

CRITERIA AND METHODOLOGY FOR DETERMINING OUTSTANDING FRESHWATER BODIES

Literature Review One, Part Two: Summary Report

December 2015



Ministry for the
Environment
Manatū Mo Te Taiao



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This work has received financial support from the Community Environment Fund Round 6, which is administered by the Minister for the Environment.

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Prepared By:

Belinda Riley – Senior Planner, Hawke's Bay Regional Council

Reviewed By:

Gavin Ide – Manager Strategy and Policy, Hawke's Bay Regional Council

Susannah Tait – Senior Planner, Golder Associates

1. Executive summary

- 1.1 This report contains a review of the relevant key documents used in developing the National Policy Statement for Freshwater Management (NPSFM), drawing on the literature summarised in Part One to answer a number of questions around the original intent of the NPSFM outstanding freshwater body (OFWB) provisions.
- 1.2 Key conclusions from the literature review are as follows:
 - a. Despite some substantial changes to the NPSFM OFWB provisions over the last seven years, the intent to protect OFWBs over other freshwater bodies has remained the same since 2008;
 - b. A nationally consistent framework based on existing case law and the National Objectives Framework (NOF) process needs to be established to enable OFWBs to be identified under the NPSFM;
 - c. In order to qualify as outstanding, a water body will need to have at least one value that is outstanding on a regional or national basis;
 - d. The NPSFM provisions should only result in a small number of water bodies being identified as outstanding across the country; and
 - e. Criteria to identify OFWBs should be similar to that of a Water Conservation Order (WCO) but in a regional context.

2. Purpose

- 2.1 The purpose of this paper is to carry out a review of the relevant key documents used in developing the NPSFM and drawing on the literature summarised in Part One, to answer a number of questions around the intent of the NPSFM provisions.
- 2.2 This review will specifically address the NPSFM, discussing the key changes between the proposed 2008 NPSFM, 2011 NPSFM and the 2014 NPSFM in regard to OFWBs, the intent behind those provisions and the associated implications for Regional Councils.
- 2.3 At the end of this review it is intended that the following questions will be answered:
 - a. What were the key changes to the OFWB provisions in the proposed 2008 NPSFM, the 2011 NPSFM and the 2014 NPSFM, and associated implications?
 - b. What was the intent behind the NPSFM OFWB provisions?
 - c. Why does MfE guidance state it expects there to be only a small number of OFWBs identified across New Zealand?
 - d. Did the NPSFM development contemplate and describe the relationship between WCOs and OFWBs as per the NPSFM?
 - e. Did the NPSFM development contemplate whether a water body should be regarded as outstanding if it only has one outstanding value or is it the overall characteristics of the water body that should be assessed?

- f. Did the NPSFM development contemplate whether a water body should be outstanding in a regional or national context?
 - g. Did the NPSFM development contemplate whether a water body should be outstanding for values that are not intrinsic to that water body e.g. gravel extraction, irrigation or hydro-generation?
 - h. Did the NPSFM development contemplate the level of protection accorded to a water body once it is deemed outstanding under the NPSFM?
- 2.4 The review will be used to inform the Community Environment Fund (CEF) project being undertaken by Hawke’s Bay Regional Council and Auckland Council in conjunction with the Ministry for the Environment (MfE). The CEF project proposes to develop a set of clear and consistent criteria for assessing and identifying OFWBs, and associated methodology for applying the criteria, that can be used by practitioners and decision-makers throughout New Zealand for the assessment and identification of OFWBs for the purposes of the NPSFM.

3. Documents reviewed

- 3.1 For the purposes of this literature review, the key documents reviewed in Literature Review One: Part One: Stocktake are detailed below. Not all of this literature is specifically discussed in this summary report due to the limited amount of information some of the literature contained on OFWBs.
- a. Ministry for the Environment. July 2008. Proposed National Policy Statement for Freshwater Management. Section 32 Evaluation.
 - b. Board of Inquiry. January 2010. Report and Recommendations of the Board of Inquiry into the Proposed National Policy Statement for Freshwater Management
 - c. Land and Water Forum. September 2010. Report of the Land and Water Forum: A Fresh Start for Fresh Water
 - d. Ministry for the Environment. January 2011, National Policy Statement for Freshwater Management 2011: Summary of Board of Inquiry Recommendations and Minister for the Environment’s Decision.
 - e. Ministry for the Environment, May 2011, Cabinet Paper, National Policy Statement for Freshwater Management.
 - f. Ministry for the Environment. November 2011. National Policy Statement for Freshwater Management 2011: Implementation Guide.
 - g. Ministry for the Environment. April 2011. Proposed National Policy Statement for Freshwater Management. Section 32 Evaluation.
 - h. Land and Water Forum, April 2012. Second Report of the Land and Water Forum: Setting Limits for Water Quality and Quantity, and Freshwater Policy and Plan-Making through Collaboration.
 - i. Ministry for the Environment, November 2012, Briefing note: Water Reform: Draft Cabinet papers.

- j. Ministry for the Environment, November 2012, Cabinet Paper, Water Reform Paper Two: Objective and Limit setting under the National Policy Statement for Freshwater Management 2011.
- k. Ministry for the Environment, November 2012, Regulatory Impact Statement: Fresh Start for Fresh Water – Objective and Limit Setting.
- l. Ministry for the Environment. March 2013. Freshwater Reform 2013 and beyond.
- m. Ministry for the Environment, June 2014, Cabinet Paper, Freshwater Programme: Amendments to the National Policy Statement for Freshwater Management.
- n. Ministry for the Environment. July 2014. National Policy Statement for Freshwater Management 2014: Summary of Recommendations and Minister for the Environment’s Decision.
- o. Ministry for the Environment. July 2014. Report and Recommendations on the Proposed Amendments to the National Policy Statement for Freshwater Management and Public Submissions.
- p. Ministry for the Environment. July 2014. Proposed Amendments to the National Policy Statement for Freshwater Management 2011. Section 32AA Evaluation.
- q. Ministry for the Environment. November 2014. National Policy Statement for Freshwater Management 2014: Draft Implementation Guide.
- r. Ministry for the Environment. August 2015. A Guide to the National Policy Statement for Freshwater Management 2014.

4. Common abbreviations in this report

MFE	Ministry for the Environment
NPSFM	National Policy Statement for Freshwater Management
OFWB	Outstanding Freshwater Body(ies)
WCO	Water Conservation Order(s)
NOF	National Objectives Framework (in 2014 NPSFM)
RMA	Resource Management Act 1991
RIS	Regulatory Impact Statement
CEF	Community Environment Fund

5. Key changes to the National Policy Statement for Freshwater Management outstanding freshwater body provisions and associated implications

- 5.1 There have been a number of changes to the NPSFM OFWB provisions between 2008 and 2014. This section summarises these changes and associated implications that have occurred over this time.
- 5.2 All versions of the NPSFM have recognised that OFWBs are a limited class of water bodies which warrant special protection, albeit in slightly different ways as summarised in Table 1.

Table 1: Summary of outstanding freshwater body provisions in various NPSFM versions 2008 - 2014

Provision	Proposed 2008 NPSFM	2011 NPSFM	2014 NPSFM
Definition: Outstanding freshwater bodies¹	<i>Means those Freshwater Resources of a region whose Notable Values and/or Tangata Whenua Values and Interests are such as to require that priority be given to protection in order to achieve the purpose of the Act.</i>	<i>Those water bodies with outstanding values, including ecological, landscape, recreational and spiritual values.</i>	<i>Those water bodies identified in a regional policy statement or regional plan as having outstanding values, including ecological, landscape, recreational and spiritual values.</i>
Protection afforded to outstanding freshwater bodies	Protection of notable values (including potential values) of outstanding water bodies	Protection of the quality of outstanding water bodies	Protection of significant values of outstanding water bodies
How outstanding freshwater bodies can be protected²	By the setting of quality and quantity limits	By the setting of quality limits	By the setting of quality and quantity limits

Proposed 2008 NPSFM

- 5.3 The proposed 2008 NPSFM sought the protection of notable values (including potential values) of OFWBs via the setting of water quality and quantity standards. This version of the NPSFM prioritised the management of OFWBs however, protection was only given to notable values being scientific, ecological and biodiversity, cultural and recreational values, meaning other values were not given increased protection (whether outstanding or not).

¹ Referred to as 'outstanding freshwater resources' in the proposed 2008 NPSFM.

² Note: The NPSFM does not limit the protection of **OFWBs** solely to the setting of quality and quantity limits, the regional council may choose to use a 'toolbox' approach which includes both regulatory and non-regulatory methods.

- 5.4 The proposed NPSFM provisions were formally notified in 2008 and submissions were assessed via a Board of Inquiry process. After assessing submissions, the Board recommended amending the OFWB provisions deciding not to carry forward the concepts contained in the 2008 proposed NPSFM. This was based on the following conclusions:
- a. The values of freshwater are wider than just ecological values, and should be widened to include ecosystem processes and indigenous species and their associated ecosystems;
 - b. The setting of these flows and levels needs to be done over time for all water bodies, not just those that are outstanding; and
 - c. When setting environmental flows and levels, the range of values to be considered need to be wider than notable values, e.g. security of supply for domestic and municipal supplies is only one of many values (including intrinsic values) that should be considered.

2011 NPSFM

- 5.5 In 2011, in accordance with the Board of Inquiry recommendations, the Minister for the Environment made some substantial changes to the OFWB provisions in the proposed NPSFM. In particular, the reference to 'notable values' was replaced with a requirement to protect the quality of OFWBs, and the ability to set flows and levels with a specific focus on protecting OFWBs was replaced to require flows and levels to be set for all freshwater bodies in a region.
- 5.6 The result of these changes was that the protection for OFWBs was narrowed to the quality of the water body and the priority for protecting OFWBs was removed in favour of protecting all water bodies. Accordingly, the amendments did not result in the overall protection of OFWBs. Meaning that, while the values that could be taken into account were widened to encompass all values, in practice because their protection was limited to water quality, the water in an OFWB could continue to be allocated providing the quality was not being degraded, even if the decrease in quantity was having a direct impact on an outstanding value.
- 5.7 No discussion occurs about the reduced protection for OFWBs in any of the associated documents to the 2011 NPSFM meaning that the decreased protection was likely unintentional. This is supported by information contained in a paper, presented to Cabinet prior to releasing the 2011 NPSFM, confirming that one of the key directions of the NPSFM is to protect OFWBs. Given this, it would make no sense to reduce the protection of OFWBs while at the same time recognising it as a key direction of the NPSFM.

2014 NPSFM

- 5.8 In 2014, the Government reviewed the 2011 NPSFM and released a summary document outlining the key changes. The OFWB provisions were amended alongside some more substantive changes, and the protection of OFWBs was widened to ensure their significant values could be protected through limits on both water quality and quantity.
- 5.9 The changes were briefly discussed in MfE's report and recommendations on the amended NPSFM, prior to adoption by the Government. However, they were not discussed in the

Minister's decision or the section 32AA report because they were classed as minor and not considered to significantly alter the NPSFM.

- 5.10 The 2014 amendments addressed the issue described in Paragraph 5.6 by ensuring all aspects that make a water body outstanding could be protected under the NPSFM, if worthy of such protection.
- 5.11 It is interesting to note that MfE's report on the proposed amendments to the NPSFM³ states that the additional protection afforded to OFWBs in the 2014 NPSFM does not apply to all values, but only to those which relate to it being outstanding. This recommendation is not consistent with Objectives A2(a) and B4 of the 2014 NPSFM which protects the significant values (not just outstanding values) of OFWBs once they are identified in an RPS or Regional Plan. This topic is further discussed in Section 6.6.
- 5.12 The definition of 'outstanding freshwater bodies' was also amended in the 2014 NPSFM to mean only those water bodies identified in a RPS or Regional Plan as outstanding. This change is not discussed in any of the reviewed literature, however it is assumed this took place to ensure that, before a water body could be deemed outstanding, it went through the Schedule 1 RMA process, ensuring all interests are taken into account.
- 5.13 MfE's report and recommendations on the amended NPSFM provides some interesting insight into the intent of the NPSFM OFWB provisions, making it clear that OFWBs are a limited class of freshwater bodies intended to attract additional protection over and above other fresh water bodies.

Conclusions

- 5.14 It is considered that the following statement contained in MfE's recommendations to the Government on the 2014 NPSFM accurately sums up the intent of NPSFM provisions since 2008:
- "Outstanding freshwater bodies are a limited class of freshwater bodies intended to attract additional protection over and above other fresh water bodies"*
- 5.15 Despite some substantial changes to the NPSFM over the last seven years, it appears that the intent to protect OFWBs has remained the same, with each iteration of the NPSFM aiming to protect the values of OFWBs in the best possible way.
- 5.16 This conclusion has been based on the fact there was no discussion in any of the reviewed literature to indicate otherwise. The 2014 NPSFM amendments support this conclusion where, despite the changes providing significantly more protection for OFWBs, they were not discussed in the Minister's decision or the section 32AA report because they were classed as minor and not considered to significantly alter the NPSFM.
- 5.17 It is reasonable to assume that any major changes around the intent to change the management of OFWBs would have warranted significant discussion with a clear conclusion as to why OFWBs did not warrant such protection/or warranted more protection. This has not occurred in any of the reviewed literature.

³ Ministry for the Environment. July 2014. Report and Recommendations on the Proposed Amendments to the National Policy Statement for Freshwater Management and Public Submissions.

6. Key questions

6.1 How do regional councils determine which freshwater bodies qualify as outstanding as per the National Policy Statement for Freshwater Management?

6.1.1 There is a general consensus in reviewed literature that an outstanding value is a high threshold and an assessment framework will need to be developed so that OFWBs can be identified as per the NPSFM. However, how high the threshold should be and what exactly should qualify as outstanding is not clear in reviewed literature.

6.1.2 While no one paper directly discusses this issue, a consistent theme emerges in the reviewed literature which suggests that the outstanding threshold should be up around that of a WCO (albeit in a regional context) or just below.

Section 32 report 2011

6.1.3 The first discussion around the term 'outstanding' takes place in the 2011 section 32 report, which recognises the need for an assessment framework to be developed so that OFWBs can be identified.

6.1.4 The section 32 report suggests a number of options to assist with identifying OFWBs from setting assessment matters in RPSs based on Environment Court decisions, to looking at existing outstanding landscape criteria and the associated processes used to identify them. The report makes specific reference to outstanding landscapes and WCOs noting that in the context of a WCO an outstanding characteristic needs to be quite out of the ordinary on a national basis.

6.1.5 It is assumed the focus on outstanding landscapes and WCOs is due to significant existing case law and guidance around this issue as a result of section 6 and Part 9 of the RMA.

6.1.6 There appears to be an expectation in the section 32 report that these interpretations will be used when developing assessment criteria for OFWBs in the context of the NPSFM 2011. Otherwise they would not have been referred to. However, it is interesting to note the language used in the section 32 report (i.e. it states these interpretations should be investigated as opposed to saying they must be investigated) and while not the preferred option, this indicates that a completely new and separate understanding for 'outstanding water bodies' in the context of the NPSFM could be developed.

6.1.7 The report places emphasis on developing a clear definition of 'outstanding' under the NPSFM to partly resolve any issues around the use of the term 'outstanding'. However, looking at the current definition of outstanding, it does not appear this advice was taken into account when developing the NPSFM. This is likely because the authors at the time assumed it was more appropriate to release a document outlining national expectations for how OFWBs could be defined at a later date.

6.1.8 There are no further discussions undertaken in the section 32 report on this matter. As such, the Cabinet paper on water reform, and the Implementation Guides are looked to for further guidance on this issue.

Cabinet paper November 2012 – water reform

- 6.1.9 The paper⁴ presented to Cabinet in November 2012 on the water reforms, is consistent with the section 32 report and recognises that a nationally consistent framework needs to be established to enable OFWBs to be identified.
- 6.1.10 The Cabinet paper recommends the proposed NOF process could underpin the framework together with other criteria or judgments to identify OFWBs. This is supported by the November 2012 RIS, which suggests using the NOF banded structure (i.e. poor, fair, good, excellent) to clearly identify OFWBs.
- 6.1.11 The Cabinet paper does not recommend solely using the NOF process and advises that just because a water body is in an excellent state, it does not automatically mean the water body is outstanding as other judgments are necessary.
- 6.1.12 While advice in the 2012 Cabinet paper differs to the 2011 section 32 report around how the criteria contained in a framework could be populated i.e. using the NOF process vs existing case law, this is likely because the NOF process was not proposed in 2011 when the section 32 report was published.
- 6.1.13 The paper also provides some interesting advice to Cabinet around the expected future relationship between WCOs and the NPSFM OFWB provisions, which indicates that in the long term the OFWB provisions in the NPSFM would eventually replace the need for WCOs. While this would likely cause significant debate and opposition, it is useful information that indicates any set of criteria developed to identify OFWBs should be at a similar high level of a WCO.
- 6.1.14 When considering this alongside the discussions in the section 32 report, it appears that a combination of approaches (NOF process + case law and existing practices) would provide an appropriate framework to identify OFWBs that is in accordance with the original intent of the NPSFM OFWB provisions.
- 6.1.15 Further discussion around the OFWB provisions take place in the NPSFM Implementation Guides, however there is a disconnect between some of the guidance statements and the discussions contained in the section 32 report and Cabinet papers which needs to be explored further.

NPSFM Implementation Guides 2011, 2014 (draft), 2015⁵

- 6.1.16 The NPSFM Implementation Guides were published by MfE in 2011, 2014 (draft) and 2015, and were designed to provide background information and commentary on the intent of the NPSFM.
- 6.1.17 Despite some key amendments to the OFWB provisions in the 2014 NPSFM, most of the discussion and guidance around OFWBs in the 2011 and 2014 Guides are the same, however there are some differences between the advice contained in the 2011 and 2014 Guides and the final 2015 Guide. Of particular note, is the 2015 Guide does not contain the

⁴ Ministry for the Environment, Cabinet Paper, Water Reform Paper Two: Objective and Limit Setting under the NPSFM 2011 (November 2012).

⁵ Note: The draft 2014 Implementation Guide, was renamed 'A Guide to the National Policy Statement for Freshwater Management 2014' in the final 2015 version.

advice found in the 2011 and 2014 Guides that an outstanding value is a high threshold, and that only a small number of OFWBs are expected to be identified across New Zealand.

- 6.1.18 It is interesting to note, that the 2015 Guide doesn't offer alternative advice, and is silent on the threshold an OFWB would be expected to meet or the expected number of OFWB across New Zealand. While there is no discussion in the Guide as to why this advice was omitted, email exchanges with MfE personnel⁶ have confirmed this does not indicate a change in the government's policy intent and the 2011 version of the Guide is still relevant and should be taken into account.
- 6.1.19 A clear link can be seen between some of the information contained in the Implementation Guides and earlier literature associated with the NPSFM, particularly those statements in the 2011 and 2014 Guides confirming that an outstanding value is a high threshold and that only a small number of water bodies across New Zealand are expected to be identified as outstanding under the NPSFM.
- 6.1.20 However, all three Implementation Guides go one step further than any of the other documents when discussing the definition of 'outstanding water body' and suggest that in order for a water body to qualify as outstanding, it can be exceptional for one particular attribute, for either local or national reasons.
- 6.1.21 The statements could be seen as conflicting, as on one hand the 2011 and 2014 Guides are saying a small number of water bodies across New Zealand are expected to be deemed outstanding, and then on the other hand they state that a water body can be outstanding in relation to one attribute that can be either locally or nationally significant.
- 6.1.22 Experience suggests that if a water body is being judged in a local context, assisted by the local community, and only needs one outstanding attribute, it is likely that more than 'a few' OFWBs will be identified per region. This combined with the omission of this advice from the 2015 Guide raises the question around whether it is correct to assume that the NPSFM only ever intended for a small number of OFWBs to be identified across New Zealand.
- 6.1.23 As the Implementation Guides have no statutory weight and were not part of the decision making process prior to the NPSFM being adopted, it is important to find a connection between information contained in the Guides and earlier literature associated with the NPSFM that clearly shows the intent of the NPSFM.
- 6.1.24 As such, the literature was reviewed to find out where the notion of 'only a small number of outstanding water bodies across New Zealand' came from; if a water body needs to possess one outstanding value, or whether 'outstanding' should be judged in the context of the overall characteristics of the water body; and whether outstanding characteristics of a water body need to be outstanding on a national or regional basis.

6.2 One outstanding value or several?

- 6.2.1 The next question is whether 'outstanding' should be judged in the context of the overall characteristics of the water body, or whether one outstanding value is enough.

⁶ Pers comm with Jonny Osborne et al via email.

- 6.2.2 The Implementation Guides clearly state one outstanding value is enough, which (as discussed in Paragraph 6.1.22) means, there is likely to be more than a few OFWBs in each region, and certainly many more than “a small number throughout New Zealand”. This directly conflicts with Paragraph 6.4.10 which concludes that an underlying assumption of the NPSFM is that only a small number of OFWBs should be identified across the country.
- 6.2.3 Bearing in mind the significance of this issue and the fact that the Implementation Guides have no statutory weight, documents released prior to the adoption of the NPSFM were reviewed to see if there was a clear intent when developing the NPSFM that this should be the case.
- 6.2.4 No link could be found between statements in the Implementation Guides and any of the other reviewed literature on this matter. In the absence of direction on this matter, this issue could be potentially addressed by developing criteria which allows a water body to be outstanding for one particular feature but also meets the key underlying assumption of the NPSFM which ensures only a small number of outstanding water bodies are identified across New Zealand. This would likely be achieved by setting criteria (and associated thresholds) at an appropriate high level to limit water bodies (being judged in a local context) triggering OFWB status due to one characteristic⁷.
- 6.2.5 Notwithstanding, it is generally considered that an outstanding water body will likely have several outstanding values, and associated exceptional characteristics, which makes it outstanding. This is consistent with experience which suggests that in most cases it is very apparent when a water body is outstanding and there are usually a number of values and associated characteristics that make it so.
- 6.2.6 However, allowing one feature to trigger ‘outstanding water body status’ will ensure that in those exceptional circumstances where a water body only has only one extremely special characteristic it can be protected e.g. a degraded water body may support a nationally important rare species and warrant protection solely on this matter.

6.3 Nationally or regionally outstanding?

- 6.3.1 The last question relates to whether outstanding characteristics of a water body need to be outstanding on a national or regional basis. There is limited discussion on this issue in literature reviewed. Only the Implementation Guides refer to OFWBs being classed as outstanding in a local, regional or national context.
- 6.3.2 While no other literature directly discusses this issue, as discussed in Paragraph 6.1.13 the 2012 Cabinet paper on water reform leads towards the conclusion that an outstanding characteristic should be up around the threshold of a WCO. Assuming this is correct, a decision needs to be made around whether an outstanding value should be the same as a WCO on a national basis, or if an outstanding value should be the same as a WCO but in a regional context.
- 6.3.3 Philip Milne’s opinion piece on the NPSFM in November 2011 acknowledges that an argument could be formed either way, noting that on one hand since the NPSFM is a

⁷ This task is associated with the CEF project and will be progressed in the next phase of this project.

national document, the term could be interpreted as being nationally outstanding, however, on the other hand since the NPSFM is designed to be implemented at a regional level, outstanding should be determined in a regional context.

- 6.3.4 Philip Milne concludes that the stronger argument is for the term outstanding being interpreted in a regional context. This conclusion is supported by reviewed literature which consistently discusses OFWBs in a regional context. For example, the 2012 Cabinet paper states that enough OFWBs need to be identified to adequately protect regional and national interests; the 2011 section 32 report talks about Regional Councils working with regional communities to assist in determining what constitutes outstanding; and MfE's report and recommendations on the amended 2014 NPSFM, talks about the significant values of OFWBs bearing in mind regional circumstances. These are just a few examples.
- 6.3.5 While there is not a significant amount of information on this issue, it seems clear that it was the intent of the NPSFM to determine OFWBs in a regional context. This is consistent with Philip Mine's opinion piece on the NPSFM water body provisions, and the advice contained in the Implementation Guides. This is further supported in all reviewed literature which discuss the NPSFM OFWB provisions in a regional context.
- 6.3.6 When considering this alongside the findings in Paragraphs 6.1.13 and 6.4.6, a conclusion can be drawn that the OFWB criteria should be at a level of a WCO but in a regional context. This is consistent with reviewed literature, and would ensure the best of the best water bodies in each region would be protected, while addressing concerns raised in the 2012 Cabinet paper and RIS on water reforms which highlight the risks around too many water bodies being deemed outstanding and potentially restricting development opportunities, or too few being deemed outstanding and not adequately protecting regional interests.
- 6.3.7 Expecting values of a water body to be outstanding only on a national basis would likely result in a low number of OFWBs identified across New Zealand (i.e. there are only 15 WCOs in New Zealand since 1984), with potentially some regions having none. This approach would not adequately protect regional interests.

6.4 How many outstanding freshwater bodies are expected to be identified throughout New Zealand?

- 6.4.1 There is consensus in reviewed literature that there will be a small number of OFWBs identified throughout New Zealand as a result of the NPSFM. However, due to conflicting advice in the three NPSFM Implementation Guides (discussed in Paragraph 6.2.2), questions have been raised if this assumption is consistent with the original intent of the NPSFM.
- 6.4.2 To resolve this issue, relevant literature was researched to see if any discussion took place around why only a small number of OFWBs are expected to be identified across New Zealand. It is essential that this issue is resolved prior to developing a set of criteria to identify OFWBs, to ensure the criteria are pitched at an appropriate level.

- 6.4.3 Advice on this matter first dates back to May 2011 in a paper⁸ presented to Cabinet to formally sign off the 2011 NPSFM and allow its release. The paper confirms that a key focus of the NPSFM is the protection of OFWBs and that only a small number of outstanding water bodies should be protected.
- 6.4.4 While not specified, it has been assumed that the associated RISs and cost benefit analyses for the NPSFM 2011 were based on this assumption as well⁹.
- 6.4.5 The OFWB provisions are then discussed in the 2011 Implementation Guide, which specifies that only a small number of water bodies are expected to be deemed outstanding across New Zealand. Interestingly, the Guide states that Objective A2¹⁰ recognises that there is a small number of OFWBs across the country that should be protected. However, no further discussion takes place around this statement.
- 6.4.6 The provisions are not discussed again until November 2012 in a paper presented to Cabinet outlining proposals for improving parts of the NPSFM 2011¹¹. While the paper doesn't directly discuss the expected number of OFWBs across New Zealand, it does indicate a close tie between WCOs and the NPSFM OFWB provisions and implies that in the long term the NPSFM OFWB provisions may replace WCOs. This is further supported by comments in a briefing paper prepared for Cabinet in November 2012 on the core elements of the water reform¹², which states that in the longer term the role of WCOs will need to be considered in the reformed freshwater management system (i.e. under the NPSFM).
- 6.4.7 While the replacement of WCOs with the NPSFM OFWB provisions would likely cause significant debate and opposition, it is useful information that indicates the original intent around the NPSFM OFWB provisions. This is relevant and shows that any criteria developed to identify OFWBs should be at a similarly high level of a WCO, which would subsequently result in a small number of OFWBs.
- 6.4.8 Further discussion in the 2012 Cabinet paper highlights potential concerns around the wide interpretation of OFWBs in the NPSFM and expects this to be an area of debate in regional planning processes. Cabinet is advised that if too many water bodies are considered outstanding there will be missed development opportunities, or if too few are identified as outstanding then regional and national interests will not be adequately protected. Identical risks are raised in the RIS prepared for Cabinet in November 2012 about objective and limit setting under the NPSFM.
- 6.4.9 The 2011 and 2012 Cabinet papers and 2012 RIS all indicate a desire for only a small number of water bodies to be identified as outstanding across the country. This is consistent with information contained in MfE's report and recommendations on the amended NPSFM, and the Draft 2014 Implementation Guide, which note that OFWBs are a

⁸ Ministry for the Environment, Cabinet Paper, National Policy Statement for Freshwater Management, May 2011.

⁹ i.e. there is an implied expectation in the 2011 section 32 report that criteria will be high level based around existing interpretations of outstanding (i.e. in Environment Court decisions). The higher the level of the criteria the smaller the number of water bodies deemed outstanding.

¹⁰ Objective A2 of the NPSFM protects the quality of water of outstanding freshwater bodies.

¹¹ Ministry for the Environment, Cabinet Paper, Water Reform Paper Two: Objective and Limit setting under the NPSFM, Nov. 2012.

¹² Ministry for the Environment, Briefing Note: Water Reform: Draft Cabinet Paper, Nov. 2012.

limited class of freshwater bodies, and only a small number of OFWBs are expected to be identified throughout the country, respectively.

Conclusions

- 6.4.10 There is clear intent in reviewed literature that the NPSFM OFWB provisions should only result in a small number of water bodies being identified as outstanding across the country (i.e. the best of the best in a regional context). All literature reviewed either directly or indirectly supports this conclusion.
- 6.4.11 Cabinet signed off the NPSFM based on advice discussed in Paragraph 6.4.3 that indicates only a small number of water bodies would be identified as outstanding across New Zealand. This appears to have been an underlying assumption of the NPSFM OFWB provisions which may have alleviated potential risks raised in the 2012 RIS around the loss in development potential if too many water bodies are identified as outstanding across New Zealand.
- 6.4.12 Significant weight is accorded to this fact. If another assumption around the numbers of OFWBs was made, the associated RISs and cost benefit analysis would have been calculated differently which may have affected the final version of the NPSFM.
- 6.4.13 This conclusion is further supported by the 2012 Cabinet paper and 2012 briefing paper which both imply the NPSFM OFWB criteria would be of a level up around a WCO, which is consistent with the assumption that the NPSFM provisions will result in a small number of OFWBs.

6.5 Once a freshwater body has been deemed outstanding what protection is accorded to it?

- 6.5.1 While it is clear that the NPSFM requires the protection of significant values of OFWBs, it is unclear what level of protection should be provided to these significant values under the NPSFM. For example, once freshwater bodies are deemed outstanding, should the 'protection' be absolute where no adverse effects on significant values can occur under any circumstances, or should the 'protection' be softer where adverse effects will generally be avoided.
- 6.5.2 There is limited discussion around the term 'protection' in the context of the NPSFM OFWB provisions, with only the 2011 section 32 and the Implementation Guides briefly discussing this matter. However, while the 2012 Cabinet paper on water reform and the 2012 RIS on objective and limit setting do not directly discuss the term protection, they identify some risks around the OFWB provisions which are relevant to this discussion.
- 6.5.3 There is consensus in this literature that the term 'protecting' sets a high standard, with the 2011 section 32 report noting that the term 'protection' is consistent with two of the properties set in section 6 of the RMA¹³. This is further supported by statements in the 2011 section 32 report, the 2012 Cabinet paper and 2012 RIS which all note a key risk of

¹³ indigenous vegetation, natural features and landscapes

the NPSFM OFWB provisions being that if too many water bodies are deemed outstanding, their development potential will be limited, i.e. due to the high level of protection.

6.5.4 However, discussion differs in reviewed literature around whether some minor effects on OFWBs may be accepted in the right circumstances.

6.5.5 This is apparent when comparing advice in the 2011, 2014 and 2015 NPSFM Implementation Guides. The language used in the 2011 Guide implies that some minor effects on an OFWB may be acceptable by stating that generally the adverse effects on the quality of the water in an OFWB will be avoided, whereas the draft 2014 Guide implies that no adverse effects will be acceptable under any circumstances by stating that adverse effects on significant values will be avoided on OFWBs.

6.5.6 The 2015 Guide implies that some adverse effects may be allowed, noting however that adverse effects on the significant values of the water body may need to be avoided in some instances to provide for those values. The 2015 Guide qualifies this statement by advising that, while degradation of some aspects of the water quality of an OFWB is allowable, that degradation cannot be at the expense of the OFWB significant values. The 2011 section 32 report is more aligned to the thinking in the 2011 Implementation Guide, noting that while the term 'protecting' sets a high standard it is not absolute and in some circumstances a OFWB may be able to be protected while allowing a level of use. However, this is not discussed further, and it is unclear if the section 32 report is only referring to a level of use being allowed where there are no adverse effects. The 2014 section 32AA report does not discuss this issue and therefore cannot be compared to the 2014 and 2015 Implementation Guides.

Conclusions

6.5.7 There is a clear intent in reviewed literature that protection of an OFWB is set at a high standard. However, whether or not this protection is absolute, or whether some minor effects can occur on significant values in some circumstances, is something that is inconclusive from the literature reviewed.

6.5.8 There is not enough information in reviewed literature to make a recommendation on this issue. While the difference in wording in the 2011, 2014 and 2015 Implementation Guides has been purposely changed from "effects will be generally avoided" to "effects will be avoided", to "effects may need to be avoided, in some instances, to provide for those values", there is no clear link to earlier literature indicating the original intent of the NPSFM provisions around this matter.

6.5.9 For reasons mentioned in Paragraph 6.1.23, it is desirable to find a link between guidance material and earlier literature so the intent of the NPSFM provisions can be clearly seen. Without this, it is suggested that existing case law, with a specific focus on the level of protection afforded to WCOs, and whether some level of use is still tolerated, and good practice examples are looked at to inform this decision. However, it is noted that this work does not form part of the CEF project and will be progressed in the future at a later date.

6.6 What is an outstanding value and what is a significant value?

- 6.6.1 Having reviewed the NPSFM 2014's OFWB-related provisions as a whole, it is clear that the NPSFM 2014 contains a two-step process for identifying and protecting outstanding freshwater bodies. Firstly, as per the definition of 'outstanding freshwater bodies' water bodies must be identified in a regional plan or RPS as having outstanding values to be identified as an OFWB under the NPSFM. Secondly, after a water body is identified in a RPS or Regional Plan as having outstanding values, Objectives A2(a) and B4 of the NPSFM then go on to direct the OFWB's significant values be protected.
- 6.6.2 There is limited guidance in the NPSFM around outstanding and significant values. The difference in terminology used in the OFWB definition and Objectives A2(a) and B4 (i.e. outstanding values vs significant values) raises two key questions:
1. are 'outstanding values' referred to in the definition of outstanding water bodies the same or different to 'significant values' referred to in Objectives A2 and B4, and
 2. are outstanding values and significant values restricted to intrinsic and biophysical values, or can they include consumptive and economics use values such as irrigation and energy.
- 6.6.3 While Question 1 is important to the future implementation of the NPSFM, it forms part of the protection discussion which is not within the scope of the CEF project (under which this Literature Review is a sub-task). As per the CEF project purpose, the focus will be on developing a set of criteria that can be used to identify if a water body has any outstanding values as per the NPSFM definition for OFWB, not criteria for identifying/protecting significant values.
- 6.6.4 While Question 1 will not be further discussed, it is noted that the discussion by MfE in the report and recommendations on the NPSFM¹⁴ states that the additional protection afforded to OFWBs should not apply to all values, but only to those which relate to it being outstanding. This is briefly discussed in Paragraph 5.11.
- 6.6.5 In response to Question 2, it is clear from the literature reviewed that the 2014 NPSFM intentionally uses the terms 'outstanding values' and 'significant values' to constrain the type of values protected under the OFWB provisions.
- 6.6.6 However, there is limited literature on this topic, and it is unclear as to whether outstanding values and significant values were intended to be confined to intrinsic and biophysical values only (such as ecosystem health and water quality) or whether outstanding and significant values can include uses and potential uses by people (such as water supply, irrigation and hydro-generation). It is noted that the 2014 NPSFM's definition of 'outstanding freshwater bodies' only makes reference to "recreational" values as a potential use value of an OFWB. The literature relevant to this matter has been summarised below.

¹⁴ Ministry for the Environment. July 2014. Report and Recommendations on the Proposed Amendments to the National Policy Statement for Freshwater Management and Public Submissions.

Proposed 2008 NPSFM

- 6.6.7 The proposed 2008 NPSFM restricted the protection of OFWB to their notable values (including potential values) being scientific, ecological and biodiversity, cultural and recreational values. In this way protection was not given to other value sets whether outstanding or not. The NPSFM contained a definition for both 'notable values' and 'outstanding freshwater resources' as follows:

Outstanding freshwater resources: means those Freshwater Resources of a region whose Notable Values and/or Tangata Whenua Values and interests are such as to require that priority be given to protection in order to achieve the purpose of the Act.

And

Notable Values: in relation to any Freshwater Resource includes:

- (a) Scientific, ecological and biodiversity values:*
- (b) Cultural values:*
- (c) Recreational (including contact recreational; e.g., swimming) values.*

- 6.6.8 There is no discussion in the section 32 report for the proposed 2008 NPSFM around why these particular values were chosen as notable and others not. However, it is clear from the narrow definition of 'notable values' that the proposed 2008 NPSFM did not contemplate recognition or protection for consumptive and economic use values under the OFWB provisions.

2011 NPSFM

- 6.6.9 In the final version of the 2011 NPSFM, the definition of OFWBs was amended to include those water bodies with outstanding values, including ecological, landscape, recreational and spiritual values, and the reference to 'notable values' was removed and replaced with a requirement to protect the quality of OFWBs through Objective A2(a).
- 6.6.10 The amendments enabled all values of water bodies to be taken into account and assessed for 'outstanding' thresholds, however, as discussed in Paragraph 5.6 their protection was limited to the NPSFM's water quality objectives¹⁵, which restricted the extent to which some values could be protected.
- 6.6.11 This change was consistent with the Board of Inquiry's recommendation on the proposed NPSFM, where the Board notes that the range of values considered for all water bodies should be widened to include all values, rather than a particular focus on notable values. To clarify, the Board noted that the security of supply for domestic and municipal supplies is only one of many values (including intrinsic values) that should be considered. However it is noted this discussion takes place in the context of all water bodies, not just in relation to OFWBs.

¹⁵ NPSFM 2011 Objective A2. Not water quantity Objectives B1 to B4.

- 6.6.12 It is reiterated that while the 2011 NPSFM widened its scope around outstanding values in the definition, its objective was to protect the quality of outstanding water bodies rather than the values themselves.
- 6.6.13 No discussion is contained in the MfE's decision on the 2011 NPSFM or the associated Implementation Guide around whether outstanding values or significant values should include both intrinsic and consumptive use values.

2014 NPSFM

- 6.6.14 The definition for OFWBs was further amended in the 2014 NPSFM as follows:
"Outstanding freshwater bodies: are those water bodies identified in a regional policy statement or regional plan as having outstanding values, including ecological, landscape, recreational and spiritual values".
- 6.6.15 The NPSFM Objectives were also amended to ensure that an OFWB's significant values were protected (i.e. Objectives A2(a) and B4).
- 6.6.16 The amendments in the 2014 NPSFM did not change the test as to what makes a water body outstanding (i.e. those with outstanding values) from the 2011 version. The key changes were around the protection of OFWBs and the requirement for either a RPS or Regional Plan to identify water bodies as outstanding before being officially recognised under the NPSFM as an OFWB.
- 6.6.17 There is no discussion in reviewed literature directly around whether outstanding values or significant values should include both intrinsic and consumptive use values. However, the discussion in the section 32AA report, and the November 2012 RIS suggest that both intrinsic and consumptive use values could potentially be classed as an outstanding value for a water body.
- 6.6.18 Specifically, the section 32AA report states that the NOF process in the NPSFM provides for the identification of significant values for OFWBs. This is further supported by the earlier November 2012 RIS which suggests using the NOF banded structure to clearly identify OFWBs. However, it is noted that the NOF banded structure relates to water quality only, which would limit the types of consumptive uses it would cover.
- 6.6.19 The national values of freshwater in Appendix 1 of the NPSFM include both intrinsic and consumptive use values. The NOF process requires all national values to be considered when developing freshwater objectives. Given this, if the full NOF process is relied on then both intrinsic and use values could be deemed 'significant' for an OFWB.
- 6.6.20 However, there is no clear link between this conclusion and discussions in other literature. MfE's report and recommendation on the 2014 NPSFM states that Regional Councils and communities are better placed to define the significant values relevant to any OFWBs, given that significant values will vary from region to region and between freshwater. For these reasons the NPSFM does not contain a definition for 'significant values'.
- 6.6.21 This advice reiterates the content of the 2014 Implementation Guide. There, the guidance states that significant values and how to protect them will need to be determined according to regional community preferences (*e.g. a wetland or water body may have a significant value related to native biodiversity, fisheries, geomorphology, culture, science, recreation or landscape*).

- 6.6.22 It is interesting to note that all of the examples (shown in brackets) given when referring to OFWBs, or significant values relate to either intrinsic values or non-consumptive uses such as recreation. While no real weight or meaning could be attributed to this, it further hints that the reviewed literature has steered clear of directly discussing this topic.
- 6.6.23 While the NPSFM does not contain a definition for 'significant values', it does contain a definition for value which includes both intrinsic and consumptive use values. While not the same, this definition is consistent with the definition of 'value' in the Land and Water Forum reports which defines values of water bodies as uses by people (e.g. drinking water, irrigation, hydro-generation, recreation) and intrinsic values (e.g. ecology, cultural, aesthetic, natural character).
- 6.6.24 The definition of value is discussed in the 2014 Implementation Guide, which notes that *"values are those intrinsic qualities, uses or potential uses associated with freshwater. They are qualities or uses that people and communities appreciate about freshwater bodies and wish to see recognised in the ongoing management of those freshwater bodies"*.

Conclusions

- 6.6.25 While the discussion around values implies that consumptive and economic uses could be classed as outstanding and/or significant, none of the reviewed literature confirms this is the case, nor does it confirm that outstanding values should be solely limited to intrinsic, biophysical and other non-consumptive values.
- 6.6.26 The literature is ambiguous on the inclusion of consumptive use values for determining OFWBs, which leaves the NPSFM open to interpretation on this matter. However, careful consideration ought to be given to the consequences of being able to class consumptive and economic use values (such as irrigation, hydro-electricity generation and drinking water) as outstanding and/or significant values under the NPSFM's OFWB provisions and the associated policy implications.