

Proposed Resource Management Amendment Bill: A new planning process for freshwater and outstanding policy decisions Cabinet paper

Date Submitted:	17 May 2019	Tracking #: 2019-B-05570	
Security Level	In Confidence	MfE Priority:	Urgent

	Action sought:	Response by:
To Hon David Parker, Minister for the Environment	Agree to send attached Cabinet paper for pre-Cabinet consultation, or direct further changes Sign attached letter	28 May 2019

Actions for Minister's Office Staff	Return the signed report to MfE Forward the attached Cabinet paper for pre-Cabinet consultation (if agreed) Send the signed letter to Chief Justice Winkelmann (and forward copies to other Judges listed in the letter)
Number of appendices and attachments 3	1. Cabinet paper 2. Timeframe to introduction 3. Draft letter to Chief Justice Winkelmann 4. Feedback received
Note any feedback on the quality of the report	

Ministry for the Environment contacts

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Proposed Resource Management Amendment Bill: A new planning process for freshwater and outstanding policy decisions Cabinet paper

Key Messages

1. The purpose of this briefing is for you to:
 - a. note feedback received on the proposed freshwater planning process
 - b. send the attached Cabinet paper for pre-Cabinet consultation
 - c. sign attached letters to the judiciary to seek feedback on an additional minor amendment for potential inclusion in the Stage 1 Resource Management Amendment Bill (the Bill).

Draft Cabinet paper for proposed freshwater planning process and timing for introduction

2. On 2 April 2019, you directed us to prepare a draft Cabinet paper to include a freshwater planning process to implement the new National Policy Statement for Freshwater Management (NPS-FM) by 2025.¹ You also directed us to include outstanding policy matters in that same Cabinet paper.² These matters are included in the draft Cabinet paper attached (Appendix 1).
3. We have sought and received feedback on the proposals from regional councils, *Essential Freshwater* advisory groups, including the Iwi Leaders Group, Kahui Wai Māori (KWM), and agencies. This is discussed in detail in Appendix 4 attached to this briefing.
4. Te Arawhiti and Te Puni Kōkiri (TPK) have expressed broad concerns about a lack of early engagement with Māori as Treaty partners. In our meeting on 9 May, you indicated you wish to keep progressing the Bill while continuing to engage with Freshwater Leaders Group, KWM, Iwi Leaders Group, council planning practitioners and government agencies. We suggest that the above engagement also extend to other key stakeholders such as the iwi authorities the Ministry has Treaty Settlement obligations to consult with.
5. We have provided two possible approaches for further engagement and consultation.
6. The first approach involves continuing to engage with the above stakeholders on the detail (but not drafting) while PCO drafts the new provisions. The *Essential Freshwater* consultation is scheduled for 22 July to 16 September. We suggest that the discussion document acknowledge the new planning process as being part of the *Essential Freshwater* package, but be clear that the avenue for feedback is via the Select Committee process.
7. We have set out a timeframe (Appendix 2) which would allow you to:
 - obtain Cabinet policy approval (13 June ENV Committee, 17 June Cabinet)
 - draft provisions while engaging with the stakeholders mentioned above
 - obtain Cabinet approval to introduce the Bill so that it is referred to Select Committee at the close of the *Essential Freshwater* consultation (estimated 16 September).
8. This approach enables you to engage further on the new freshwater planning process with select groups (without delaying drafting) and proceed with consultation on freshwater. The Select Committee process will benefit from the wider feedback gained through the *Essential Freshwater* consultation. There are however risks with this approach. Only limited consultation

¹ [2019-B-05416] *Essential Freshwater* 40: Assisting councils to implement the NPS-FM

² To rescind previous agreements for proposals you no longer wish to progress, seek agreement to minor clarifications of existing policy, and note detailed policy agreements made to date that were delegated to other Ministers - *Weekly Update report for the week starting 15 April 2019*

has been undertaken on the proposal, particularly with iwi, which has not met the expectations of Te Arawhiti and TPK

9. The Cabinet paper (Appendix 1) includes draft text in the consultation section [paras 71-73] to reflect this approach. We will amend it if you disagree.
10. An alternative option is to use the *Essential Freshwater* public consultation as an opportunity to seek wider feedback on the proposed freshwater planning process. Feedback could then be used to inform policy development for further consideration in advance of Bill introduction. Considering feedback prior to Bill introduction may reduce risk of a contentious select committee process, but would delay Bill introduction to November. If you direct this approach, we can amend the Cabinet paper accordingly in advance of pre-Cabinet consultation.

Proposed amendment to the title of the head of the Environment Court

11. Separately, the Principal Environment Judge (PEJ) has requested an additional amendment through the Bill, to change this title to the 'Chief Environment Judge'.
12. The current 'Principal' title is a carryover from when the Planning Tribunal (which had a Principal Planning Judge) was replaced by the Environment Court by the Resource Management Amendment Act 1996. We have not found any policy rationale for why the 'Principal' title was retained.
13. The only two other courts with 'Principal' Judges are divisions of the District Court.³ Conversely, the Environment Court is not a division of the District Court, and the PEJ is mandated to carry out its functions independently under section 251 of the RMA. The status of the PEJ is therefore more closely aligned with other Chief Judges, not the other Principal Judges, which the PEJ advises has caused confusion.
14. The Ministry of Justice has not expressed a view on the proposed title change, and recommend the judiciary be consulted. We recommend you sign the attached letter to seek feedback from the judiciary.
15. If the judiciary is supportive of the change, and feedback is received by 7 June, we seek your agreement to instruct PCO to make the amendment as part of the Bill.⁴ Cabinet agreement can be sought via the LEG paper at the time the Bill considered for introduction.

Financial, regulatory and legislative implications

16. You have indicated that costs of administering the freshwater planning process should be recovered from regional and unitary councils. While the majority of costs will be recoverable, there will be some costs that cannot be attributed to a specific hearing process, and therefore need to be absorbed by the Crown.⁵ For example, a secretariat of two to three full time employee to support administration, and costs of regular meetings of commissioners for consistency. We intend to absorb these costs within the existing baseline through resource prioritisation of the *Essential Freshwater* implementation package.
17. The attached policy Cabinet paper does not include content regarding commencement, transitional or savings provisions for the various Bill proposals, or the potential proposed amendment to the title of the Principal Environment Judge. These provisions are more suited to include in the later paper, for the Cabinet Legislation Committee, when the Bill is considered for introduction.

³ The Family Court and Youth Court, under section 7(2)(b) of the District Court Act 2016

⁴ We have identified at least one consequential amendments to a different legislation - Remuneration Authority Act 1977 (for remuneration purposes).

⁵ For example, initial appointment of freshwater commissioners and generic administration and coordination

Other matters

18. As discussed with you, Environment Canterbury wrote to you on 18 April outlining their views on the challenges involved in reviewing resource consents following a plan change. They provide two solutions to facilitate consent reviews. You have indicated you would like to see proposed drafting for these for possible inclusion in the Bill. We are preparing advice for you on this matter, and address your concerns relating to certificates of compliance and existing use certificates.
19. You have also received advice from the Ministry of Education (MoE) regarding an amendment to the RMA to exclude all requiring authorities from needing to pay financial contributions on designations. We consider this matter requires further substantial policy work to better identify the problem and any costs or risks. We will work with MoE further on this.
20. 9(2)(g)(i)

Next Steps

21. If you agree, pre-Cabinet consultation can begin on 17 May, in advance of lodgement on 6 June for consideration at the Cabinet Environment, Energy and Climate Committee on 13 June. In order for the timeframe to be met, we are seeking your feedback on the draft Cabinet attached to this briefing (Appendix 2).
22. We are preparing a regulatory impact statement for the proposed freshwater planning process. We will provide this to your office when it is complete for lodgement with Cabinet Office alongside the final Cabinet paper.
23. We will discuss implementation aspects of the proposed freshwater planning process with KWM in their next hui on 28-29 May. We will also undertake further consultation on the proposal with targeted groups.
24. Timeframes for our recommended approach to introduce the Bill are set out in Appendix 2. We can provide you with an updated timetable, if you direct this.
25. There is a high risk of delay of the progress of the Bill, if additional policy proposals (as discussed in the other matters section above) are being added to the scope of the Stage 1 reform Bill.

Recommendations

26. We recommend that you:

- a. **Agree** to the proposed freshwater planning process as set out in the attached Cabinet paper (Appendix 1)

Yes/No

- b. **Agree** to undertake pre-Cabinet consultation with Ministers and political parties on the Cabinet paper, seeking approval to draft the proposed freshwater planning process (time frames set out in Appendix 2)

Yes/No

- c. **Note** concerns raised by Te Arawhiti and Te Puni Kōkiri regarding the lack of wider consultation, particularly with Māori, on the proposed freshwater planning process

- d. **Direct** us to:

EITHER

1. undertake further high level engagement with targeted groups, including *Essential Freshwater* advisory groups, while informing the wider public during the *Essential Freshwater* consultation that there will be an opportunity for public submissions on the proposed freshwater planning process during the Select Committee process

Yes/No

OR

2. undertake wider public consultation on the proposed freshwater planning process as part of the *Essential Freshwater* programme

Yes/No

- e. **Note** we have included text in the draft Cabinet paper (Appendix 1) to the effect of option d(1) above, but will amend this at your direction, in advance of pre-Cabinet consultation

- f. **Note** that initial appointment and general administration of the central freshwater commissioners will have some cost that will not be attributable to regional hearing panels (for the purpose of cost recovery), which we intend to absorb within existing MfE baselines

- g. **Note** the Principal Environment Judge has requested an additional amendment for the Stage 1 Bill, to replace the current title with 'Chief Environment Judge',

- h. **Sign** the attached letter to the Chief Justice, Rt Hon Dame Helen Winkelmann (Appendix 3), seeking her feedback on this proposal

Yes/No

- i. **Agree** that if feedback from the judiciary is supportive and received on time, we instruct PCO to draft this for inclusion in the Stage 1 Bill, for Cabinet consideration through the LEG paper process

Yes/No

- j. **Agree** that this briefing and appendices will be released proactively on the Ministry for the Environment's website at the time the *Essential Freshwater* consultation is launched

Yes/No

Signature



Robert McClean
Manager
RMA Practice

17/5/2019

Hon David Parker
Minister for the Environment

Date

Appendix 1: Cabinet paper - *Proposed Resource Management Amendment Bill: A new planning process for freshwater and outstanding policy decisions*

Proactively released

Appendix 2: Timeframe for introduction of Resource Management Amendment Bill (Stage one) – no wider pre-consultation

Milestone	Timeframe aligned with Essential Freshwater package consultation
Ministerial consultation	17-21 May (note this is while you are overseas between 16-26 May)
Political consultation	22-31 May (note this will begin while you are overseas between 16-26 May)
Kāhui Wai Māori hui	28/29 May
Lodgement with Cabinet Office	6 June
Feedback from Chief Justice due	7 June
Cabinet Committee	13 June (ENV)
Cabinet	17 June
Drafting instructions to PCO, Bill drafting, draft LEG paper, departmental disclosure statement	22 July (estimate)
<i>Essential Freshwater</i> consultation opens	17 June - 26 July
Agency consultation on Bill and LEG paper	26 July - 2 August
Bill and LEG material to Minister	9 August
Ministerial consultation	14-20 August
Political consultation	21-27 August
Ministry of Justice BORA report to Attorney-General	20 August
Lodgement with Cabinet Office	5 September
Cabinet LEG Committee	10 September
Cabinet	16 September
<i>Essential Freshwater</i> consultation closes	16 September (estimate)
Earliest possible first reading	24 September
Select Committee process	6 months (could be shorter)
Earliest possible second reading	March 2020
Earliest possible third reading	March 2020
Earliest possible Royal Assent	April 2020

Appendix 3: Letter to Chief Justice Rt Hon Dame Helen Winkelmann

Proactively released



2019-B-05570

The Rt Hon Dame Helen Winkelmann
The Chief Justice of New Zealand
Chief Justice's Chambers
DX SX 11224
WELLINGTON 6140

Dear Chief Justice Rt Hon Dame Helen Winkelmann

Comments sought on a potential amendment to the Resource Management Act 1991

I am seeking your feedback on whether a legislative amendment is needed to change the title of the 'Principal Environment Judge' to the 'Chief Environment Judge'. This change would be consistent and align with the titles of other Chief Judges who have similar roles.

I am advised by Ministry for the Environment officials that the title 'Principal Judge' is currently used at the Environment Court, the Family Court, and the Youth Court. However, while the Family and Youth Courts are divisions of the District Court, the Environment Court is not. I am advised that under section 251 of the Resource Management Act 1991, the Principal Environment Judge is responsible for the orderly and expeditious discharge of the business of the Environment Court. As such, the roles and responsibilities of the Principal Environment Judge are more closely aligned to those of the other Chief Judges (not the other Principal Judges).

Therefore, I am seeking your view on whether the title of the Principal Environment Judge should be amended for consistency and to address any possible confusion about the role of the head of the Environment Court and its relationship with the District Court. If you consider this legislative change to be appropriate, I will consider progressing the change through the Resource Management Amendment Bill, due to be introduced to the House later this year.

I would appreciate receiving your comments by 7 June 2019.

Yours sincerely

Hon David Parker
Minister for the Environment

CC: The Hon Justice Venning
Chief High Court Judge

Her Honour Chief Judge J-M Doogue
Chief District Court Judge

His Honour Judge L Newhook
Principal Environment Judge

Appendix 4: Feedback

Feedback from regional council practitioners on proposed freshwater planning process

1. We have received feedback on the proposed freshwater planning process from regional council practitioners. These practitioners saw efficiency benefits through the centralised appointment of freshwater commissioners and secretariat support. However, they suggested that 20 working days may be insufficient time for a council to respond to the hearing panel's recommendations, for various reasons. We have included provision in the Cabinet paper to enable councils to seek an extension to this timeframe by applying to the chair of the freshwater commissioners.
2. Council practitioners also suggested legislative prescription be minimised where possible, to reduce risk-averse behaviour from councils (due to potential for judicial review), and to allow for local circumstances to be applied as necessary.
3. The possibility of allowing for councils to opt out of the process for minor freshwater plan changes was also raised. We consider that the new process should remain mandatory to reduce potential complexity, uncertainty and judicial review risk. Instead, we anticipate that the freshwater commissioners will be able to instigate a proportional response in the way they run the new process (for example, allowing for shorter hearings for minor plan changes).
4. Other feedback pertained to implementation issues:
 - a. potential challenges for councils to undertake necessary obligations under existing Treaty settlement legislation prior to notification of proposed plan changes by 2023
 - b. uncertainty over what content must be included in a plan change to implement the NPS-FM, and
 - c. risk of poor quality plans being notified by 2023
 - d. concern that there might not be enough suitably qualified and experienced people to appoint as freshwater commissioners by 2023 (particularly in cross examination).
5. As these matters are not statutory, we will respond to these points through aspects of the *Essential Freshwater* package (including proposed NPS amendments, implementation support and guidance for councils and appointment of freshwater commissioners).

Feedback from Kāhui Wai Māori (KWM)

6. We have discussed the freshwater planning proposal with the Essential Freshwater advisory groups, including KWM in their hui on 29 April. KWM provided feedback on the proposal, referring at the same time to its report *Te Mana o Te Wai* (and recommendations). We have provided you with initial advice on the KWM report [2019-B-05567 refers].
7. We intend to discuss how the process can work in practice, including how we ensure panel members have the necessary skills and understanding of Te Aō Māori and iwi/Māori membership, at KWM's next hui on 28/29 May.

Feedback from agencies

8. We consulted a number of agencies on the draft Cabinet paper.⁶ We received feedback⁷ on

⁶ Te Puni Kōkiri, Ministry of Culture and Heritage, Department of Conservation, Department of Internal Affairs, Department of Prime Minister and Cabinet, Te Arawhiti, Ministry of Justice, Ministry of Transport, Ministry of Health, Land Information New Zealand, Ministry of Primary Industries, Ministry of Business, Innovation and Employment, Ministry of Housing and Urban Development (HUD), the Treasury, New Zealand Defence Force, Ministry of Education, and Department of Corrections

⁷ From Te Arawhiti, Ministry of Justice, Department of Conservation, Ministry of Housing and Urban Development, the Treasury, and Ministry of Health

proposed legislative aspects, implementation issues (including financial implications), and concern about a lack of wider consultation on development of this policy to date.

9. The Ministry of Justice opposed the proposed limitations on appeal rights, due to natural justice constraints and in principle that appeal rights should not be reduced as an incentive for councils to accept recommendations. We note the limited appeals in this proposal are based on the previous Auckland Unitary Plan process and generally align with those agreed by Cabinet for the proposed Urban Development Legislation. We recommend progressing the current proposal as outlined in the Cabinet paper, to reduce delays in making freshwater plans operative. However, we acknowledge this will likely be a matter raised through consultation.
10. Te Arawhiti raised concerns around the Crown re-designing an RMA decision-making process with minimal input from Māori. They indicated that engagement with Māori on the proposal to date did not meet their expectations of what was appropriate. Te Puni Kōkiri also questioned the level of engagement that had been undertaken by Māori, and how this had influenced the freshwater planning process. Te Arawhiti also questioned whether the proposal would be workable in cases where bespoke decision-making and co-governance arrangements are mandated under existing Treaty Settlement legislation. We will work with PCO to ensure Bill drafting is workable with existing arrangements, and will provide you with further advice if necessary.
11. Agencies also raised potential implementation matters, including:
 - a. limited capability and capacity for councils, iwi and hapū to work through all necessary statutory requirements while ensuring robust plan proposals will be ready for notification by 2023
 - b. regional councils may have to deprioritise other work areas (including responses to other national direction) to focus resource on freshwater
 - c. uncertain costs to the Crown for establishment and central administration (secretariat) for of freshwater hearing commissioners
 - d. potential lack of suitably qualified and experienced personnel available for appointment as freshwater commissioners in advance of 2023
 - e. what role Māori might have to support the initial appointment of central freshwater commissioners that have tikanga Māori experience, and locally-nominated representatives who understand the perspectives of tangata whenua.
12. We consider these implementation matters do not require legislation to address, however they are valid issues with implications for effective implementation of the proposal, and require suitable support to address. We will consider these factors as we prioritise resources within the *Essential Freshwater* implementation programme and budget.
13. Agencies also provided some minor wording suggestions for the draft Cabinet paper, which we have incorporated in the revised version attached.
14. It is noted that the draft Cabinet paper that was circulated to the agencies on 7 May contains a different policy detail regarding the appointment of the freshwater hearing panels. In that version of the paper, regional councils were to appoint the freshwater hearing panel, which must include two Government appointed freshwater commissioners. The attached Cabinet paper identifies the Minister for the Environment as setting terms of reference for the functions of the group of freshwater commissioners and the chair, and states that the freshwater commissioners will convene freshwater hearing panels.

Other matters

15. TPK also have concerns about the potential lack of Māori engagement on the policy proposal to enable the EPA to undertake enforcement actions. We consider there will be opportunity

for public consultation after the Bill is introduced.

16. DoC have also commented on the technical amendment to fix cross-referencing error relating to the board of inquiry process for national environment standard. They questioned whether we have identified all the relevant sections that will need to be amended to meet the intent of the policy proposal. We will work with DoC closely, and instruct Parliamentary Counsel Office accordingly.

Proactively released