?

21. Policy A4 of the NPSFM 2014 is included in the Southland Regional Water Plan and the Proposed Southland Water and Land Plan. Despite the NPSFM 2014 being revoked, there is no mechanism in the RMA nor the NPSFM 2020 to remove Policy A4 without using the Schedule 1 process.
22. Accordingly, in our opinion, Policy A4 is a relevant consideration under section 104(1)(b)(vi) of the RMA as a relevant provision of a plan or a proposed plan.
23. In terms of weight, that issue typically only arises where there is a conflict between an operative and proposed plan. There is no such conflict here as both plans include Policy A4 and the Policy does not conflict with the NPSFM 2020. While the NPSFM 2014 that required Policy A4’s inclusion in the plans has been revoked, we do not consider that means that Policy A4 should be given less weight when considering applications for discharges.

Cost of alternatives and term

Given the effects management hierarchy in the NPSFM 2020, is the cost of alternative discharges (e.g. to land) something Environment Southland can consider if proposing to grant consent for a discharge to water with a longer consent term?

24. In our opinion, the effects management hierarchy provided by the NPSFM 2020 does not preclude the consideration of the cost of alternative discharges. The effects management hierarchy prescribes that effects must be avoided, minimised or remedied (where practicable), offset (where possible), compensated or, if all else fails, the activity must be avoided. The cost of mitigation or amendments to a

⁷ MfE has issued an “avoiding loss or rivers” fact sheet. However, it provides no real guidance on how clause 3.24 is to be applied in practice.

proposal is relevant to determining whether it is practicable to avoid, minimise or remedy the effects.

25. Case law is clear that significant investment in a proposal can indicate a longer term of consent is appropriate. However, we have reservations with the argument that the cost of an alternative discharge could justify a longer term of consent. In our opinion, the cost of alternatives may demonstrate that a discharge is the best practicable option (and will be relevant to the assessment under section 105 of the RMA). However, that of itself would not lead to a longer term of consent.
26. The issue of term is complex and may warrant further discussion.
27. Please contact us if you would like to discuss any of the above this further.

Wynn Williams

MEMORANDUM

Date: 6 November 2020
To: Aurora Grant (Environment Southland)
From: Mike Doesburg

NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT 2020: APPLICATION FOR PROCESSING RESOURCE CONSENTS

1. The National Policy Statement for Freshwater Management 2020 (**NPSFM**) took effect on 3 September 2020 and is a relevant matter for consideration when Environment Southland (**Council**) processes resource consent applications.¹ While the Ministry for the Environment (**MfE**) has published factsheets on limited aspects of the NPSFM, there is currently little guidance on how the NPSFM should be interpreted and applied.²
2. You have asked for our opinion on how the Council should apply the NPSFM when processing resource consent applications. In particular, you have asked for our advice on the following issues:
 - a. The Council has not yet amended its regional plans to include the policies required by the NPSFM. You have asked:
 - i. How should the NPSFM be weighted when processing resource consent applications for activities in, or that will affect, waterbodies?
 - ii. Should a policy required by the NPSFM be given more, the same, or less weight than those policies currently in the Council's plans?
 - b. Clause 3.24 of the NPSFM directs the Council to insert a policy into its regional plans that requires that the loss of river extent and values is avoided, unless there is a functional need for the activity in the location and the effects of the activity are managed by applying the effects management hierarchy. You have asked:
 - i. Does this policy apply only to activities that will reduce the extent of a river (and its values), for example, reclamation, diversion or piping of rivers? Or does it apply to other activities such as discharges and water takes?
 - ii. What does "avoid" mean in relation to these activities?
 - c. Policy 7 of the NPSFM states "loss of river extent and values is avoided to the extent practicable." You have asked:
 - i. How does this relate to clause 3.24, which states that the loss of extent and values should be avoided?
 - d. The Council has not yet determined what Te Mana o te Wai means in Southland or undertaken the NOF process. You have asked:

¹ RMA, s 104(1)(b).

² In fact, many of MfE's worksheets direct councils to seek legal advice on how the NPSFM should be applied to applications that are currently being processed.

- i. What does Te Mana o te Wai, as set out in Policy 1 of the NPSFM, mean in the absence of the NOF process having occurred on a regional scale?
 - ii. In the absence of the NOF process, could submissions from iwi in opposition to an activity be considered as evidence that the activity is inconsistent with Policy 1 of the NPSFM?
 - iii. Can a proposal be found to be consistent with Te Mana o te Wai if iwi are in opposition to it on freshwater or cultural grounds?
- e. Loss of value is defined in clause 3.21 of the NPSFM as when a wetland or river is less able to provide for certain existing or potential values. You have asked:
- i. Does maintaining a river in a degraded state constitute a loss of potential value?
3. We address each question in turn below.

Weighting

4. There is both an operative plan and proposed plan relating to water in the Southland region (the Regional Water Plan (**RWP**) and proposed Southland Water and Land Plan (**pSWLP**), respectively). The NPSFM requires that every regional plan is changed, without using the RMA Schedule 1 process, to include two policies and an objective.³ These provisions relate to natural inland wetlands, rivers, and fish passage, respectively.
5. In addition to the above objective and policies, which will become an objective and policies of the RWP and pSWLP, the NPSFM has its own objective and policies which, where relevant, must be had regard to in resource consent applications.⁴

What weight should be applied to the NPSFM when considering applications before the Council includes the mandatory policies in its regional plans?

6. The Council has not yet changed its plans to include the policies on natural inland wetlands and rivers, nor the objective on fish passage.
7. Guidance issued by MfE on the NPSFM 2014 (amended 2017) (which also included policies that were required to be inserted into regional plans without using the Schedule 1 process) confirmed that such policies should be applied as if they were included in plans, even if they had not yet been inserted.
8. We agree with the MfE guidance. The Council must include the policies and objective (or words to the same effect) in its plans and has no discretion to change the intent or effect of those provisions. In other words, it is a matter of when, not if, the provisions will be incorporated in the RWP and pSWLP.
9. The issue of the weight applied to objectives and policies of plans typically only arises where there is a conflict between an operative and proposed plan that would lead to a different decision under each. There is no such conflict here as the objective and policies will be included in both the RWP and the pSWLP. Accordingly, the issue of weighting between those plans would not arise.

³ Set out at clauses 3.22, 3.24, and 3.26 of the NPSFM.

⁴ RMA, s 104(1)(b).

10. In our opinion, the two policies and objective required to be inserted by the NPSFM should be applied as if they were currently part of the RWP and pSWLP. Those provisions are relevant considerations under ss 104D and 104 of the RMA.

Should a policy required by the NPSFM be given more, the same, or less weight than those policies currently in the Council's plans?

11. The orthodox approach is that objectives and policies should be applied according to their terms. We are not aware of any authority that suggests that a policy included in a plan under direction of a national policy statement must be given priority or greater weight than policies included in plans using the Schedule 1 process. However, in the event of a conflict between policies, a policy required by the NPSFM may be given greater weight, depending on the circumstances.
12. Case law provides that if there is a tension or conflict between policies, effort should be made to resolve the tension by paying close attention to expression of the provisions.⁵ If the tension cannot be resolved, recourse can be had to higher order documents (e.g. a regional policy statement and national policy statements) or ultimately to Part 2 of the Act.⁶
13. Given the directive nature of the policies required by the NPSFM, we consider that any tension with other plan policies is likely to be resolved by paying close attention to the wording of the policies. For example, for rivers the policy required by clause 3.24 of the NPSFM provides:
- 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.
14. The policy is clear and directive – loss of river extent and values must be avoided unless the council is satisfied that the exceptions apply. This policy will likely prevail over less directive policies.
15. In the event that there is a tension that cannot be resolved by paying attention to the wording, higher order documents should be considered to determine which provision should prevail. Given that the policies required by the NPSFM are derived directly from the NPSFM itself, and reflect NPSFM policies 6 and 7, it is inherent that they give to effect to it. In contrast, the provisions of the RWP and pSWLP were prepared under previous policy direction (before the NPSFM 2011 and under the NPSFM 2014 (prior to the 2017 amendments), respectively). Accordingly, depending on the circumstances, the policies required by the NPSFM are likely to prevail.

Clause 3.24 of the NPSFM

16. Clause 3.24 of the NPSFM directs the Council to insert a policy into its regional plans that requires that the loss of river extent and values is avoided, unless both functional need and the effects management hierarchy requirements are met.

Is the "loss" related to only some activities in rivers or any activities in rivers?

17. The NPSFM is a regulation as defined in the Interpretation Act 1999 and is therefore subject to that Act. Section 5 of the Interpretation Act 1999 provides that the

⁵ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, at [129].

⁶ *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* (2017) 20 ELRNZ 564 (HC) at [76]; *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, at [72].

meaning of an enactment must be ascertained from its text and in light of its purpose. For the NPSFM, the purpose is expressed in:

- a. the fundamental concept of the NPSFM – Te Mana o te Wai;⁷
 - b. the objective;⁸
 - c. the policies;⁹ and
 - d. the scheme and arrangement of the NPSFM.
18. In our opinion, text of the policy required by clause 3.24 is broad. It requires that the loss of river extent and values is avoided (unless certain criteria are met). The policy's application is not explicitly limited to only certain activities (e.g. reclamation, drainage or in-stream structures). The definition of "loss of values" in relation to rivers is similarly broad and is not limited to certain activities.¹⁰
19. The fundamental concept, objective and relevant policies of the NPSFM are all targeted at ensuring the health and well-being of water bodies are prioritised and protected. The NPSFM also directs that freshwater is managed in an integrated way.
20. We acknowledge, however, that the section 32 report for the NPSFM and the regulatory impact statement focuses on the costs of piping, diversion and reclamation activities when assessing Policy 7 of the NPSFM (which clause 3.24 implements). However, in our opinion, the NPSFM must be interpreted applying the principles outlined above, rather than by reference to the costs assessed in the section 32 report and other background documents.
21. In our opinion, in the absence of clear guidance or case law, the best interpretation of the policy in clause 3.24 is that it applies to all activities that may adversely affect the extent and values of rivers, including discharges as well as reclamation, drainage and in-stream structures. We consider that a narrower interpretation (i.e. that clause 3.24 applies only to physical changes to rivers) requires a strained reading of clause 3.24 and the definition of "loss of values".

What does "avoid" mean in relation to these activities?

22. The leading case on the meaning of "avoid" in policy documents and plans is *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*.¹¹ In that case, in the context of the NZCPS the Court found that "avoid" has its ordinary meaning of "not allow" or "prevent the occurrence of".¹²
23. The Supreme Court came to this conclusion, taking into account the juxtaposition of "mitigate" and "remedy" as they are used in the relevant NZCPS policies. We consider that this is the appropriate meaning to attach to "avoid" where it is used in clause 3.24, given the contextual similarities: the ability to remedy and/or mitigate effects is also relevant in the context of clause 3.24 through the effects management hierarchy.

⁷ NPSFM, at 1.3.

⁸ NPSFM, at 2.1.

⁹ NPSFM, at 2.2.

¹⁰ NPSFM, at 3.21.

¹¹ *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38.

¹² *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [96].

24. The policy in clause 3.24 requires that “The loss of river extent and values is avoided, unless the council is satisfied ...” that particular criteria are met. If the criteria are not met, the loss of river extent or values should not be allowed, or should be prevented.
25. Importantly, the matter that must be avoided is the loss of extent and values, not any adverse effects on a river per se (in contrast to Policies 11, 13 and 15 of the NZCPS). This requires contextualisation of the existing and potential values of the river and assessment of whether the river will be less able to provide for those values.
26. As set out above, where there is a directive policy to avoid something, that policy will prevail over any less directive policies. Depending on the proposal, this may mean that it is appropriate to impose conditions or decline a resource consent application to ensure that the proposal would not render the river less able to provide for those values.

Relationship between Policy 7 and clause 3.24

27. Policy 7 of the NPSFM requires that “[t]he loss of river extent and values is avoided to the extent practicable.”
28. Clause 3.24 directs the Council to insert 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
 - (b) the effects of the activity are managed by applying the effects management hierarchy.
29. Both Policy 7 and clause 3.24 (both now and when the policy is included in the Council’s regional plans) will be relevant policy considerations in resource consent applications for activities that may affect river extent or values.
30. In our opinion, Policy 7 should not be read as providing a gloss on the avoid direction in clause 3.24 (i.e. that the avoid direction in clause 3.24 can be ignored where avoidance is not practicable). Clause 3.24 appears to be intended to implement Policy 7 of the NPSFM. In doing so, it particularises Policy 7 by identifying when it may not be practicable to avoid the loss of river extent or values. In particular, the policy in clause 3.24 provides criteria that outline when the loss of river extent or values need not be avoided:
 - a. where there is a functional need for the activity in that location; and
 - b. where the effects of the activity are managed by applying the effects management hierarchy.
31. The effects management hierarchy is defined in clause 3.21 and its first step is to avoid adverse effects where practicable. The effects management hierarchy goes on to require that effects be minimised, remedied, offset or compensated.

Te Mana o te Wai

What does Te Mana o te Wai, as provided for in Policy 1 of the NPSFM, mean in the absence of the NOF process having occurred on a regional scale?

32. Regardless of the extent to which the NPSFM has been given effect in the Council’s planning framework (i.e., regardless of whether or not the Part 3 Implementation steps have been completed), regard must still be had to the objective and policies of the NPSFM when assessing resource consent applications under s 104 of the Act.

33. Policy 1 of the NPSFM requires that “Freshwater is managed in a way that gives effect to Te Mana o te Wai.” Te Mana o te Wai is defined in the NPSFM as having the meaning set out in clause 1.3.
34. The hierarchy of obligations (expressed in both clause 1.3 and the objective of the NPSFM) will be relevant to the assessment of effects of a proposed activity, regardless of whether the NOF process has occurred on a regional scale. This hierarchy of obligations prioritises:
 - a. first, the health and well-being of water bodies and freshwater ecosystems
 - b. second, the health and 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.
35. Accordingly, the question of whether a proposed activity will first, prioritise the health and well-being of a particular water body and freshwater ecosystem, before going on to provide for other needs, will be relevant to both the Council’s notification decision and its decision on the substantive grant, regardless of whether limits that give effect to Te Mana o te Wai have been included in the planning framework.

In the absence of the NOF process, could submissions from iwi in opposition to an activity be considered as evidence that the activity is inconsistent with Policy 1 of the NPSFM? Can a proposal be found to be consistent with Te Mana o te Wai if iwi are in opposition to it on freshwater or cultural grounds?

36. The Council is yet to complete a number of implementation steps set out in Part 3 of the NPSFM, including consulting with tangata whenua on the ‘local approach to Te Mana o Te Wai’, engaging with communities on how Te Mana o te Wai is to be implemented, and including limits in freshwater plans that implement Te Mana o Te Wai.
37. Regardless of this, we consider that the objective and policies of the NPSFM must be applied. The NPSFM has legal force and is the most recent articulation of the matters of national significance that are relevant to achieving the purpose of the Act in relation to freshwater management.¹³
38. Although the ‘local approach to Te Mana o te Wai’ is yet to be developed, guidance may be taken from Te Tangi a Tauria – The Cry of the People to assist in determining the relative weighting of certain NPSFM policies in any given situation.¹⁴
39. We also consider that submissions and evidence provided by tangata whenua on resource consent applications will be important to assist in understanding relevant aspects of Te Mana o te Wai for the relevant waterbody in the context of the proposal. However, we do not consider that submissions or evidence from tangata whenua in opposition to a proposal means that Policy 1 of the NPSFM is not achieved. It is for the decision-maker to consider and weigh the proposal in light of submissions and evidence and determine whether Policy 1 of the NPSFM is achieved. Submissions and evidence from tangata whenua will be important considerations in that assessment.
40. We note that Te Mana o te Wai has been a key consideration in the appeals on the pSWLP and that the Environment Court has focused on Te Mana o te Wai when

¹³ RMA, s 45(1).

¹⁴ Noting that an Iwi Management Plan could be considered in accordance with section 104(1)(c) of the RMA as being “any other matter the consent authority considers relevant and reasonably necessary to determine the application”.

considering the pSWLP's objectives and policies. This reinforces our opinion that submissions and evidence from tangata whenua, while not the sole consideration, will be important to assist in applying the NPSFM and pSWLP concepts of Te Mana o te Wai.

Does maintaining a river in a degraded state constitute a loss of potential value?

41. Loss of value is defined in the NPSFM. This definition provides, in relation to natural inland wetlands and rivers, that "loss of value ... means the wetland or river is less able to provide for the following existing or potential values ...".¹⁵
42. Therefore, it follows that to lose value, a wetland or river must be "less able" to provide for one of the specified values than it was previously. This contemplates a comparison between a previous state and a potential future state. In other words, this indicates that there is a bar set at the current state against which the potential future state, which includes the proposed activity, is compared. In the case of the renewal of a consent for an existing discharge, the current state is that which would occur absent the discharge.
43. If, in the potential future state, a wetland or river is less able to provide for one of the specified values than it is in the current state, that constitutes a loss of value or potential value.
44. If, in the potential future state, a wetland or river is equally or more able to provide for one of the specified values than it is in the current state, in our opinion, that does not constitute a loss of value or potential value.
45. The assessment of whether a proposal represents a loss of value is complicated by the reference to "potential values" in the definition of "loss of value". It is unclear what is intended by "potential values". We consider that there are two arguable meanings:
 - a. On a narrow interpretation, "potential values" could contemplate that some of the values listed (e.g. ecosystem health, indigenous biodiversity and Māori freshwater values) are difficult to prove they exist in a waterbody. For example, a river survey might show that an area may provide habitat for indigenous fish, despite no such fish being present at the time of survey. Thus the relevant reach may have potential indigenous biodiversity values, but not demonstrable "existing values".
 - b. On a wider interpretation, "potential values" could refer to the values that the waterbody could have in the future. Prior to undertaking the NOF process, this would include potential enhanced values for ecosystem health, indigenous biodiversity, hydrological functioning, Maori freshwater values, or amenity values. Following the NOF process, this could include such enhanced values, as well as any aspirational values identified by the community that do not already exist in the water body.
46. Having regard to the NPSFM's focus on improving freshwater quality,¹⁶ we consider that the second, wider interpretation is likely. In the event that interpretation is accepted, the policy guidance provided in clause 3.24 requires that activities are avoided that would make a water body is less able to provide for a potential value in the future. In essence, this would mean that there could be no reduction in existing

¹⁵ NPSFM, at 3.21.

¹⁶ For example, NPSFM, Policy 5.

values and also that any activity must not preclude the potential for improvement in a value in the future.

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