



Draft cabinet paper for first Resource Management Act 1991 amendment bill

Date submitted: 8 March 2024

Tracking number: BRF-4323

Security level: **Classification**

MfE priority: Urgent

Actions sought from Ministers		
<i>Name and position</i>	<i>Action sought</i>	<i>Response by</i>
To Hon Chris BISHOP Minister Responsible for RMA Reform	Provide feedback on the draft Cabinet paper	11 March 2024

Actions for Minister's office staff	
Return the signed briefing to the Ministry for the Environment (RM.Reform@mfe.govt.nz and ministerials@mfe.govt.nz).	

Appendices and attachments
Appendix 1: Draft Cabinet paper

Key contacts at Ministry for the Environment			
<i>Position</i>	<i>Name</i>	<i>Cell phone</i>	<i>First contact</i>
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Responsible Manager	Fiona Newlove		
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Minister's comments

Draft cabinet paper for first Resource Management Act 1991 amendment bill

Key messages

1. This briefing provides you with an early draft of the Cabinet paper for the first, narrowly scoped Resource Management Act 1991 (RMA) amendment bill (the Bill), for feedback by Monday 11 March 2024.
2. The draft Cabinet paper reflects your intent to include the following policy in the Bill:
 - i. excluding the hierarchy of obligations within the National Policy Statement for Freshwater Management 2020 (NPS-FM) from resource consenting (with a clarification and some additions outlined in below)
 - ii. extending the duration of consents for existing marine farms
 - iii. ceasing the implementation of new SNAs for three years to enable a thorough review of their operation, and
3. The draft paper also includes placeholder text for the additional amendments Ministers have been invited to submit to Cabinet Committee as soon as practicable for inclusion in this bill [ECO-24-MIN-0022 refers]. Those are:
 - i. the Minister of Agriculture on sloped land
 - ii. the Minister of Transport on port consent extensions.
4. The draft Cabinet paper seeks policy decisions for three matters. The matters being dealt with through separate Cabinet decisions are:
 - i. The Associate Minister for the Environment, Hon Andrew Hoggard, has sought separate Cabinet agreement to the final policy to suspend, for three years, the clauses in the National Policy Statement for Indigenous Biodiversity (NPS-IB) that direct councils to identify new Significant Natural Areas (SNAs) and include them in their plans. This was considered by Cabinet Committee (ECO) on 6 March 2024, subject to Cabinet confirmation on 11 March 2024.
 - ii. We understand the Minister of Agriculture intends to seek policy decisions on the changes relating to sloped land in a separate Cabinet paper.
5. We are working with officials at the Ministry of Transport to clarify the proposal to extend port consents. We understand this matter relates to the right of port companies to occupy the coastal marine area that are due to expire in 2026.
6. Separately, the Ministry for Primary Industries (MPI) is briefing the Minister for Oceans and Fisheries, Hon Shane Jones, on the policy proposals for extending marine farm consents and the outcome of targeted engagement they undertook on the proposals in the week of 26 February 2024. The content in the cabinet paper relating to marine farm consents is therefore subject to Minister Jones' further policy decisions. We will update this content in the paper prior to your office circulating it for Ministerial consultation.

7. The draft Cabinet paper also:

- i. seeks authority to issue drafting instructions to the Parliamentary Counsel Office (PCO) to draft an RMA Amendment Bill for introduction by the end of May
- ii. notes that the Bill will be referred to a select committee for approximately four months
- iii. provides a summary of feedback received from iwi/Māori and stakeholders during targeted engagement on the proposal to exclude the hierarchy of obligations within the NPS-FM from resource consenting
- iv. outlines the legal risks of the policy proposals and Treaty-related impacts.

We recommend you discuss this paper with relevant portfolio lead Ministers, prior to circulating for wider Ministerial consultation

8. Given the Minister for Oceans and Fisheries' interest in this paper, we recommend you share a copy of the draft now, or build in time to share it with the relevant portfolio lead Ministers who are progressing policy changes via the Bill, prior to circulating the paper more widely to your Ministerial colleagues. Those Ministers include:

- i. Minister for Oceans and Fisheries, Hon Shane Jones
- ii. Minister of Agriculture, Hon Todd McClay
- iii. Minister of Transport, Hon Simeon Brown
- iv. Associate Minister for the Environment, Hon Andrew Hoggard

Regulatory impact analysis

9. Officials are preparing a draft Regulatory Impact Statement (RIS) to be attached to the Cabinet paper. We'll provide a draft of the RIS to your office next week which will cover all the matters you are seeking final policy decisions on through this Cabinet paper.

We are co-ordinating the process and supporting relevant agencies as needed

10. Agencies are working to brief relevant Ministers on the policy matters to be included in the Bill. We are supporting them with timeframes and access to our RM policy and legal expertise. We are co-ordinating content to go into the Cabinet paper and RIS, but we've asked relevant agencies to lead on providing advice and seeking relevant policy decisions from responsible Ministers.

Excluding the hierarchy of obligations within the NPS-FM from resource consenting

11. The draft Cabinet paper seeks agreement for the proposal to apply to 'consent authorities' (ie, is not limited to councils) to capture all potential decision-makers on applications for resource consent. This is a clarification of what you and other Ministers agreed in BRF 4041¹.

¹ BRF 4041 referred to "councils" or "decision makers". It should have referred to consent authorities.

12. The draft Cabinet paper also includes the following recommendations which were not covered in previous advice:

- i. agreement for consent authorities to disregard assessments against the hierarchy of obligations in the NPS-FM that are voluntarily included in applications for resource consent even though it could not be considered by consent authorities. This will mitigate the risk of perceived biases in consent decisions.
- ii. agreement for the proposal to commence immediately after the Bill takes effect to maximise its impact while the NPS-FM is being replaced, and for the proposal to cease to have effect when the NPS-FM is replaced.
- iii. agreement for the proposal to apply only to consent applications lodged with a consent authority after the Bill takes effect to ensure an orderly transition.

13. The draft Cabinet paper notes that:

- i. the proposal will only exclude the hierarchy of obligations within specific clauses of the NPS-FM from resource consenting. Where the hierarchy is contained in a regional policy statement, plan, or other document (eg, an iwi planning document), it will continue to be a relevant matter for resource consenting.
- ii. when applying Part 2 of the RMA to consent applications, consent authorities may still prioritise the health and well-being of waterbodies and freshwater ecosystems, and the health needs of people (ie, the first and second priorities of the hierarchy) over other uses of water in consent decisions.

Treaty-related implications - excluding the hierarchy of obligations within the NPS-FM from resource consenting

14. In the limited engagement on the proposal, the key points conveyed by many iwi and Māori on the changes include:

- concern about or opposition to the changes, predominantly due to concerns about potential impacts on freshwater quality, as well as impacts on customary rights, and Treaty settlement commitments for some iwi, and
- that the engagement process has been inadequate (for reasons including insufficient information, lack of time, and that decisions appeared to have already been taken).

15. In light of the limited engagement and uncertain impact of the proposal on freshwater, it is difficult to assess (for both the proposal and policy development process):

- whether or not the Treaty principles of partnership and active protection² have been met
- whether or not general engagement obligations contained in some Treaty settlements have been met,

² These principles were articulated by the Court of Appeal in the *Lands* case in 1987 - see Appendix One of the RIS for more details.

- whether or not processes provided for in certain settlements, such as for the Waikato and Whanganui rivers³, have been met, and
- implications for the Crown's commitments on Māori freshwater rights and interests⁴.

s9(2)(h)

16. s9(2)(h)

17. s9(2)(h)

Next steps

18. Following receipt of your feedback on the attached draft Cabinet paper:

- We will update the paper for sharing with relevant lead Ministers (progressing policy through the Bill), and wider ministerial consultation with your colleagues, in time to lodge with Cabinet Committee (CBC) on 28 March, for consideration on 2 April 2024.
- Officials will begin preparing drafting instructions for PCO. To ensure the Bill can be introduced in May, PCO requires final drafting instructions by 15 April 2024 at the very latest.

19. Subject to Cabinet agreement, officials from the Ministry for the Environment will undertake targeted engagement on the proposed amendments to the NPS-IB in the week of 11 March 2024. The engagement will be with key stakeholders including members of the Biodiversity Collaborative Group, Māori organisations (FOMA⁵, NZ Māori Council, Te Wai Māori Trust, and Iwi Leaders Group Pou Taiao), and councils. We will update the Cabinet Paper to reflect the outcome of this engagement prior to it being lodged.

20. We will continue to co-ordinate the process and support responsible agencies, as needed, to provide advice to their Ministers on the matters for inclusion in this Bill.

³ s9(2)(h)

⁴ s9(2)(h)

⁵ s9(2)(h)

Recommendations

We recommend that you:

- a. **provide feedback** to officials on the attached draft Cabinet paper by 11 March 2024.
- b. **agree to either:**
 - i. **forward** the draft Cabinet paper to Hon Shane Jones, the Minister for Oceans and Fisheries now

Yes | No

OR

- ii. **share** a draft of the paper with those Ministers who have policy contained in it, prior to wider Ministerial consultation

Yes | No

- c. **note** that the proposal regarding the hierarchy of obligations in the NPS-FM in the draft Cabinet paper reflects decisions taken by Ministers to-date (BRF-4041 refers), with the exception of the following:
 - i. that consent authorities must disregard assessments against the hierarchy of obligations that are included in applications for resource consent
 - ii. it applies to consent authorities (ie, is not limited to councils) to capture all potential decision makers on applications for resource consent
 - iii. it commences immediately after the amendment bill takes effect and ceases to have effect when the NPS-FM is replaced
 - iv. it applies only to consent applications lodged with a consent authority after the amendment bill takes effect.
- d. **note** officials will discuss the above proposals with Minister Simmonds and MPI officials who will ensure Minister McClay is aware.

Signatures



Hayden Johnston
General Manager

Natural Environment Policy

8 March 2024

Hon Chris BISHOP

Minister Responsible for RMA Reform

[date]

Appendix 1: Draft Cabinet paper