SFF Project: 405972 Adoption of Good Practice Fish Screening Project – Milestone 15

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Legislative Context – who manages fish screening?

1. Introduction

All fisheries in New Zealand are generally governed by the Conservation Act 1987 (CA87), which includes the Freshwater Fisheries Regulations 1983 (FFR83),[1] the Fisheries Act 1983, and specific responsibilities including protecting freshwater habitats,[2] and advocating for aquatic life and freshwater fisheries generally.[3] These functions are managed by a number of organisations including the Department of Conservation (DOC), Ministry for Primary Industries, and Fish and Game New Zealand. The Ministry for the Environment and Regional Councils also have freshwater management responsibilities under the Resource Management Act 1991 (RMA91). Regarding fish screening more specifically, Regional councils and DOC are the primary governing entities with specific responsibilities. Regional councils gain these responsibilities through the RMA91 and DOC through the FFR83.

2. Resource Management Act 1991

The purpose of the RMA91 is to promote the sustainable management of natural and physical resources, while safeguarding the life-supporting capacity of air, water, soil and ecosystems, and avoiding, remedying and mitigating any adverse effects of activities on the environment. No person may undertake an activity that contravenes a national environmental standard or a regional rule unless the activity is allowed by a resource consent, or the activity is allowed for under other parts of the RMA91 (e.g. when water is required to be taken or used for individual's reasonable domestic needs, an individual's animal's drinking water, or for firefighting purposes).

[1] Subsidiary legislation administered under section 48(a) of the CA87.
[2] Section 6(ab) of the CA87.
[3] Section 53(3)(d) of the CA87.

Under section 13 and 14 of the RMA91, regional councils control effects relating to the use of water and waterways by placing restrictions on certain uses of beds of lakes and rivers (e.g. the use, construction and/or removal of structures in rivers and stream beds and/or avoiding, damaging or removing habitats of animals in, on or under the bed of a lake or river), and restrictions relating to water (e.g. the take, use, damming or diversion of water). Environmental effects relating to structures in river and stream beds are, therefore, controlled under the RMA91, and these include consideration of the habitat of aquatic and terrestrial flora and fauna, and fish screening (by implication).

3. Regional Councils

Regional councils are responsible for implementing the requirements of the RMA91. This is primarily undertaken by developing regional policy statements, regional plans and the issuing of consents under the RMA91. The role of regional councils in relation to fish screening is primarily to ensure that any adverse effects on freshwater fish species caused by diverting or taking water is minimised. It is important to recognise that regional councils are also expected to assess the environmental impacts of fish screens and take the necessary actions to mitigate or avoid any potential negative effects related to their implementation and ongoing operation.

Regional policy statements provide an overview of the resource management issues of a region, and objectives, policies and methods to achieve integrated management of the natural and physical resources of that region.

Regional plans set rules governing the use of resources within the region. Some activities, including most activities in the bed of a lake or river and the taking, using, damming or diverting of water, require express authorisation by a regional plan or resource consent. Other activities, such as the use of land, only require resource consent if they breach a national environmental standard or a rule in a regional or district plan. Rules implemented in regional plans can include the consideration of fish screening, and protection of areas of significant habitats for indigenous fauna and or sportsfish (i.e. salmon spawning habitat. Regional plans usually require the installation of fish screens for most water takes and diversions. These plans can include specific guidelines and regulations to follow depending on the size and scale of the take or diversion activity.

4. National Direction

Regional plans and policy statements must give effect to any national policy statements, and be consistent with national regulations (such as national environmental standards).The Essential Freshwater package, which includes the National Policy for Freshwater Management 2020 (NPS-FM) and the National Environmental Standards for Freshwater (NES-F), is a package of such documents which outlines general guidance, and specific regulations, relevant to the management of freshwater New Zealand wide. Only once in this package is fish screening mentioned directly, however, the conceptual framework of Te Mana o Te Wai, which is an overarching requirement for the management New Zealand's freshwater, requires that the health and well-being of water bodies and freshwater ecosystems are prioritised above and beyond anything else, including economic well-being (which is included under the third and last priority of Te Mana o Te Wai). In order to ensure that Te Mana o Te Wai is given effect to, when building instream structures that may have an effect on freshwater fish species, the well-being of the ecosystem (and therefore the fish) must be prioritised above economic well-being. Including a suitable fish screen could be a way to ensure this.

The NPS-FM establishes ecosystem health as a compulsory national value and sets out a requirement to maintain or improve ecosystem health (and other values) in relation to freshwater. Instream structures are a pressure on ecosystem health and can have significant adverse effects on fish and other aquatic species if not installed with the correct precautionary measures. Consequently, as the requirements of the NPS-FM are progressively implemented by national and regional government agencies, fish screens and other precautionary measures are likely to receive increasing focus.

Section 55(5)(f) of the NES-F requires that a fish screen with mesh spacing no greater than 3mm must be used on any intake related to an inland wetland if the activity is a diversion that uses a pump. This is the only direct requirement for a fish screen in the NES-F which primarily focuses on allowing for fish passage. Because the NES-F is guided by the NPS-FM, which also guides regional plans, the exclusion of significant fish screening direction alludes to the fact that fish screens are primarily managed at a regional scale. Because of this, it is essential to refer to local regional plan policies and rules to understand local legislative requirements and responsibilities in relation to fish screens.

5. Freshwater Fisheries Regulations 1983 and Department of Conservation and Fish and Game Councils

The FFR83 includes the following definitions:

*"**fish facility** means any structure or device, including any fish pass or fish screen inserted in or by any water course or lake, to stop, permit, or control the passage of fish through, around, or past any dam or other structure impeding the natural movement of fish upstream or downstream".*

"*fish screen* *means any device whether moving or stationary designed to impede or stop the passage of fish*".[4]

Part 6 of the FFR83 includes the specific responsibilities of DOC in relation to fish screening. These apply to all natural rivers, streams or other freshwater bodies but are limited to physical barriers, i.e. dams and diversion structures. Within these regulations, fish screening is referred to both directly and indirectly through the use of the phrase fish facility (which includes fish screens as per the definition provided above). DOC's responsibilities under the FFR83 include:

- DOC may require that any dam or diversion structure to be built has a fish facility included, and set conditions on their design and performance (regulations 43 & 44).[5]
- If a fish facility is required:
    - Every manager of a dam or diversion structure shall ensure the structure maintains adequate flow through or past, so it functions as specified at all times or periods specified within their control (regulation 45).
    - DOC may require that any fish facility undergo maintenance or repairs (regulation 46).
- It is an offence for anyone to injure or damage a fish facility (regulation 47).
- Approval is required for any person to make a structural change to a fish facility (regulation 48).
- Any warranted officer may inspect a fish facility (regulation 49).
- No person, other than a warranted officer acting in their official capacity, shall take, obstruct, contrivance or imped a fish on its passage through or past a fish facility (regulation 50).[6]

[4] Freshwater Fisheries Regulations 1983 Clause 2(1)
[5] Subject to the RMA91 and any determination under that Act
[6] Except when provided for by the Director-General in writing to the manager of the fish facility.

In order to interpret when these fish screening statutory requirements apply in relation to regulations 43 and 44 of the FFR83, it is important to understand the definitions of dam and diversion structure. Under the FFR83, these are defined as follows:

- **Dam**: any structure designed to confine, direct, or control water, whether permanent or temporary; and includes weirs.[7]
- **Diversion structure:** any structure designed to divert or abstract natural water from its natural channel or bed whether permanent or temporary.[8]

These definitions are intentionally broad, and as such, many instream structures (e.g. floodgates, tide gates, pumping stations and water intakes) will likely meet the definition of a dam or diversion structure. If so, these structures will be subject to the statutory requirements of Part 6 of the FFR83. An example of this would be a floodgate which can be opened or closed to admit or exclude water. Because this floodgate is 'controlling water', it would be considered a dam and would be subject to Part 6 of the FFR83.

The FFR83 regulations came into force on 1 January 1984, so generally apply to all structures built after 1 January 1984. These regulations apply to all dams or diversion structures in any natural river, stream or water, but exclude:

- Any net, trap, or structure erected and used solely for the purpose of taking or holding fish.
- Any dam constructed on dry or swampy land or ephemeral water courses for the express purpose of watering domestic stock or providing habitat for water birds.
- Any water diversion not being incorporated into or with a dam, that is solely and reasonably required for domestic needs or for the purposes of watering domestic stock and that empties, without dead ends, into any viable fish habitat.
- Any dam or diversion structure subject to a water right issued under the provisions of the Water and Soil Conservation Act 1967 (prior to 1 January 1983) or any structure authorised by a Regional Water Board not requiring a water right that in no way impedes the passage of fish. This Act was the primary legislation governing the use of water resources prior to the enactment of the RMA91.

[7] Freshwater Fisheries Regulations 1983 Clause 2(1)
[8] Freshwater Fisheries Regulations 1983 Clause 2(1)

6. Other Statutory Requirements

In addition to those administered under the RMA91 and the FFR83, it should be noted that there are other statutory requirements that need to be considered in any proposals for development and management of physical structures (including fish screens). These include:

- Design integrity for intended purpose and on-going management of structures and assets (e.g. Building Act 2004, Railways Act 2005, RMA91, Local Government Act 2002).
- Land status (such as landowner approval for any works on their property and on special status areas, e.g. Reserves Act 1977).
- Protection of species and habitat, for instance section 26ZJ of the CA87 which provides that it is an offence if any works (e.g. installing a structure into a waterway) disturb or damage spawning grounds of any freshwater fish; or regulation 70 of the FFR83, which makes it an offence to intentionally kill or destroy indigenous fish.
- Fish salvage, which can often be required in construction projects within waterways. If, during any fish salvage or translocation, someone wishes to transfer and release fish into any freshwater, they are likely to require approval under section 26ZM of the CA87 and/or regulation 59 of the FFR83.
- The requirement to manage for ecosystem health under the National Policy Statement for Freshwater Management (NPS-FM).

It is important to consider all of these factors when installing, maintaining or altering instream structures in New Zealand waterways.

7. Conclusion

In summary, New Zealand fish screening regulations and requirements aim to prevent fish from entering dams, diversion rivers, or other man-made waterway structures. Regional councils and DOC are the primary governing entities in relation to this topic and have specific responsibilities which they gain through the RMA91 and FFR83 respectively. It is likely that approval would be needed from both the relevant regional council and DOC as a minimum for the installation, maintenance, or alteration of instream structures in New Zealand waterways. When doing works in any waterway, it is best to contact the relevant authorities to check legislative responsibilities, as legislation and interpretation of legislation can change over time. If you are planning on installing any new instream structures, or altering existing structures, it is recommended that you contact your closest DOC permissions team for more information regarding the necessity of a fish screen.