

In Confidence

Office of the Minister for the Environment

Chair, Cabinet Environment Committee

## **Proposed Resource Management Amendment Bill: A specialised planning process for freshwater, and other outstanding policy decisions**

### **Proposal**

1. On 8 October 2018, Cabinet agreed to a set of amendments to improve the operation of the Resource Management Act 1991 (RMA), in advance of a more comprehensive review of the resource management system [CAB-18-MIN-0485.01 refers]. This paper seeks Cabinet approval to include additional proposals in a Resource Management Amendment Bill (the Bill).

### **Executive summary**

2. A two-stage approach is proposed for improving the resource management system, and Cabinet has already agreed to Stage 1 [CAB-18-MIN-0485.01 refers]. Stage 1 will comprise a Bill to address problems in the RMA that are relatively straightforward to correct, or where there is a clear need to act in advance of decisions on a more comprehensive review. The Bill will reduce complexity, increase certainty, restore previous public participation opportunities, and improve RMA processes.
3. This paper seeks Cabinet approval to include additional proposals in the Bill. These comprise a new plan-making process for freshwater management to implement a new National Policy Statement for Freshwater Management (NPS-FM), other amendments needed to support that process, and changes of a technical nature relating to other issues.
4. My intention is that the Bill be given a first reading by September 2019. I would aim for it to be passed by mid-2020, when the new NPS-FM comes into force.
5. Stage 2 is being addressed in a separate paper, *Comprehensive review of the resource management system: scope and process*.

### **Applying a specialised planning process to regional freshwater plans in order to implement a new NPS-FM**

6. The Government is committed to improving New Zealand's freshwater quality by stopping further degradation and loss, and reversing past damage. Our programme for doing so is outlined in *Essential Freshwater: Healthy Water, Fairly Allocated* (Essential Freshwater) published in October 2018.<sup>1</sup>
7. Key to achieving our freshwater goals will be a new NPS-FM under the RMA. I intend to consult on this later this year, and it would come into force in mid-2020. Regional and

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<sup>1</sup> Essential Freshwater outlines how freshwater quality has been declining particularly in lowland areas, at pages 8-11 and 30-34 of the document.

unitary councils (councils) will be required to fully implement the NPS-FM within their own plans by 31 December 2025.

8. The new NPS-FM will replace the current inadequate 2017 version. Recent reporting from councils to the Ministry for the Environment (MfE) has shown that the majority of councils are unlikely to meet the primary deadline of fully implementing the 2017 version by 2025 and are likely to take until 2030 or later (the deadline can currently be extended to 2030 in certain circumstances). Such delays are unacceptable and place our rivers, lakes and aquifers at risk of continued long-term degradation. The reasons for delay are varied but include slow standard RMA plan-making processes.
9. Such delays, especially for the new NPS-FM, should not be accepted. The Land and Water Forum and others have recommended a Water Commission be established to oversee management of our waterways. This may be part of a longer-term solution, but in the short term I propose to ensure that the 2025 deadline is met by establishing a group of freshwater commissioners to convene freshwater hearing panels for regional freshwater plans.
10. I am therefore seeking Cabinet agreement to amend the RMA, to provide for a new specialised planning process for freshwater (freshwater planning process). Regional and unitary councils will be required to use this process for any changes needed to their regional plans and policy statements to implement the new NPS-FM. The new process is broadly based on that used for the Auckland Unitary Plan (and generally aligns with the proposed process for development plans by the new housing and urban development authority, Kāinga Ora–Homes and Communities)<sup>2</sup>.
11. I have considered whether existing RMA plan-making processes could be used instead. There are two such processes. One is the collaborative planning process (CPP), which I propose be repealed as it is ineffectual and unnecessary. The other process is the streamlined planning process, but this is optional and councils cannot be directed to use it.

#### *Freshwater commissioners and freshwater hearing panels*

12. To support freshwater planning and ensure robust hearings for plans, I propose to:
  - appoint a group of freshwater commissioners, chaired by a retired or current Environment Judge, with a secretariat provided by MfE or the Environmental Protection Authority (EPA), to form the core of freshwater hearing panels. The commissioners will each need to be accredited under the Making Good Decisions programme,<sup>3</sup> and collectively have the following expertise:
    - experience in judicial processes and cross examination
    - expertise in relation to freshwater quality and quantity, and freshwater ecology
    - knowledge of the RMA
    - understanding of tikanga Māori and mātauranga Māori

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<sup>2</sup> The Bill to establish this Crown entity, the Kāinga Ora–Homes and Communities Bill, was introduced on 29 May 2019.

<sup>3</sup> See sections 39A and 39B of the RMA.

- enable the group to convene freshwater hearing panels to hear submissions, test a proposed plan's robustness, and provide recommendations to the council
  - provide for each freshwater hearing panel to include:
    - two freshwater commissioners (one as the chair with a casting vote)
    - two accredited local councillors (or two accredited commissioners nominated by the council)
    - one accredited person with an understanding of tikanga Māori and mātauranga Māori (to be selected from nominations by local tangata whenua)
  - provide that in particular circumstances a hearings panel size could exceed five, in order to accommodate circumstances unique to a region or locality.
13. To retain a council's role as decision maker and to ensure democratic accountability, it will be able to reject a freshwater hearing panel recommendation. However, a council would need to develop an alternative provision and document why it would better achieve the purpose of the RMA and the NPS-FM. In doing so, the council would not be required to consult with any parties, and could not consider submissions or other evidence unless it was made available to the freshwater hearing panel.
14. Standard RMA planning steps<sup>4</sup> will continue to apply up to the close of further submissions. This includes, but is not limited to, requirements to consult with iwi, prepare evaluation reports, publicly notify planning documents, and call for submissions and further submissions. A council will need to forward all relevant information to the freshwater hearing panel.

*Council retains responsibility for final approval*

15. Within 20 working days of the council's receipt of the freshwater hearing panel's recommendations, the council will have to publicly notify its decisions, identifying:
- the recommendations that it accepts and those it rejects, and the reasons why
  - where a recommendation is rejected, the alternative provision it has made, together with a further evaluation report under section 32AA of the RMA.
16. The council may seek from the chair of the freshwater commissioners an extension to this timeframe, at the discretion of the chair. However, I expect that a council would ultimately accept hearing panel recommendations unless there were compelling reasons not to.

*Appeals*

17. The standard RMA planning process provides any person who made a submission on a plan with a right of appeal to the Environment Court (a merits appeal); and (on a point of law only) further appeal rights to the High Court, Court of Appeal, and Supreme Court (subject to leave to appeal being granted to access the latter two Courts).

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<sup>4</sup> Part 1, Schedule 1 of the RMA.

18. I propose that a right of appeal be available in the freshwater planning process for any person who made a submission on a plan. However, to ensure that plans are in place by 2025, appeal rights would be restricted as follows:

- a right of appeal to the Environment Court (a merits appeal), but limited to those parts of the freshwater hearing panel's recommendations that the council rejects; and (on a point of law only) a further appeal right to the High Court
- a right of appeal to the High Court (on a point of law only) on those parts of the freshwater hearing panel's recommendations that the council accepts; and (on a point of law only) a further appeal right to the Court of Appeal (subject to leave being granted to do so).

In other words, for a rejected hearings panel recommendation, there would be no appeal right beyond the High Court; and for an accepted recommendation, no appeal right beyond the Court of Appeal.

19. An application for judicial review of a relevant decision would have to be lodged at the same time as any appeal to the High Court on a point of law, and both proceedings would then be heard together in the High Court unless it was impracticable to do so.

20. See Appendix 1 for a diagrammatic representation of the differences between the standard planning process and the proposed freshwater planning process, especially in relation to appeal rights.

#### *Timeframes*

21. I propose that timeframes be specified to ensure freshwater planning occurs expeditiously:

- councils will be required to publicly notify changes to regional plans and regional policy statements to implement the NPS-FM no later than 31 December 2023
- freshwater commissioners will have a role to coordinate hearings to ensure that councils make final decisions no later than 31 December 2025.

22. I will set terms of reference for the functions of freshwater commissioners and the chair. Freshwater hearing panels will determine their own procedures. The panel could, among other things:

- direct conferencing of experts which may be facilitated by a panel member or other independent party
- direct conferencing of submitters who wish to be heard at the hearing
- facilitate pre-hearing meetings
- refer matters/issues to mediation or other alternative dispute resolution processes
- permit cross examination
- commission reports to assist in making its recommendations to the council
- appoint a special advisor(s) to assist the panel.

23. The relevant council must provide administrative support to the freshwater hearing panel. Also, a council officer must be available to provide relevant information to the panel. This

includes being present at hearings and any pre-hearing processes to speak to matters in the proposed plan and to give evidence and address matters raised in submissions.

24. There is scope for either MfE or the EPA to oversee the nomination and selection process for the group of freshwater commissioners, and provide the secretariat. I propose that councils meet the hearing costs following appointment of the panels. (Councils already meet their own hearings costs under the standard planning process.) Costs are noted under financial implications below and outlined in the attached Regulatory Impact Statement (RIS) for this proposal (Appendix 2).
25. Councils have expressed concerns about the complexity of freshwater issues and public expectations for participation. I propose that central government work with councils to assist them in preparing quality freshwater planning provisions. MfE is best placed to provide this support, drawing on funding from Budget 2019. \$12 million has been allocated for supporting councils to develop and implement freshwater plans over the next four years. This support would be provided where the need is greatest, such as to smaller less well-resourced councils.

#### *Repealing and replacing the Collaborative Planning Process*

26. The freshwater planning process would comprise a new Part 4 in Schedule 1 of the RMA. This would replace the existing Part 4, the CPP, which added 22 pages to the length of the RMA in 2017.
27. The CPP was apparently meant to be a means of resolving complex regional and local issues in a non-litigious way. However, it was heavily criticised at the time as being an unnecessary codification of a process that could occur voluntarily, as being muddled and overly prescriptive, and wrong in its detail.
28. It was always open for local authorities to run collaborative processes. Such processes do not need to be prescribed and become rigid and inflexible, as the Part 4 CPP is.
29. When councils see value in collaborative processes, they choose to run their own on a non-statutory basis. In respect of freshwater, these include the Hawkes Bay TANK project and the Waikato Healthy Rivers plan change. Councils steer clear of the Part 4 CPP and its onerous and legally risky constraints.
30. To date no local authority has used the CPP, and none is likely to. It was an ineffectual amendment to the RMA, which will not be missed.

#### **Further support for a new NPS-FM**

##### *Farm plans*

31. As part of the Essential Freshwater programme, officials are developing a farm environmental management regime, which would include mandatory freshwater modules of farm plans (FW-FPs). These would enable land use practices to be regulated for the purpose of managing freshwater quality, including enforcement provisions.

32. Freshwater modules would have skilled and recognised third parties working with farmers to identify key risks, inefficiencies and sources of water contamination at a farm scale; and develop for each farm a bespoke, risk-based and practical plan to improve environmental performance. FW-FPs would be guided by set standards, tools and guidance. The aim would be to:
- align FW-FPs with rules set nationally, and by councils in their plans
  - avoid having to set highly detailed national rules that may not respond effectively to all the variables of real-world farming situations
  - avoid councils putting in place regimes that are overly reliant on individual resource consents for land use practices.
33. To be effective, the FW-FP regime needs to be enforceable, so that farmers can be held to account for undertaking the activities identified in their bespoke plan.
34. It is yet to be determined whether existing RMA provisions are sufficient to establish an effective and enforceable FW-FP regime. If, after advice from officials, the Minister of Agriculture and I determine that amendment to the RMA is necessary, I seek agreement for us to instruct the Parliamentary Counsel Office (PCO) to draft the necessary amendment. This would be put to the Cabinet Legislation Committee (LEG) when the Bill is considered for introduction.
35. I seek this authorisation now, as I intend to go to public consultation on the basis of clearly indicating that the FW-FPs will be enforceable. Timelines are also very tight for getting the necessary legislation and regulations in place. I will seek Cabinet policy approval for a farm environmental management regime, including FW-FPs, in a separate paper at a later date.

#### *Certificates of compliance*

36. Certificates of compliance (certificates) are a legal authorisation to do an activity. Certificates can be granted for any permitted district or regional activities. While certificates are treated as resource consents under the RMA, they are only subject to some of the standard provisions that apply to other resource consents, for example certificates cannot be reviewed. This inability to review is one of several matters related to certificates that my officials are investigating.
37. I want to ensure there is no loophole through which certificates of compliance can be used to frustrate the work we are doing as part of the Essential Freshwater programme. Therefore, I seek agreement to seek further policy advice and instruct PCO to make necessary amendments through this Bill, for consideration by LEG when the Bill is considered for introduction.

## Other Stage 1 amendments to the RMA

### *Policy decisions made by Ministers under delegated authority*

38. Cabinet [CAB-18-MIN-0485.01, paragraphs 35-37 refer]:

- agreed that the Bill empower the Environmental Protection Authority (EPA) to undertake enforcement actions under the RMA
- authorised the Minister for the Environment, the Associate Minister for the Environment (with portfolio responsibility for the EPA), the Minister of Finance, and the Minister of Justice, to consider and agree specific functions appropriate for the EPA
- authorised the Minister for the Environment to issue drafting instructions to the Parliamentary Counsel Office, if this agreement was reached.

39. The delegated Ministers have agreed that the Bill should provide the EPA with new powers to undertake enforcement actions under the RMA, ensuring the EPA has sufficient legislative authority for effective enforcement functions, while providing accountability.<sup>5</sup>

40. Cabinet noted that the RMA provides Environment Court members, but not special advisors to the Environment Court, with protection from legal proceedings. Cabinet authorised the Minister for the Environment and the Minister of Justice to consider and agree whether to provide special advisors with this protection [CAB-18-MIN-0485.01, paragraphs 52-54 refer]. The Minister of Justice and I agreed to do so, consistent with how technical advisors are treated under the Senior Courts Act 2016.

### *Clarifying other existing proposals*

41. I seek Cabinet agreement to the following clarifications of existing proposals that Cabinet has previously approved.

42. Cabinet [CAB-18-MIN-0485.01, paragraph 21.1 refers] agreed to enable councils to suspend processing resource consent applications until fixed charges required at lodgement are paid. Councils can also require fixed administrative charges if and when the application is notified, to cover additional process costs such as from publicly notification or holding a hearing.

43. I therefore seek Cabinet agreement to enable consent authorities to suspend processing of applications if a charge is required at notification, until that charge is paid, consistent with the intent of the previous policy decision.

44. Cabinet agreed to repeal section 120(1B), which precludes appeals by submitters on matters beyond the scope of their original submission, to re-enable submitters to appeal

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<sup>5</sup> The new powers will enable the EPA to:

- warrant enforcement officers
- apply to the Environment Court for declarations
- commence investigation and enforcement actions where no local authority is involved
- assist local authorities in investigation and enforcement actions already underway
- intervene in, and 'take over', the investigation and enforcement functions of local authorities in relation to specific cases, with procedures to be followed in such cases
- apply to the Courts to recover costs of investigations and prosecutions, that the Courts consider just and reasonable, from convicted offenders
- gather information from local authorities in order to exercise its enforcement functions
- report on actions taken under this enforcement function in its annual report, including the outcomes of these actions (where it would not prejudice the maintenance of law).

on legitimate matters beyond the scope of their original submission. Section 120(1B) also precludes appeals on matters struck out by the consent authority under section 41D. Submitters can object but cannot appeal to the Environment Court if their objection is dismissed, but they can apply to the High Court for judicial review.

45. I consider that the current law ensures adequate public participation while preventing abuse of processes, and seek Cabinet agreement to retain the existing preclusion on appeals regarding any part of a submission struck out under section 41D of the RMA.

#### *Expanding the pool of potential alternate Environment Judges*

46. The efficient operation of the Environment Court relies on availability of alternate Environment Judges when Environment Judges are not available.<sup>6</sup> Cabinet has agreed to clarify that acting District Court Judges and acting Māori Land Court Judges can be appointed or hold office as alternate Environment Judges [CAB-18-MIN-0485.01, paragraph 51 refers].

47. Retired Environment Judges are valued for their specialist knowledge and expertise, and it will be beneficial for them also to be able to be appointed as alternate Environment Judges. I note that acting or alternate Judges over the age of 70 are given fixed-term appointments, and cannot serve beyond age 75.

48. I seek Cabinet agreement to amend the RMA to:

- enable a retired Environment Judge to be eligible for appointment as an alternate Environment Judge
- enable retired Environment Judges to have the same jurisdiction, power, protection and privileges as a District Court Judge
- align the terms of appointment for retired Environment Judges appointed as alternate Environment Judges with those for acting Judges under the District Court Act 2016.

#### *Financial contributions*

49. Notices of requirement can be applied for and decided by requiring authorities (ie, Ministers, local authorities, and other network utility operators) to designate land in a district plan and undertake works. Financial contributions are a tool set through district plan policies to offset environmental effects, and may be used to create esplanade reserves and strips. A recent Environment Court decision found that financial contribution conditions can be imposed on notices of requirement, in a case concerning a new school.

50. There is potential that requiring authorities, including Ministers, may have financial contribution conditions imposed on them that are significantly higher than has been the historical norm. I want to ensure that unreasonable financial contributions cannot be imposed on notices of requirement. I therefore seek Cabinet authorisation to seek further policy advice and instruct PCO if any specific issues need addressing through this Bill for consideration by LEG when the Bill is considered for introduction.

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<sup>6</sup> The RMA only allows District Court Judges and Māori Land Court Judges (and acting Judges) certified under the District Court Act 2016 and Te Ture Whenua Māori Act 1993 (TTWMA) to be appointed as alternate Environment Judges.

### *Procedural requirements for national environmental standards*

51. The Resource Legislation Amendment Act 2017 introduced a single process for creating national direction (national environmental standards (NES) and national policy statements (NPS)), allowing both types of national direction to be progressed through a board of inquiry process, using procedural requirements that previously only applied to an NPS.
52. There are certain procedural requirements that the Minister for the Environment must follow in response to a board of inquiry's recommendations on a proposed NPS. These requirements should also apply to recommendations for a proposed NES but currently do not, due to a drafting oversight in an amendment to the RMA in 2017. I seek agreement to clarify that the procedural steps the Minister must follow after a board of inquiry process for an NPS also apply to a NES.

### *Rescinding previous Cabinet decisions*

53. Cabinet [CAB-18-MIN-0485.01, paragraphs 35-37 refer]:

- agreed to amend the RMA to enable the Environment Court to review, by declaration, councils' decisions on whether or not to notify resource consent applications
- authorised the Minister for the Environment and the Minister of Justice to agree, subject to detailed policy advice, how this process would work in relation to the existing route for challenging these decisions (by application to the High Court for judicial review).

54. Officials have advised that existing provisions for judicial review need to be retained, as otherwise there would be risks to natural justice, and that there are legal grounds outside of the RMA that cannot be reviewed by the Environment Court. In light of this, I consider the new declaration process would risk further complicating resource consent applications.

55. I therefore propose that the Environment Court declaration proposal is not progressed at this time, but that instead we stick with the status quo. I have directed officials instead to consider this matter as part of Stage 2 review, which will involve wider consideration of the Environment Court's role in decision making.

56. Cabinet previously agreed to amend the RMA to clarify that "deemed permitted boundary" and "deemed permitted marginal or temporary" activities are not in contravention of Part 3 of the RMA [CAB-18-MIN-0458.01 paragraphs 24-25 refer]. Following advice from Crown Law that Part 3 is not engaged by these types of activities, this amendment is no longer necessary, so I seek Cabinet agreement to rescind its previous decision.<sup>7</sup>

### **Consultation**

57. The following consultation has been undertaken on the proposals contained in this paper. Some minor policy details on the freshwater planning process (eg reference to mātauranga Māori) have changed since that consultation, and additional matters have been added to the paper. This includes enabling a farm environment management

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<sup>7</sup> These activities are permitted through sections 87BA and 87BB of the RMA.

regime, clarification of certificate of compliance and imposing financial contributions on notices of requirement.

#### *Freshwater planning process*

58. The paper was sent to the following agencies: Ministry of Culture and Heritage, Department of Prime Minister and Cabinet, Department of Conservation, Department of Internal Affairs, Ministry of Primary Industries, Ministry of Business, Innovation and Employment, Ministry of Justice, Ministry of Health, Ministry of Transport, Land Information New Zealand, Ministry of Housing and Urban Development, Ministry of Education, Department of Corrections and the New Zealand Defence Force, Treasury, Office for Maori Crown Relations – Te Arawhiti, and Te Puni Kōkiri.
59. The Ministry of Justice (MOJ) considers that, on principle, appeal rights should not be reduced to incentivise councils' acceptance of hearing panel recommendations. MOJ is concerned this would make council decisions vulnerable to judicial review on the ground that decisions were influenced by an irrelevant factor (ie desire to avoid costs and delay of appeals).
60. I consider this risk to be low. My proposal draws on examples such as the Auckland Unitary Plan, where there was no evidence of an increase in judicial review proceedings. I also note that councils are frequently voicing concerns about the undue delay in plan-making processes, both at an individual council and Local Government New Zealand (LGNZ) level.
61. The Office for Maori Crown Relations – Te Arawhiti expressed broad concerns about a lack of early engagement with iwi/Māori as Treaty partners on freshwater planning, and strongly recommended engaging more widely with iwi/Māori. Te Puni Kōkiri (TPK) expressed similar concerns.
62. A number of agencies requested more detail on the nature of support needed for councils – which was addressed through Budget 2019.
63. I have tested the proposal for the new freshwater planning process with advisory groups under the Essential Freshwater programme. This includes initial engagement with Kāhui Wai Māori (KWM), who expressed support for making councils deliver freshwater improvements faster, and holding councils to greater account for implementing the NPS-FM. KWM is concerned that the freshwater hearing panels will not have enough capacity in tikanga Māori.
64. I also informed the Freshwater Leaders Group and regional councils, who are generally supportive of the proposal. All the above groups want to be involved in developing the proposal prior to select committee consideration of the Bill. The Freshwater Iwi Leaders Group was informed but has not expressed a view. Council planning practitioners were broadly supportive, but raised implementation issues which can be resolved through non-statutory measures and support.
65. I propose to continue to engage with the above stakeholders on the detail of the freshwater planning process while PCO drafts its provisions. The Essential Freshwater consultation will occur later this year. I intend that the consultation document acknowledge the new planning process, and be clear that the avenue for feedback will be via the select committee process.

66. My officials have talked to selected council planning practitioners about the use of the Collaborative Planning Process (currently Part 4 of Schedule 1 of the RMA). They have advised that it is unlikely to be used as it is overly complex.

#### *Consultation on other matters*

67. The EPA and MfE have worked closely on the policy proposal to enable the EPA to undertake enforcement action under the RMA. MfE officials consulted the regional council Compliance and Enforcement Special Interest Group. LGNZ wrote to me with concerns about enabling the EPA to take over investigation and enforcement responsibilities from councils in particular cases. I anticipate the EPA will use these powers sparingly, and annual reporting will provide transparency.

68. TPK has concerns about the potential lack of Māori engagement on the policy proposal to enable the EPA to undertake enforcement actions. I consider there will be opportunity for public consultation after the Bill is introduced.

69. I have consulted the judiciary on the proposed amendments relating to the appointment of alternate Environment Judges.<sup>8</sup> The Chief Justice agrees there is a potential barrier to the appointment of an alternate Environment Judge, and is supportive of amending the eligibility criteria for the appointment of alternate Environment Judges under the RMA.

70. Selected council planning practitioners were consulted on technical aspects of the proposals to ensure workability in practice, and their feedback informed this paper.

#### **Financial implications**

71. The financial implications of the proposal for MfE can be met within departmental baselines taking into account funding in Budget 2019. This paper is not seeking funding for the costs incurred by freshwater commissioners while they are on freshwater hearing panels, as these will be met by councils.

72. The cost of planning processes in different regions varies. Officials consider the new freshwater planning process may result in less overall cost to councils nationally than the standard planning process. This takes into account the support that MfE will give councils to develop and implement their freshwater plans, and the expertise and rationalisation of approaches that freshwater commissioners will bring.

#### **Legislative implications**

73. The proposed Resource Management Amendment Bill is priority 3, and the policies and associated legislative change proposed here will be progressed alongside the proposals already agreed by Cabinet [CAB-18-MIN-0485.01 refers]. I seek Cabinet's authority to:

- instruct PCO as set out in this paper, noting that some consequential amendments may be required to the RMA and other affected statutes to ensure workability of the agreed amendments

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<sup>8</sup> The Chief Justice of New Zealand, the Chief High Court Judge, the Chief Māori Land Court Judge, the Chief District Court Judge and the Principal Environment Judge.

- further clarify and develop policy matters relating to the proposals in this paper in a manner not inconsistent with the policy recommendations contained in the paper, and develop commencement, transitional and any savings provisions with PCO, through the drafting process.

74. The commencement and transitional provisions once drafted will be subject to approval by Cabinet when it considers the Bill for introduction.

75. My intention is that the Bill be given a first reading by September this year. I would aim for it to be passed by mid 2020, when the new NPS-FM is also intended to come into force.

### **Regulatory impact analysis**

76. A RIS for the initial proposals was provided in October 2018 [CAB-18-MIN-0485.01 refers].

77. MfE has prepared RISs for the new freshwater planning process (Appendix 2); and for clarification of existing proposals, EPA enforcement functions, and legal protection for special advisors to the Environment Court (Appendix 3). The Regulatory Impact Analysis Team in the Treasury advised that its analysis role for these RISs could be completed by MfE's Regulatory Impact Analysis Panel (the Panel).

#### *Freshwater planning process*

78. The Panel has reviewed the RIS for the freshwater planning process (Appendix 2). The Panel considers that it partially meets the quality assessment criteria:

- The RIS is clearly presented and is concise in explaining the problem associated with the plan-making process, and in setting out options to improve the system. The analysis of the options is sound, but falls short of fulfilling all of the RIS criteria due to the lack of consultation with some affected groups as discussed below.
- There is a recognised need for urgent action for the implementation of the NPS-FM. In considering options for improving the process for plan-making, consultation has been undertaken with central government agencies and local government, including regional councils. Government advisory groups on freshwater reform, such as KWM, were engaged with on the proposal. KWM includes members with experience in the primary sector and agribusiness, freshwater science and mātauranga Māori, local government, resource management law and policy, and whānau and hapū advocacy. However, there has not been formal consultation ahead of Cabinet decisions with tangata whenua (iwi and hapū themselves), primary producers, key environmental NGOs or RMA practitioners in general.
- A similar hearings based process was instituted for the Auckland Unitary Plan and the streamlined planning process, however it is not a default setting and proposals could have been consulted on. Given the significance of water, especially to tangata whenua and primary users, this limited consultation is considered to be significant. While there is an opportunity for these groups to engage through the select committee process for the Bill, this is not on its own considered sufficient to cover the approach to consultation prior to Cabinet decisions.
- However, we note that two significant consultation processes are proposed to address the lack of consultation. From early July through to mid-August there is targeted

consultation planned on the comprehensive review of the RMA, which will include discussion of the freshwater planning process. In addition, the Essential Freshwater programme will run from August to October and include wide ranging public consultation, as well as targeted hui with iwi/hapū and primary sector groups and will include a detailed description of these specific proposals. The feedback from these consultations will be collated by MfE and passed on to the Select Committee.

- Subject to consultation on this proposal being sufficiently captured through these processes the panel is satisfied that the RIS partially meets the RIS criteria.

79. As noted in this paper, I intend to use the upcoming consultation on the comprehensive review of the RMA to inform stakeholders about the proposed freshwater planning process, and the upcoming Essential Freshwater consultation to inform stakeholders and the wider public. Feedback from these processes will be provided to the select committee by officials, and this will also help inform public submissions to the select committee when the Bill is introduced.

#### *Other matters*

80. The Panel has also reviewed the additional RIS (Appendix 3). The Panel considers that it meets the quality assessment criteria.

- The RIS is written clearly and concisely and does enough to make the case for the recommended options with the elements of the proposal being clear and the potential impacts having been identified. The problem definition is clearly articulated and the analysis and advice is commensurate with the issues considered within the scope of the regulatory change. The RIS convincingly explains the likely impacts and costs of the preferred option, to the minimum statutory requirements.
- The RIS draws from engagement undertaken to date with potentially affected parties, including local government and the EPA. The input and feedback received on the proposal and its potential impacts has been reflected in the analysis.

81. The Treasury Regulatory Quality team has determined that the proposal to clarify the process following a board of inquiry recommendation for a NES [see paragraph 51], is not subject to the Regulatory Impact Analysis requirements on the basis that this will have no, or minor, impacts on businesses, individuals or not-for-profits.

82. Some of the matters in this Cabinet paper are not included in the RIS, as policy development is ongoing. Officials will prepare an additional RIS for these matters, as required, if they are proposed to be included in the Bill, for consideration by LEG when it considers the Bill for introduction.

#### **Human rights, gender implications and disability perspective**

83. There are no human rights, gender or disability implications associated with this paper.

#### **Publicity**

84. There will be an announcement on the Beehive website after the Bill's introduction to the House. All papers, including briefing notes, will be proactively released at the time of introduction.

## Proactive Release

85. I am proposing to delay the release of this paper until the Bill is introduced later in the year, beyond the usual 30 business days after the paper has been approved by Cabinet.

## Recommendations

The Minister for the Environment recommends that the Committee:

1. **note** that on 8 October 2018, Cabinet agreed to a set of amendments to the Resource Management Act 1991 (RMA) to reduce complexity, increase certainty, restore previous public participation opportunities and improve processes, in advance of a more comprehensive review of the resource management system [CAB-18-MIN-0485.01 refers]
2. **note** the Resource Management Amendment Bill holds a category 3 priority on the 2019 Legislation Programme (to be passed if possible in the year)

### **Applying a specialised planning process to regional freshwater plans in order to implement a new National Policy Statement for Freshwater Management (NPS-FM)**

3. **note** that:
  - 3.1. the Government is committed to improving New Zealand's freshwater quality by stopping further degradation and loss, and reversing past damage. It has established a work programme to do this – *Essential Freshwater: Healthy Water, Fairly Allocated* [CAB-18-MIN-0296 refers]
  - 3.2. the NPS-FM is a key regulatory tool to manage freshwater and requires regional councils to set freshwater objectives and limits by 31 December 2025, which may be extended to 31 December 2030 in certain circumstances
  - 3.3. for a variety of reasons, the majority of councils will not meet the 31 December 2025 deadline
  - 3.4. the current planning processes in Schedule 1 of the RMA will not be able to resolve the problems relating to freshwater planning.
4. **agree** to amend the RMA to provide for a new freshwater planning process
5. **agree** that regional and unitary councils will be required to use this process for any changes required to their regional plans and policy statements to implement a new NPS-FM
6. **agree** that standard RMA planning steps under Part 1 of Schedule 1 will continue to apply up to the close of further submissions, and that a council will need to forward all relevant information to the freshwater hearing panel

#### *Freshwater commissioners and freshwater hearing panels*

7. **agree** to empower the Minister for the Environment to appoint accredited freshwater commissioners, who collectively have:
  - 7.1. experience in judicial processes and cross examination
  - 7.2. expertise in relation to water quality and quantity, and freshwater ecology

- 7.3. knowledge of the RMA
- 7.4. understanding of tikanga Māori and mātauranga Māori
8. **agree** that the chair of the freshwater commissioners will be a retired or current Environment Judge
9. **agree** that the Minister for the Environment will set terms of reference for the functions of the group of freshwater commissioners and the chair
10. **agree** that the group of freshwater commissioners will support regional freshwater planning by convening freshwater hearing panels to run hearings in each region and form the core of each panel
11. **agree** that each freshwater hearing panel must include:
  - 11.1. two freshwater commissioners, one of whom will serve as chair and hold the casting vote
  - 11.2. two accredited councillors, nominated by the council (or two accredited independent commissioners nominated by the council)
  - 11.3. one accredited person with an understanding of tikanga Māori and mātauranga Māori (to be selected from nominations by local tangata whenua)
12. **agree** that in particular circumstances a hearings panel size could exceed five, in order to accommodate circumstances unique to a region or locality
13. **agree** that the freshwater hearing panel will determine its own procedures, among other things to:
  - 13.1. direct conferencing of experts which may be facilitated by a panel member or other independent party
  - 13.2. direct conferencing of submitters who wish to be heard at the hearing
  - 13.3. facilitate pre-hearing meetings
  - 13.4. refer matters/issues to mediation or other alternative dispute resolution processes
  - 13.5. permit cross examination
  - 13.6. commission reports to assist in making its recommendations to the council
  - 13.7. appoint a special advisor(s) to assist the panel
14. **agree** that the freshwater hearing panel will be required to make recommendations to the council on submissions and any related freshwater planning matters, and can recommend changes to the proposed regional planning document to address any matters it identifies
15. **agree** that the freshwater hearing panel will be required to follow normal RMA plan and policy statement decision-making requirements, in formulating its recommendations on freshwater planning related matters
16. **agree** that the relevant council must provide administrative support for the freshwater hearing panel; and that a council officer must be available to provide relevant information to the panel, including being present at hearings and any pre-hearing processes, giving evidence and addressing matters raised in submissions
17. **note** that MfE will provide support to councils in the development of freshwater planning

documents

18. **agree** that costs associated with freshwater hearing panels will be met by the relevant council

*Council retains responsibility for final approval*

19. **agree** that the council retains responsibility for final approval of regional planning documents, and within 20 working days of receipt of the freshwater hearing panel's recommendations, the council must publicly notify its decisions identifying:

- 19.1. the recommendations that it accepts and the recommendations that it rejects and the reasons why
- 19.2. where the recommendations are rejected, the alternative provisions it has made, together with a further evaluation report under section 32AA

20. **agree** that the council:

- 20.1. may seek from the chair of the freshwater commissioners an extension to this timeframe, at the discretion of the chair
- 20.2. when developing an alternative provision, is not required to consult with any parties and must not consider any submission or other evidence unless it was made available to the freshwater hearing panel

*Appeals*

21. **agree** that a right of appeal be available in the freshwater planning process for any person who made a submission on a plan, but be restricted (compared with the standard planning process) as follows:

- 21.1. a right of appeal to the Environment Court (a merits appeal), but limited to those parts of the freshwater hearing panel's recommendations that the council rejects; and (on a point of law only) a further appeal right to the High Court
- 21.2. a right of appeal to the High Court (on a point of law) on those parts of the freshwater hearing panel's recommendations that the council accepts; and (on a point of law only) a further appeal right to the Court of Appeal (subject to leave being granted to do so)

22. **agree** that there will be no further rights of appeal beyond the High Court for rejected recommendations, or beyond the Court of Appeal for accepted recommendations

23. **agree** that an application for judicial review of a relevant decision must be lodged at the same time as any appeal to the High Court on a point of law, with both proceedings then being heard together in the High Court, unless it is impracticable to do so

*Timeframes*

24. **agree** that councils will be required to notify regional planning documents to implement the NPS-FM by 31 December 2023 and make final decisions by 31 December 2025

*Repealing and replacing the Collaborative Planning Process*

25. **agree to** repeal the collaborative planning process in Part 4 of Schedule 1 of the RMA

26. **agree** that the freshwater planning process [detailed in recommendations 3-23 above] be drafted into Part 4 of Schedule 1 of the RMA, to replace the collaborative planning process

### **Further support for a new NPS-FM**

#### *Farm plans*

27. **note** that as part of the Essential Freshwater programme, officials are developing a farm environmental management regime, which would include mandatory freshwater modules of farm plans (FW-FPs)

28. **note** that officials will provide advice as to whether amendment to the RMA is necessary to establish an effective and enforceable FW-FP regime

29. **delegate** policy approval to the Minister for the Environment and the Minister of Agriculture, following advice from officials, to decide whether amendment to the RMA is necessary to establish such a regime

30. **authorise** the Minister for the Environment and the Minister of Agriculture to issue drafting instructions to Parliamentary Counsel Office (PCO) if they decide that an amendment is necessary

31. **note** that the Minister for the Environment and Minister for Agriculture will seek Cabinet policy approval for a farm environmental management regime, including FW-FPs at a later date

#### *Certificates of compliance*

32. **note** that there is a risk that certificates of compliance could undermine the effect of new regulations, and that MfE officials will provide advice to determine whether an RMA amendment is necessary

33. **delegate** policy approval to the Minister for the Environment, following advice from officials, to consider and agree policy about whether amendment to the RMA is necessary to address issues with certificates of compliance

34. **authorise** the Minister for the Environment to issue drafting instructions to PCO if, following advice from officials, it is necessary to amend legislation to address issues with certificates of compliance

### **Other Stage 1 amendments to the RMA**

#### *Policy decisions made by Ministers under delegated authority*

35. **note** that Cabinet agreed that the EPA be given enforcement functions under the RMA and authorised the Minister for the Environment, Associate Minister for the Environment (with portfolio responsibility for the EPA), Minister of Finance, and Minister of Justice to consider and agree detailed policy on specific RMA functions appropriate for the EPA [CAB-18-MIN-0485.01, paragraphs 34-37 refer]

36. **note** that the group of Ministers, as per recommendation 35 above, considered and agreed detailed policy matters to be included in the Bill
37. **note** that Cabinet authorised the Minister for the Environment and the Minister of Justice, following advice from officials, to consider and agree whether to provide special advisors to the Environment Court with protection from legal proceedings under the RMA [CAB-18-MIN-0485.01, paragraphs 54-55 refer]
38. **note** that the Minister of the Environment and the Minister of Justice have agreed that this protection should be included in the Bill
39. **agree** to provide special advisors to the Environment Court with protection from legal proceedings under the RMA

*Clarifying other existing proposals*

40. **note** that Cabinet agreed to amend the RMA to enable consent authorities to suspend processing of a resource consent application if a fixed charge is required to be paid at lodgement, until the fixed charge is paid [CAB-18-MIN-0485.01, paragraph 21.1 refers]
41. **agree** to amend the RMA to enable consent authorities to suspend processing of a resource consent application if a fixed charge is required to be paid at notification, until that fixed charge is paid
42. **note** that Cabinet agreed to repeal section 120(1B) of the RMA, which restricts the scope of an appeal on a resource consent to matters raised in a person's submission [CAB-18-MIN-0485.01, paragraph 14 refers]
43. **agree** to retain the current preclusion on appeals on matters raised in a submission, or part of a submission, that were struck out under section 41D of the RMA
44. **note** that submitters are able to apply to the High Court for judicial review if they are dissatisfied with the council's decision to strike out their submission

*Expanding the pool of potential alternate Environment Judges*

45. **note** that Cabinet agreed to clarify that acting District Court Judges and acting Māori Land Court Judges can be appointed or hold office as alternate Environment Judges [CAB-18-MIN-0485.01, paragraph 51 refers]
46. **agree** that the RMA be amended to enable a retired Environment Judge, to be appointed and hold office as an alternate Environment Judge
47. **agree** that a retired Environment Judge, who is appointed as an alternate Environment Judge shall have the same jurisdiction, powers, protections, and privileges as an Environment Judge, and the same terms of appointment as an acting District Court Judge

### *Financial contributions*

48. **note** that there is a risk that unreasonable financial contributions conditions may be imposed on notices of requirement, and that MfE officials will provide advice to determine whether an RMA amendment is necessary
49. **delegate** policy approval to the Minister for the Environment, following advice from officials, to consider and agree policy about whether amendment to the RMA is necessary to address issues with financial contributions conditions being imposed on notices of requirement
50. **authorise** the Minister for the Environment to issue drafting instructions to PCO if, following advice from officials, it is necessary to amend legislation to address issues with financial contributions conditions being imposed on notices of requirement

### *Procedural requirements for national environmental standards*

51. **note** that, due to a drafting oversight, it is unclear in the RMA as to what steps are to be followed by the Minister for the Environment when a board of inquiry recommends that a national environmental standard be created
52. **agree** to amend the RMA to clarify that the steps the Minister for the Environment must follow when a board of inquiry recommends a NPS also apply when a board of inquiry recommends a NES

### *Rescinding previous Cabinet decisions*

53. **note** that Cabinet agreed to enable the Environment Court to review councils' resource consent notification decisions and authorised the Minister for the Environment and the Minister of Justice, following advice from officials, to consider and agree detailed policy about how declarations on notification decisions will work in relation to judicial review [CAB-18-MIN-0485.01, paragraphs 39-48 refer]
54. **note** that officials advise the existing avenue of challenge to the High Court by judicial review should be retained, and the Minister for the Environment no longer considers this proposal aligns with the objectives of this Bill
55. **agree** to rescind the relevant Cabinet decisions to enable the Environment Court to review councils' resource consent notification decisions
56. **agree** to rescind the relevant Cabinet decisions to clarify and validate "deemed" to be permitted activities under section 87BA or 87BB of the RMA [CAB-18-MIN-0485.01, paragraphs 24-25 refer]

### *Procedural matters*

57. **invite** the Minister for the Environment to issue drafting instructions to the PCO to implement the decisions set out above through a Bill to amend the RMA

58. **authorise** the Minister for the Environment to:

- 58.1. issue drafting instructions to PCO to make consequential amendments to the RMA and other affected statutes to ensure workability of the agreed amendments
- 58.2. develop any commencement, transitional and savings provisions with PCO, through the drafting process

59. **agree** that the Minister for the Environment has the ability to further clarify and develop policy matters relating to the proposals in this Cabinet paper in a manner not inconsistent with the policy recommendations contained in the paper

60. **note** that:

- 60.1. the drafted commencement and transitional provisions will be subject to approval by Cabinet when it considers the Bill for introduction
- 60.2. MfE's Regulatory Impact Analysis Panel has reviewed:
  - 60.2.1. the Regulatory Impact Statement (RIS) for the initial proposals produced by MfE, and considers that it partially met the quality assessment criteria
  - 60.2.2. the RIS for the proposed freshwater planning process produced by MfE (Appendix 2), and considers that it partially met the quality assessment criteria
  - 60.2.3. the RIS on the remaining new proposals produced by MfE (Appendix 3) and considers that it meets the quality assessment criteria
- 60.3. the Minister for the Environment will release this paper and its accompanying RISs when the Bill is introduced
- 60.4. officials will prepare an additional RIS, as required, for other proposed amendments, when the Cabinet Legislation Committee considers the bill for introduction

61. **agree** to delay the release of this paper until the Bill is introduced later in the year, beyond the usual 30 business days after approval by Cabinet.

Authorised for lodgement.

Hon David Parker

**Minister for the Environment**

**Appendix 1: Diagram of the differences between the standard planning process and the proposed freshwater planning process, especially in relation to appeal rights**

Proactively released

Proactively released

**Appendix 3: Regulatory Impact Statement – Additional proposals for Bill to amend the Resource Management Act 1991**

Proactively released