



2019-B-05786 – draft Cabinet Legislation Committee (LEG) paper for Resource Management Amendment Bill 2019

Date Submitted	28 August 2019	Tracking #: 2019-B-05786
Security Level	In-confidence	MfE Priority: Urgent

	Action sought:	Response by:
To Hon David Parker, Minister for the Environment	Decisions	4 September

Actions for Minister's Office Staff	<p>Return the signed report to MfE.</p> <p>Forward the attached LEG paper, Bill, and Departmental Disclosure Statement for Ministerial and political consultation (Appendix 1), if agreed</p>
Number of appendices and attachments #3	<p>Titles of appendices and attachments (i.e. separate attached documents):</p> <ol style="list-style-type: none"> Draft LEG paper, the Bill and the Departmental Disclosure Statement Policy rationale for the additional matters relating to the proposed Freshwater Planning Process Regulatory Impact Summary for your information

Ministry for the Environment contacts

Position	Name	Cell phone	1 st contact
Principal Author	Chyi Sim		
Head of CE Office	Justin Strang	022 066 9013	
Senior Analyst	Oliver Sangster	9(2)(a)	✓

Key Messages

Purpose

1. The purpose of this briefing is to:
 - a. provide a draft Cabinet Legislation Committee (LEG) paper, the proposed Resource Management Amendment Bill and the Departmental Disclosure Statement for Ministerial and political consultation (Appendix 1)
 - b. seek your agreement to policy clarifications for the proposed Freshwater Planning Process
 - c. seek your agreement to commencement, savings and transitional provisions for the following proposals:
 - i. Freshwater Planning Process (FPP)
 - ii. Remove the ability to impose financial contributions on notices of requirement lodged by the Minister of Education
 - iii. Rename the head of the Environment Court, and
 - iv. Repealing CPP

Draft LEG paper for pre-Cabinet consultation

2. The draft LEG paper and the draft Bill (v.9.3) gives effect to the Cabinet decisions that have already been made [CAB-MIN-18-0485.01 and CAB-MIN-19-0337.01], and Ministerial decisions made between November 2018 and July 2019.¹

Additional policy decisions required for Freshwater planning process

3. Cabinet delegated you the authority to issue drafting instructions to amend the RMA or other affected statutes to ensure the workability of the agreed amendments, and further clarify and develop policy matters for the proposals in a manner not inconsistent with the policy recommendations [CAB-MIN-19-0337.01, paragraph 59.1 and 60 refers].
4. We seek your agreement to additional policy matters that will require Cabinet agreement. These matters are key to ensure the workability of the freshwater planning process, and are included in the LEG paper.
 - a. Clarify the scope to require all provisions of the freshwater planning instrument² to use the FPP
 - b. All proposed freshwater planning instruments must be publicly notified and a hearing must be held
 - c. Councils are required to submit the relevant material to the Chief Freshwater Commissioner (Chief FWC), rather than the panel, no more than six months after the public notification of the planning instrument
 - d. The EPA will be enabled to provide secretariat support to the group of freshwater commissioners, if requested by the Minister for the Environment
 - e. Provide the discretion for the Chief FWC to convene panels with fewer than five members (but no fewer than three members)³
 - f. The freshwater hearing panel (the panel) must prepare a further evaluation report

¹ The relevant briefing notes ref - 2018-B-05174, 2018-B-05007, 2019-B-05125, 2019-B-05645, and 2019-B-05570.

² This includes all freshwater regional policy statements and regional plans.

³ We propose panels must comprise at least one accredited councillor (or independent commissioner nominated by council), one government appointed freshwater commissioner and one commissioner with understanding of tikanga and mātauranga Māori, nominated by local tangata whenua.

- if their recommendations differ from what was initially prepared and notified by the council
- g. The Chief FWC has the ability to accept or reject variations to proposed freshwater planning instruments.⁴
 - h. The hearing panel may accept or reject late submission
5. We recommend you seek Cabinet's agreement to rescind the previous Cabinet decision that was to provide the panel an ability to appoint special advisors [CAB-19-MIN-0337.01, paragraph 13.7 refers]. This is unnecessary. The panel has the ability to commission technical reports, or the council where needed.
6. The following technical matters have also been included in the Bill. We seek your agreement to these matters, as you have been delegated the power to make these decisions [CAB-19-0337.01, paragraph 60 refers]. These do not require Cabinet agreement as they are consistent with the policy decisions that have been made by Cabinet.
- a. Councils will not be able to extend any timeframes in the freshwater planning process
 - b. Councils must give notice of their intention to provide materials and nominations to the Chief FWC at least 20 working days before they provide all relevant material to the Chief FWC
 - c. Apply all the relevant duties and powers to hold a hearing.⁵ This includes, but is not limited to:
 - i. conduct hearings without unnecessary informality,
 - ii. requiring councils (or commission a person) to produce a hearing report, and
 - iii. where there is a lack of accreditation, the decision of the panel is not invalidated
 - d. Matters that a hearing panel must consider, when they formulate recommendations. These include, but are not limited to, relevant sections of the RMA that the councils need to consider when developing regional planning instruments, reports produced from pre-hearing meetings, expert conferencing, mediation directed by the panel, and reports commissioned by the panel
 - e. The Minister for the Environment can no longer call-in freshwater planning instruments as a matter of national significance
 - f. Apply Local Government Official Information and Meetings Act 1987 (LGOIMA) to the hearing panel
7. The policy rationale for matters described in paragraphs 4 and 6 can be found in Appendix 2.

Financial Contributions, exemption for Notices of Requirement lodged by the Minister of Education

8. Cabinet authorised you to determine if additional amendments to the RMA are required to ensure that unreasonable financial contributions cannot be imposed on notice of requirement [CAB-19-0337.01, paragraph 50 refers].
9. Following advice from officials, you directed us to include a proposal that exempts the Minister of Education (as a requiring authority) from conditions on their notices of requirement

⁴ Once the material on the planning instrument have been received by the Chief FWC

⁵ Section 39 to 42A of the RMA

that require financial contributions [2019-B-05645 and 2019-B-05770 refers].

10. While the Ministry of Education (MoE) had previously sought a wider clarification that financial contributions (specified in Part 6 of the RMA) could not be applied to Part 8 of the RMA (designations and heritage orders), they are supportive of the amendment proposed.
11. We have worked with MoE on the content of this, which is detailed in the updated Regulatory Impact Statement (RIS) (Appendix 3)

Commencement, Savings and Transitional Provisions.

12. You have previously agreed to a suite of commencement, savings and transitional provisions (CST) in January 2019 for the initial proposals in the Bill [2019-B-05125 refers]. We are now seeking your agreement to the CST provisions for the new policy proposals that will be progressed as part of the Bill.

Commencement – immediately the day after the date of Royal Assent

13. We recommend that the following proposals commence the day after the date of Royal Assent:
 - a. a new Freshwater Planning Process
 - b. proposal to clarify the steps that the Minister for the Environment must follow when a board of inquiry recommends a National Environment Standard (NES)
 - c. renaming the head of the Environment Court
 - d. exempt the Minister of Education from conditions requiring a financial contribution, and
 - e. repeal the Collaborative Planning Process (CPP)
14. The policy proposals described in (b) to (e) will not require many implementation requirements (i.e. new forms or guidance). We will communicate with our stakeholders closely to ensure they are well aware of the changes required, before Royal Assent.
15. For the freshwater planning process identified in (a) above, we note that there will be extensive preparatory work required prior to the passing of the Bill. This will include setting up the secretariat support within the Ministry, identifying suitable candidates for Cabinet consideration, and providing guidance for councils.
16. In order to implement the freshwater planning process in a timely manner, the Ministry will need to plan for implementation while the Bill is going through the parliamentary process.

Savings and transitional provisions

17. We are proposing that any freshwater planning instruments that were notified (including variations) before the enactment of the Bill will go through under the existing standard Schedule 1 process.
18. Any notices of requirement lodged that have not been determined (i.e. appeals are still pending) will be dealt with as if the RMA has not been amended.
19. We are proposing a transitional provision to ensure that the Principal Environment Judge who holds office on the day before the enactment will be able to carry on their role under their new title Chief Environment Judge, immediately following enactment.

Consultation with agencies

20. We have received feedback from Department Internal Affairs (DIA), Ministry of Education, NZ Defence Force (NZDF), Department of Conservation (DoC), Māori Crown Relations - Te Arawhiti, Environment Protection Authority (EPA) and Te Puni Kōkiri (TPK).
21. We received one comment from DIA on the proposal to rename the Environment Judge and

they are supportive of the change. No other agencies commented on this amendment to the RMA.

Freshwater planning process

22. The majority of agencies' feedback sought clarifications on the FPP, and we have updated the relevant sections of the draft LEG paper to improve clarity.
23. Māori Crown Relations – Te Arawhiti and DoC are concerned about the lack of clarity around the scope of planning provisions that must be developed under the FPP. The process proposed in the Bill is designed to ensure that the regional planning instruments will give effect to the NPS-FM by 31 December 2025. We expect that this subject will be canvassed in submissions, which would provide opportunities to consider this further in the legislative process.
24. Māori Crown Relations – Te Arawhiti also raised concerns about having one person on the panel with an understanding of tikanga Māori and mātauranga Māori, especially in areas where there are numerous iwi groups with overlapping interests. They were also concerned how the Chief FWC will decide on the panel member when he or she receives multiple nominations from tangata whenua. This matter was also raised by TPK.
25. This is the same issue that is currently faced by RMA decision makers, when forming a hearing panel. We note the process does not preclude more than one person from having an understanding of tikanga Māori and mātauranga Māori experience sitting on the panel.⁶
26. We also acknowledge that the Chief FWC may need guidance when considering multiple nominations from tangata whenua, and this could be addressed through terms of reference when they are appointed. The Chief FWC will be supported by MfE or EPA, and will also be able to consult with the relevant councils or specialists on this matter.
27. The relevant provisions of Schedule 1 of the RMA that will continue to apply include consultation requirements with tangata whenua. Councils will need to prepare their plans in accordance with existing arrangements with local tangata whenua.

Exemption from Financial Contributions

28. DoC, NZDF and DIA provided specific comments on the proposal to exempt the Minister of Education (as a requiring authority) from financial contributions.
29. DoC questioned why the proposal only offered an exemption for the Minister of Education, and considered that it raises doubt for Crown requiring authorities. NZDF requested the RMA to be amended to also exempt the Minister of Defence from financial contributions.
30. DIA would prefer this matter be considered through other work programmes addressing funding growth from Crown development, rather than through an amendment in this Bill in advance of that wider work (as proposed).
31. We recommend you wait to see if any feedback is received from Ministers to consider this matter.

Next Steps

32. We seek your approval to the proposed clarification amendments, and the CST provisions.
33. If you agree, we recommend you initiate Ministerial and political consultation. To meet your expectation of introducing the Bill as soon as possible, we will continue to work with Parliamentary Counsel Office (PCO) to refine the Bill while consultation is taking place.
34. The table below outlines the timeline to introduce the proposed bill, if you agree to begin consultation now. The timeline below is contingent on the outcome of the Ministerial and

⁶ There will be no maximum number of panel members [CAB-19-MIN-0337.01, paragraph 12].

political consultation (and your direction on the matters discussed in this briefing).

Milestone	Date
Ministerial and political consultation	29 August to 10 September
First reading speech and media release to Minister's office (draft)	12 September
Final Cabinet paper lodged for consideration by LEG Committee	12 September
LEG committee	17 September
CAB Committee	23 September
Introduction to the House and Media release	23 September
Earliest possible First reading	26 September

Recommendations

35. We recommend that you:

- a. **Agree** to consult Ministers and political parties on the attached draft LEG paper, the Bill and the Departmental Disclosure Statement

Yes / No

- b. **Agree** to the following policy clarifications in relation to the Freshwater Planning Process (FPP) that have been included in the Bill:

- i. All regional planning instruments that implement the NPS-FM or relate to freshwater must be developed under the freshwater planning process

Yes / No

- ii. All regional planning instruments under FPP must be publicly notified and a hearing must be held

Yes / No

- iii. EPA will provide secretariat support to the freshwater commissioners, if directed by the Minister for the Environment

Yes / No

- iv. Council will be required to submit the relevant material to the Chief Freshwater Commissioner no more than six months after the public notification of their proposed freshwater planning instrument

Yes / No

- c. The Chief Freshwater Commissioner has the power to convene a panel with a minimum of three members (at least one accredited councillor or independent commissioner nominated by council, one government appointed freshwater

commissioner, and one commissioner with an understanding of tikanga Māori and mātauranga Māori, nominated by local tangata whenua)

Yes / No

- i. The hearing panel must prepare a further evaluation report if their recommendations differ from what was initially prepared and notified by the council

Yes / No

- ii. The Chief Freshwater Commissioner has the power to accept or reject variations to proposed freshwater planning instruments that have already been forwarded to him or her for consideration

Yes / No

- iii. Councils will not be able to extend any timeframes in the FPP

Yes / No

- iv. Councils must give notice of providing the material and nominations to the Chief Freshwater Commissioner at least 20 working days before they provide all relevant material to the Chief FWC

Yes / No

- v. Applying all the relevant hearing powers and duties under the RMA

Yes / No

- vi. The hearing panel, in formulating their recommendations on the proposed freshwater planning instruments, must consider the relevant RMA decision making sections (i.e. regional policy statement and regional plan) that a council must consider in a standard process, and reports produced from pre-hearing, conferencing, dispute resolution or technical reports commissioned by the panel

Yes / No

- vii. The Minister for the Environment can no longer call in freshwater planning instruments as a matter of national significance

Yes / No

- viii. The hearing panel will have the ability to accept or reject late submissions

Yes / No

- ix. Applying LGOIMA to ensure a transparent process, and that information held by the panel is governed by the same provisions that apply to local government

Yes / No

- d. **Agree** to seek Cabinet's agreement to rescind the previous Cabinet agreement that was to provide the panel an ability to appoint special advisors [CAB-19-MIN-0337.01, paragraph 13.7 refers]

Yes / No

- e. **Agree** to the following commencement provisions:

- i. Proposal to enable the Freshwater Planning Process to commence the day

after the date of Royal Assent

Yes / No

- ii. Proposal to clarify that the steps that the Minister for the Environment must follow when a Board of Inquiry recommends a NES to commence the day after the date of Royal Assent

Yes / No

- iii. Proposal to rename the head of the Environment Court to commence the day after the date of Royal Assent

Yes / No

- iv. Proposal to exempt the Minister of Education as a requiring authority from financial contributions to commence the day after the date of Royal Assent

Yes / No

- v. Proposal to repeal Collaborative Planning Process to commence the day after the date of Royal Assent

Yes / No

- f. **Agree** to the following transitional and savings provisions:

- i. Any proposed freshwater planning instruments that were notified (including variations to these planning instruments) prior to the enactment of the Freshwater Planning Process provisions will go through the Schedule 1 process as it currently stands

Yes / No

- ii. Any pending notices of requirement that have not been determined (i.e. appeals are not resolved) will be dealt with as if the RMA has not been amended

Yes / No

- g. **Agree** that this briefing and appendices will be released proactively on the Ministry for the Environment's website after the introduction of the Bill

Yes / No

Signature

Justin Strang
Head of the Office of the Chief Executive

Hon David Parker
Minister for the Environment

Date

Appendix 1: Draft LEG paper, the Bill and the Departmental Disclosure Statement

Final versions of the documents presented in Appendix 1 are available on the Ministry for the Environment website

Proactively released

Appendix 2: Additional policy rationale for the new policy matters on the freshwater planning process (FPP)

Policy matters	Policy Rationale
<p>All provisions of the freshwater planning instrument must use the new freshwater planning process</p>	<p>Cabinet agreed that the freshwater planning instruments that implement the NPS-FM must use this FPP [CAB-19-MIN-0337.01, paragraph 5 refers]. Although we note that the majority of the freshwater provisions would be implementing the NPS-FM, there could still be aspects which may relate to freshwater and contribute to freshwater outcomes that fall outside of the NPS-FM. A slight expansion of scope will ensure that all freshwater matters (even outside of the NPS-FM) can be considered holistically in a single process.</p>
<p>All freshwater planning instruments must be publicly notified and that a hearing must be held</p>	<p>The proposed freshwater planning process provides for limited appeal rights to ensure that freshwater planning instruments will be in place (i.e. operative) in a fast and efficient manner. Given the reduced rights of appeal, there is a need to ensure that there is adequate public participation throughout the process.</p>
<p>EPA to provide secretariat support to the group of freshwater commissioners, if requested by the Minister for the Environment</p>	<p>The EPA is already providing administrative and technical support to Boards of Inquiry, and therefore have the capability to provide secretariat support (including planning support) to the freshwater commissioners, if required. This will enable them to undertake this function in the RMA, and allow some flexibility to transfer this function to them, should the Minister for the Environment consider it to be appropriate in the future.</p>
<p>The relevant council must submit information no more than six months after the relevant planning instrument is notified to the Chief FWC</p>	<p>This is to ensure the Chief FWC will have adequate time to convene a hearing panel to hear submissions and make recommendations on the planning instrument within the required two year timeframe.</p>
<p>Chief Freshwater Commissioner to convene a panel with fewer than five members (but no fewer than three members)</p>	<p>There could be instances where the freshwater planning instrument is minor in nature, especially those plan changes post 2025. In these instances, it could be appropriate for the Chief FWC to convene a panel with fewer than five members (but no fewer than three members).</p> <p>The panel could consist of council nominated commissioner (or accredited councillor), one government appointed commissioner (with the casting vote), and one accredited commissioner with an understanding of tikanga Māori and mātauranga Māori, nominated by local tangata whenua.</p>
<p>The hearing panel must prepare a further evaluation report, if their recommendations differ from what was initially prepared and notified by council</p>	<p>The panel should prepare a further evaluation report on any of its recommendations are different to that in the proposed regional planning documents. This duty sits with any panel convened to decide or make recommendations under Schedule 1 and should also apply to the freshwater hearing panel to ensure transparency in the recommendations/decision making process.</p>

<p>The Chief Freshwater Commissioner (Chief FWC) will have the ability to accept or reject variations to changes to regional policy statements and regional plans (once material has been received)</p>	<p>There may be instances where a variation to the planning instrument is required due to new data (or new science), and there will be no risk to the overall timeframe.</p> <p>Given the Chief FWC has an oversight of the freshwater planning process, it is appropriate for him or her to have the ability to accept or reject variations.</p>
<p>Councils will not be able to extend any timeframes in the freshwater planning process</p>	<p>The policy intent is to ensure that the freshwater planning instruments to implement the NPS-FM be in place by 31 Dec 2025. To avoid any unreasonable delay, we are recommending that councils will not be able to extend any timeframes in the freshwater planning process.</p>
<p>Councils must give notice of intention to provide material and nominations to the Chief FWC at least 20 working days before they provide all relevant material to the Chief FWC</p>	<p>This is to ensure that the Chief FWC will be able to plan ahead, and assess the nominations provided. There may be multiple nominations with overlapping interests (i.e. from local tangata whenua), and this may result in additional time to convene the panel. The Chief FWC will also need time to consider nominations and the availability of the freshwater commissioners to achieve a balanced panel.</p>
<p>Applying all relevant powers and duties to hearing panels. This includes, but is not limited to:</p> <ul style="list-style-type: none"> i. conduct hearings without unnecessary informality, ii. require councils or commission a person to produce a hearing report, and iii. where there is a lack of accreditation, the decision for the panel is not invalidated 	<p>This is necessary for the hearing panel to conduct the hearing in a manner that is familiar for the submitters. Therefore we recommend that the normal RMA powers and duties in relation to hearing continue to apply.</p> <p>To avoid doubt, the hearing panel will have additional RMA hearing powers such as direct pre-hearing meetings, dispute resolutions and expert conferencing and cross-examination.</p> <p>The panel should also be able to request a person to provide a hearing report as is the current practice.</p> <p>It is also important to clarify that where there is a lack of accreditation, the decision by the panel is not invalidated. There may be instances where a person with specific technical expertise is required and they are not accredited.</p> <p>This is to acknowledge that there could be instances where there are suitable candidates (especially those nominated by local tangata whenua) who have the expertise to sit on the panel, but do not have adequate time or opportunity to obtain the required accreditation.</p>
<p>Matters that a hearing panel may consider that affect the recommendations</p>	<p>The freshwater hearing panel must consider the matters (i.e. in Sections 61, 62, 66 to 70B, 77A to 77D regional plans). These are all the matters that must be considered when Council prepares a regional plan/regional policy statement. Therefore it is logical that these should also be matters that must be considered when the panel makes a decision.</p> <p>We are also recommending that the panel must consider any reports produced as a result of pre-hearing meetings, expert conferencing, mediation or other alternative dispute resolution, directed by the Panel. These processes are an important part of resolving matters before the hearing. Any agreements reached between parties and any areas of disagreement will form a major part of the decision making process.</p> <p>Any technical or other reports commissioned by the panel – the Panel has the ability to commission reports on any matter relevant to its understanding of the</p>

issues and therefore these should also be a matter for consideration in decision making.

The above matters are essential as the panel is able to formulate recommendations that go outside the scope of submissions, and matters raised during the hearing or by the panel or any other person during the hearings process should be relevant (this is discussed in a separate section).

The matters that the hearing panel must consider are similar to what were required of the Auckland Independent Hearing Panel when they developed the Auckland Plan.

The hearing panel may accept or reject late submissions

It is not uncommon for Council to receive late submissions. Often, councils will accept late submissions, and waive the time limit under s37 of the RMA. Section 37 – time extension provision will be dis-applied in this freshwater planning process, and therefore is important to include an enabling power in the RMA.

The ability to participate in the hearing process and the right to appeal hinges on whether a person has submitted or not. This is therefore an important component in the FPP, as this process has truncated appeal rights.

The overall timing of the process is controlled by the Panel and therefore it would be appropriate to allow the Panel to have oversight of the impact that accepting or rejecting late submissions will have on the process.

We recommend that when considering whether it is appropriate to accept or reject a submission the panel should have consideration for; whether accepting or rejecting the submission will have an impact on overall timeframes, or whether the submission raises a new matter/ provides new information that was not available earlier, such as more recent monitoring data or updated analysis.

The Minister for the Environment can no longer call-in freshwater planning instruments as a matter of national significance (NSP)

The FPP is created specially to expedite freshwater planning as the current RMA planning system is slow and has not delivered the intended freshwater outcomes. Applying the NSP provisions would introduce additional complexity that is not needed, given the powers of the panel and the truncated appeal rights.

Applying LGOIMA 1987

This applies the same way that it applies to a board of inquiry (appointed under section 149J RMA) and to the independent hearing panel that helped develop the Auckland Unitary Plan.

The intent is that any person may make a request to the freshwater hearing panel for any specified official information that the panel may hold but that request be governed by the matters, constraints and procedures set out in the LGOIMA 1987.

This provides appropriate transparency in the process and ensures that information held by the panel is governed by the same provisions as applies to local government

Appendix 3: Regulatory Impact Statement for your information

Appendix 3 is available on the Ministry for the Environment website

Proactively released