



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Proposed Resource Management Amendment Bill: A Specialised Planning Process for Freshwater, and Other Outstanding Policy Decisions

Portfolio **Environment**

On 1 July 2019, following reference from the Cabinet Environment, Energy and Climate Committee, Cabinet:

Background

- 1 **noted** 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];
- 2 **noted** 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 **noted** 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];
 - 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 **agreed** to amend the RMA to provide for a new freshwater planning process;
- 5 **agreed** 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 **agreed** 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 **agreed** 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 **agreed** that the chair of the freshwater commissioners will be a retired or current Environment Judge;
- 9 **agreed** that the Minister for the Environment will set terms of reference for the functions of the group of freshwater commissioners and the chair;
- 10 **agreed** 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 **agreed** 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 **agreed** that in particular circumstances a hearings panel size could exceed five, in order to accommodate circumstances unique to a region or locality;
- 13 **agreed** 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 **agreed** 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 **agreed** 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 **agreed** that the relevant council must provide administrative support for the freshwater hearing panel;
- 17 **agreed** 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;
- 18 **noted** that MfE will provide support to councils in the development of freshwater planning documents;
- 19 **agreed** that costs associated with freshwater hearing panels will be met by the relevant council;

Council retains responsibility for final approval

- 20 **agreed** 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:
- 20.1 the recommendations that it accepts and the recommendations that it rejects and the reasons why;
- 20.2 where the recommendations are rejected, the alternative provisions it has made, together with a further evaluation report under section 32AA;
- 21 **agreed** that the council:
- 21.1 may seek from the chair of the freshwater commissioners an extension to this timeframe, at the discretion of the chair;
- 21.2 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

- 22 **agreed** 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:
- 22.1 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;
- 22.2 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);

- 23 **agreed** 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;
- 24 **agreed** 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

- 25 **agreed** 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

- 26 **agreed** to repeal the collaborative planning process in Part 4 of Schedule 1 of the RMA;
- 27 **agreed** that the freshwater planning process, referred to in paragraphs 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

- 28 **noted** 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);
- 29 **noted** that officials will provide advice as to whether an amendment to the RMA is necessary to establish an effective and enforceable FW-FP regime;
- 30 **delegated** policy approval to the Minister for the Environment and the Minister of Agriculture, following advice from officials, to decide whether an amendment to the RMA is necessary to establish such a regime;
- 31 **authorised** 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;
- 32 **noted** 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

- 33 **noted** 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;
- 34 **delegated** policy approval to the Minister for the Environment, following advice from officials, to consider and agree policy about whether an amendment to the RMA is necessary to address issues with certificates of compliance;
- 35 **authorised** 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**

- 36 **noted** that in October 2018, 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];
- 37 **noted** that the group of Ministers, as per paragraph 36 above, considered and agreed detailed policy matters to be included in the Bill;
- 38 **noted** 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];
- 39 **noted** that the Minister of the Environment and the Minister of Justice have agreed that this protection should be included in the Bill;
- 40 **agreed** to provide special advisors to the Environment Court with protection from legal proceedings under the RMA;

Clarifying other existing proposals

- 41 **noted** 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];
- 42 **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 notification, until that fixed charge is paid;
- 43 **noted** 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];
- 44 **agreed** 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;
- 45 **noted** 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

- 46 **noted** 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];
- 47 **agreed** that the RMA be amended to enable a retired Environment Judge, to be appointed and hold office as an alternate Environment Judge;
- 48 **agreed** 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

- 49 **noted** 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;
- 50 **delegated** 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;
- 51 **authorised** 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

- 52 **noted** 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;
- 53 **agreed** 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

- 54 **noted** that in October 2018, 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];
- 55 **noted** 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;
- 56 **rescinded** the decisions referred to above in paragraph 54;
- 57 **rescinded** 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];

Procedural matters

- 58 **invited** 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;
- 59 **authorised** the Minister for the Environment to:
- 59.1 issue drafting instructions to PCO to make consequential amendments to the RMA and other affected statutes to ensure workability of the agreed amendments;
 - 59.2 develop any commencement, transitional and savings provisions with PCO, through the drafting process;

- 60 **agreed** that the Minister for the Environment has the ability to further clarify and develop policy matters relating to the proposals in the paper under ENV-19-SUB-0037 in a manner not inconsistent with the policy recommendations contained in the paper;
- 61 **noted** that:
- 61.1 the drafted commencement and transitional provisions will be subject to approval by Cabinet when it considers the Bill for introduction;
- 61.2 MfE's Regulatory Impact Analysis Panel has reviewed:
- 61.2.1 the Regulatory Impact Statement (RIS) for the initial proposals produced by MfE, and considers that it partially meets the quality assessment criteria;
- 61.2.2 the RIS for the proposed freshwater planning process produced by MfE (Appendix 2), and considers that it partially meets the quality assessment criteria;
- 61.2.3 the RIS on the remaining new proposals produced by MfE (Appendix 3) and considers that it meets the quality assessment criteria;
- 61.3 the Minister for the Environment will release the paper attached under ENV-19-SUB-0037 and its accompanying RISs, updated to reflect the amended RIS assessment for the proposed freshwater planning process, when the Bill is introduced;
- 61.4 officials will prepare an additional RIS, as required, for other proposed amendments, when the Cabinet Legislation Committee considers the bill for introduction;
- 62 **noted** that the paper under ENV-19-SUB-0037 will not be proactively released until the Bill is introduced later in 2019, beyond the usual 30 business days after approval by Cabinet.

Michael Webster
Secretary of the Cabinet

Secretary's Note: This minute replaces ENV-19-MIN-0037. Cabinet agreed to the recommendations from ENV in paragraphs 56 and 57 to rescind earlier decisions.

Hard-copy distribution:

Prime Minister
Deputy Prime Minister
Minister for the Environment