

## Freshwater planning process - transitional arrangements and scope of matters

Date Submitted:	6 September 2019	Tracking #: 2019-B-05971	
Security Level	In confidence	MfE Priority:	Urgent

	<b>Action sought:</b>	<b>Response by:</b>
To Hon David Parker, Minister for the Environment	Discuss with officials	9 September 2019

Actions for Minister's Office Staff	<b>Return</b> the signed report to MfE.
Number of appendices and attachments 3	Titles of appendices and attachments (ie separate attached documents): 1. Options for managing plan changes notified prior to enactment of the Bill 2. Options for addressing issues of scope - and who should decide 3. Survey of current (and projected) freshwater plan changes
Note any feedback on the quality of the report	

### Ministry for the Environment contacts

Position	Name	Cell phone	1 <sup>st</sup> contact
Principal Author	[REDACTED]		
Director	[REDACTED]	[REDACTED]	✓

## **Freshwater planning process - transitional arrangements and scope of matters**

### **Purpose**

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1. You have asked for advice on the following in relation to the freshwater planning process:
  - A) Transitional arrangements for plan changes which have been publicly notified and are before a hearing panel/Environment Court post enactment (e.g, mid-2020).
  - B) The scope of matters that may be heard through the freshwater planning process and who should decide.
2. We have provided material on each of these issues (Appendix 1 and 2 respectively) and wish to discuss this with you. Following your feedback we will instruct PCO accordingly and amend the draft LEG paper, if required.

### **Context**

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3. At a meeting on 26 August we discussed the scenario where a freshwater plan change could be before a hearing panel or the Environment Court at or beyond 2020. Progressing these plan changes through the standard First Schedule process could be both costly and redundant as the plan changes may not implement the 2020 NPS-FM.
4. We also discussed issues around the scope of matters that may be heard through the freshwater planning process (FPP) and you, while acknowledging the need for integrated catchment management, expressed concern about 'scope creep'. You asked for options on how to manage this, including what 'must' versus 'may' be progressed through the freshwater planning process, and who should decide.

### **Analysis and Advice**

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#### **A) Transitional arrangements for freshwater plan changes currently underway**

##### *Current transitional arrangements provided for in the Bill*

5. Regional policy statements and plan changes that are notified before the enactment of the Bill will be progressed through the current Schedule 1, Part 1 process. This also includes any variations to the above planning instruments that are notified after the enactment of the Bill. Keeping them 'bundled' together recognises that a variation is not a stand-alone plan but is often a correction to the notified plan. There would be misalignment if the variation were to be operative before the notified plan.

##### *Extent of current plan processes and likely council approach going forward*

6. We have undertaken a desktop survey of freshwater plan processes that are currently being consulted on, publicly notified or under appeal. The results are summarised in Appendix 3 and show that there are approximately 20 plan changes in progress, with 5 under appeal (including two that appear to be in hiatus with Court decisions pending since 2016).
7. We have discussed the new freshwater planning process with council staff. They support the process but are concerned about meeting the initial timeframes and hearing costs.

Councils consistently raise the issue of accountability to ratepayers in terms of how much is spent on plan changes, and the consultation burden, as matters of concern for them.

8. Following the launch of the Action for Healthy Waterways on 5 September 2019, we met with regional councils to discuss how we might support them to implement the package. As part of that we asked how they expect to manage current planning processes while meeting the proposed new timelines (e.g. notification by 2023). Some were clear that they will withdraw proposed plans and focus on making the additional changes needed to give effect to the 2020 NPS-FM by 2023.
9. We consider, however, that there are few councils which would have the resources to concurrently support a plan hearing process under Schedule 1, Part 1 while developing the new plan content that is required by 2023 to go through the FPP.
10. Given the points above, we expect that councils will take a pragmatic approach to implementing the 2020 NPS-FM. In this respect councils are likely to either not progress a current proposed freshwater plan change any further and/or withdraw a proposed plan change. A council has the ability to 'withdraw' a plan change at any point up to an Environment Court hearing, and prepare another plan in its stead. We expect that councils will refocus their efforts on notifying a new plan change by 31 December 2023, which contains provisions to give effect to the 2020 NPS-FM, in order to take advantage of the new freshwater planning process.
11. We will continue to encourage this pragmatic approach through our work with councils supporting implementation of the NPS-FM. We note that there may be instances where the plan change should continue, for example if the plan change process is nearly completed and would still give effect to parts of the 2020 NPS-FM (many aspects of the 2017 NPS-FM are carried over such as all the existing attributes requiring objectives and limits).
12. For reasons of efficiency, flexibility in decision-making as to whether a proposed plan should continue could be an advantage. ✓

*Current settings and avenues to intervene*

13. There are several avenues already available under the RMA to intervene in a plan process. As discussed above, a council has the ability to 'withdraw' a plan change at any point up to an Environment Court hearing, prepare another and notify.
14. In addition there are existing powers for the Minister for the Environment to intervene including call-in of the plan, and investigation and requiring the council to prepare a new plan.
15. For our part, the Ministry will track council's performance much more closely as part of supporting implementation of the Essential Freshwater program and the new freshwater planning process. We intend to be involved right at the start of a council's plan development process - up to making submissions, and we will report progress to the Minister for the Environment on a more regular basis.

*Recommendation - in regard to proposed/notified plans*

16. We consider councils are best placed to make decisions on whether current plan changes should be progressed or whether resources are better spent on a new plan change process. This will depend on the nature of the proposed plan change, the extent to which it meets statutory requirements and addresses freshwater management problems in the region and the improvement it offers compared to the operative plan.
17. We recommend relying on your existing powers to intervene in council planning processes, and on the Ministry's involvement in supporting implementation of the 2020 NPS-FM to influence councils to manage current plan changes.

18. Should you wish to be able to explicitly direct a council to withdraw a plan change through the Bill we have provided 2 options for you to consider outlined in Appendix 1.

*Recommendation - in regard to plans under appeal*

19. There are two significant plan changes that are either already at the Environment Court or are likely to be. The Southland Land and Water Plan is due to be operative by end of 2019, but could be appealed to the High Court, and Horizons Plan Change 2, is gathering attention from many parties and could be appealed if it continues. We suggest that where a plan is before the Court it should be left to 'run its course' for the reasons set out below, and that councils will consolidate plan changes to take advantage of the new planning process in all other cases.

20. We have not provided options around intervening in Environment Court processes. We do not recommend this for the following reasons:

- a. It would override the sunk investment of appellants
- b. It would be a source of uncertainty and potential costs for the Court, and
- c. Such a power, if provided to the Minister of the Crown, would be extremely contentious and may risk the passing of the Bill as a whole.

**B) Scope of matters that may be progressed through the freshwater planning process**

21. To give effect to the NPS-FM, freshwater plans will need to include regional land-use rules which are necessary for achieving freshwater outcomes. There is a risk that this could lead to 'scope creep'. This could impact having plans in place by 2025 if a panel finds it is spending time on matters other than those strictly needed to give effect to the NPS-FM.

22. We note that 'the bright line' test on what constitutes freshwater plan content, and what does not, can be difficult to apply and that, generally, an integrated approach to land and water planning is encouraged. We consider that councils are best placed to make these decisions, so plans are cohesive, integrated and can be progressed (where possible) through a single, efficient process.

23. We have, however, developed options which could provide an additional check and balance to the issue of 'scope creep'. We note these additional powers may be particularly useful in the first generation of plans to implement the new NPS-FM to ensure the 2025 timeframe is met.

24. The options are set out in Appendix 2. Should you wish to progress either Option 2 or 3, we suggest the following decision-making criteria could be applied as follows:

- Efficiency – timeliness and cost considerations
- Practicality
- Avoiding perverse outcomes (e.g., potential for plan content that contradicts or is not aligned)
- Providing certainty for users.

*Recommendation*

25. We recommend retaining the regional council role to interpret and decide what 'relates' to freshwater means and that a freshwater panel hears all provisions put to it. We consider the risk is low that this would result in scope creep which overloads freshwater hearing and results in delay to the 2025 timeframe. In our view councils are going to be under considerable pressure to implement the requirements of the 2020 NPS-FM and will not, in

the first instance, have the capacity to notify a plan that has broader land-use provisions within it.

26. We acknowledge that this could occur *after* the first generation of plans which implement the NPS-FM (e.g. post-2025) and councils begin a 10-year review of their land and water plans. We would expect however that by this time the RMA reforms will have resulted in changes to the planning regime as a whole.
27. Should you wish for there to be a greater degree of oversight then we suggest this decision-making fits within the role and functions of the freshwater hearing panel. We could also provide for the panel to defer hearing those parts of the plan until post-2025, although this would incur greater costs to the council (see Appendix 2).

### **Next Steps**

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28. We have time scheduled on Monday 9 September to meet with you to discuss the options. Following your direction we will instruct PCO accordingly. At this stage we are still aiming to provide you with a draft Bill for lodging on 12 September.
29. This date could change depending on the outcome of discussions on the matters presented in this briefing. The options are likely to require significantly more time to draft (should you decide to progress them), will require additional Cabinet decisions supported by a RIS and will delay introduction. Further, we consider some options may be sufficiently contentious that they pose a risk to the passage of the Bill as a whole.
30. We suggest that a valid approach is to respond to these issues during the Select Committee process through the Departmental Report and/or via a SOP. This will allow introduction of the Bill to proceed apace and we can formulate a response on the basis of submitter feedback.

**Recommendations**

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31. We recommend that you:

a. **Meet** with officials for further discussion

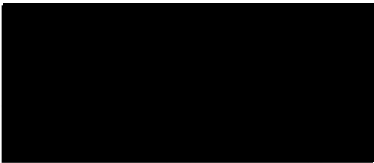
Yes/No

b. **Agree** that this briefing and appendices will be released proactively on the Ministry for the Environment's website as part of a package of material released on introduction of the Bill

Yes/No

**Signature**

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Director: Water taskforce

6/9/19  
Date

A handwritten signature in blue ink, appearing to be 'D. Parker'.

Hon David Parker  
Minister for the Environment

7/9/19  
Date

Proactively released

**Appendix 1: Options for managing plan changes notified prior to enactment of the Bill**

Proactively released

Proactively released

**Issue: How will planning instruments<sup>1</sup> which implement the NPS-FM 2017 notified before enactment of the Bill be dealt with?**

Planning instruments that are notified pre-enactment of the Bill may either still be subject to appeal post 2025 and/or will not fully give effect to the NPS-FM 2020

**Key Considerations**

- Planning instruments that give effect to the NPS-FM 2017 may still be giving effect to the NPS-FM 2020 in part (as the compulsory values and attributes have been carried over)
- Implementing the NPS-FM 2020 will be an iterative process that builds on the NPS-FM 2017.
- It is likely that councils will require a number of plan changes to fully give effect to the NPS 2020 across all catchments in their region.

**Proposed in the Bill**

The planning instrument notified prior to the enactment of the Bill will continue to be progressed under the current RMA Schedule 1 Part 1 process (after the Bill is enacted)<sup>2</sup>

For plan changes that are still in progress after the enactment of the Bill,<sup>3</sup> the regional council could:

- Withdraw the proposed plan change at any point up to when a hearing begins at the Environment Court, and work toward notifying a new plan by 2023.
- Prepare a new plan change, and withdraw the old plan and notify the new plan on the same day<sup>4</sup> so that the plan would go through the Freshwater Planning Process (FPP).
- Continue their planning process under the Schedule 1 process as it currently stands - this may be a valid approach if they are considerably through the process and what is being proposed goes some way towards implementing the NPS FM 2017 and/or NPS 2020.
- Propose a variation to the plan change that was notified before the enactment of the Bill which gives effect to the NPS-FM 2020. However, even if the variation is proposed after the enactment of the Bill, this variation will need to be processed under current Schedule 1 process as it stands.

**Recommended**

**Pros**

- Allows councils to utilise existing tools in the RMA
- Simplifies drafting.
- Regional councils are best placed to decide whether there is value in continuing the process, or whether they should suspend/withdraw the proposed plan change and progress a new proposed plan change under the FPP.
- There are existing Ministerial tools to utilise, if council planning instruments are considered inadequate (see below and body of briefing).

**Cons**

- Potential for councils to carry on with processes that are costly and redundant (however it is considered highly unlikely that a regional council would decide to progress plan change that does not at least in part continue to improve outcomes for freshwater).
- Does not address the issue that the provisions may be deficient and not fully implement NPS-FM 2020.
- An investigation under s25 would probably only be appropriate where there is an overall failure to progress any meaningful plan changes or where there is a difference of opinion about whether a council thinks its current plan change gives effect to the NPS 2020.

**Alternative Option**

Direction regarding planning instruments or variations that have not been heard (after the enactment of the Bill) to use the Freshwater Planning Process (FPP)

**Sub-option (i): Minister's discretion (Ministerial intervention power)**

The Minister may:

- suspend a planning instrument, and/or a variation to these planning instrument, or
- direct councils to withdraw the planning instrument, and
- direct councils to prepare a planning instrument (or vary) and use the FPP.

**Sub-option (ii): Mandatory to use the FPP process (provision in the RMA)**

Include a new provision that suspends or directs councils to withdraw freshwater planning instruments notified before enactment.

**Not Recommended**

**Pros**

- Ministerial oversight and direction and/or legislative direction.
- Council may avoid wasting resources and can direct effort into new plan changes that more fully implement NPS FM 2020.
- Would remove the risk of judicial review to councils on their decisions

**Cons**

- Councils are best placed to make judgements on efficient use of their resources – especially decisions to continue with the existing planning instruments that were notified pre-enactment, or begin a new process, and the effect on freshwater outcomes.
- There will be a large amount of time/resources required for officials to undertake an assessment and/or consider the degree to which the plan change gives effect to the NPS-FM 2020 - unlikely to be a 'clear cut' decision.
- Will require a high degree of capability and capacity to establish if the process met the relevant criteria.
- High level of uncertainty for the regional council and stakeholders.

Should you wish to intervene in plan processes notified prior to enactment of the Bill, there are existing powers under the RMA for you to:

- Require information about how a council is exercising its functions (eg, may include a planning strategy)
- Direct the preparation of a plan change or review
- Investigate, then impose persons to carry out a councils functions
- Call-in regional plans (subject to the plans meeting certain criteria).

Should you decide to progress Sub-option(i), the following matters will also need your consideration:

- Criteria (e.g does not adequately implement the NPS-FM 2020)
- Specify a cut-off date (e.g. up to 5 days before the hearing).

For Sub-option (ii), a decisions on when this applies and what criteria are required also needed.

<sup>1</sup> Regional policy statement and plan changes (including variations).

<sup>2</sup> Variations to these planning instruments must use the same planning track (ie, Schedule 1/Part 1).

<sup>3</sup> If a plan change is notified, rules (but not policies) that protect or relate to freshwater have immediate legal effect (Section 86B(3)(a)). The effect of withdrawing a plan change is the previous operative plan rules would apply until the new plan is notified in 2023.

<sup>4</sup> This ensures the rules still have legal effect.

**Appendix 2: Options for addressing issues of scope - and who should decide**

Proactively released

## Issue: Scope and decision making powers in relation to the matters that can be considered through Freshwater Planning Process (FPP)

The proposed planning instruments<sup>1</sup> will give effect to the 2020 NPS-FM and include regional land use provisions needed to achieve freshwater outcomes. There are risks that timeframes might not be met if the freshwater hearing panel is spending time on debating matters other than those which give effect to the NPS-FM or relate to freshwater generally.

### Key Consideration

The entry criteria for the FPP process is planning provisions that 'give effect to the NPS-FM 2020 or that relate to freshwater'. While this is not a 'bright-line' test, it provides a criteria against which a regional council must assess its provisions against in order for them to go through this process.

<b>Proposal in the Bill</b> The regional council decides which planning provisions fall within the scope of the FPP	<b>Option 1</b> Give the freshwater hearing panel powers	<b>Option 2</b> Provide ability for Minister to decide the scope of what goes through the FPP
<ul style="list-style-type: none"> <li>Councils assesses what changes to planning instruments are needed to give effect to the NPS-FM 2020, and may include any other freshwater related matters eg, structures in the beds of rivers or flood control works.</li> <li>The panel hears all provisions put to it.</li> </ul> <p style="text-align: center;"><b>Recommended</b></p>	<ul style="list-style-type: none"> <li>Empower a freshwater hearing panel to say provisions are outside their jurisdiction where in their opinion they don't relate to achieving freshwater outcomes.</li> <li>Any decision to remove a provision from consideration should be done before the hearing commences.</li> </ul> <p style="text-align: center;"><b>An alternative to current Bill drafting</b></p>	Legislation would state that giving effect to NPS-FM 2020 and freshwater related matters MUST go through FPP, and MAY include 'other matters' (for example to hear a full Land and Water plan).  Sub options: (i) Enable on enactment.  (ii) Enable post 2025 for the FPP to hear the 'other matters'.  (iii) Provide discretion to the Chief FW Commissioner or hearing panel.
<p><b>Pros:</b></p> <ul style="list-style-type: none"> <li>What is notified by the council is what goes through the FPP process – high degree of certainty for participants in the process.</li> <li>Council decides what "implements the NPS-FM or relates to freshwater" covers and the risk of not getting it right rests with the council.</li> </ul> <p><b>Cons</b></p> <ul style="list-style-type: none"> <li>Potential for scope creep (although the council may also be judicially reviewed if they attempt this which acts as a disincentive).</li> <li>If councils try to put more than is necessary through the process this could risk the hearing panel's ability to conduct hearings within time.</li> <li>Regional councils have to decide and might not get it right (i.e. risk of judicial review).</li> </ul>	<p><b>Pros:</b></p> <ul style="list-style-type: none"> <li>Timeliness – better enables hearing process to deliver the NPS-FM by 2025.</li> <li>Hearing panel (rather than Chief FWC) is best placed to make these decisions as they will have all of the information.</li> </ul> <p><b>Cons:</b></p> <ul style="list-style-type: none"> <li>Uncertainty for regional councils.</li> <li>Submitters may have made significant investment up to this point only to find their issues are not dealt with through this process.</li> <li>May create dual planning processes, costing more and resulting in land and water plans which are not integrated.</li> </ul> <p style="text-align: right;"><i>but risks knowing good money after bad</i></p>	<p><b>Pros:</b></p> <ul style="list-style-type: none"> <li>Ministerial oversight of what is going through the process and ability to be directive.</li> <li>Option (ii) would assist plans to implement the NPS-FM to be in place by 2025 and allow fully integrated plans to be heard post that.</li> <li>Efficient – allows for one planning process for integrated land and water plans.</li> </ul> <p><b>Cons:</b></p> <ul style="list-style-type: none"> <li>Option (i) may risk the hearing panel's ability to conduct all hearings and meet the 2025 timeframe.</li> <li>Large amount of time and resources required for the assessment of each plan change pre-hearing.</li> <li>The time required to undertake assessment could threaten overall 2023 and 2025 timeframes.</li> <li>Potential Judicial Review of Minister's decision.</li> <li>Takes resources away from addressing substantive issues of the plan change.</li> <li>Creates an additional process step that will take time.</li> <li>This is likely to fall outside the scope of the Cabinet's approval of the freshwater planning process, and additional policy approval from Cabinet will be required.</li> </ul>

<sup>1</sup> Regional policy statement change or plan change (or variation to these planning instruments)

### Appendix 3 – Survey of current (and projected) planning processes

- **Draft Plan Changes** either out for consultation, or to go for consultation (total 5).
  - Canterbury Regional Council – Plan Change 5
  - Hawkes Bay Regional Council – Plan Changes 8 and 9
  - Taranaki Regional Council – 2015 – Draft Proposed Plan but no resolution - preparing Proposed Freshwater and Soil Plan
  - Nelson City Council – Draft Nelson Plan out for consultation late 2019.
- **Proposed Plan Changes** out for consultation or no decision issued yet (total 15)
  - Horizons Plan Change 2 – consultation period closes 21 October 2019
  - Bay of Plenty Regional Council - Proposed Change 5 Kaituna River Plan Change to RPS and PC10 – Lake Rotorua Nutrient Management
  - Canterbury Regional Council – Proposed Plan Change 7 and Plan Change 1 (Drylands Farming) to Land and Water Regional Plan.
  - Hawkes Bay Regional Council – RPS Change 5; Plan Change 7 (Outstanding water bodies) and Plan Change 2 (Existing Intensive Farming Land Uses)
  - Otago Regional Council – Plan Change 6A
  - Waikato Regional Council – Plan Change 1 and Variation 1
  - Wellington Regional Council – closing date for appeals 18 September 2019
  - West Coast Regional Council – Proposed PC 1 (Wetlands)
  - Auckland Council- Auckland Plan operative in part
  - Gisborne District Council – Plan Change 62 to Combined Regional Land and District Plan incorporated into Terawhiti Management Plan
  - Marlborough District Council – Proposed Marlborough Environment Plan- (Hearings complete, but decision not issued).
- **Current appeals** that relate to freshwater (total 5)
  - Southland Regional Council - Proposed Southland Water and Land Plan – 25 Appellants on freshwater matters, each has between 5 and 35 s.274 Parties
  - Bay of Plenty Regional Council – Plan Change 9 – Regional Water Quantity
  - Northland Regional Council - Proposed Regional Plan - combined regional air, land, water and coastal plan; 23 appeals received, 11 relate to freshwater
  - Otago Regional Council - Proposed Plan Change 5A – Lindis Integrated water management -1 appeal 2016 (does not appear from the website that appeal has been resolved)
  - Gisborne District Council - 1 appeal on Regional Freshwater Plan remains outstanding (Appeal Topic 6, Cultural Interests).
- Several processes are set/tied by Treaty Obligations (e.g. Bay of Plenty, Canterbury, Manawatu Wanganui Regional Council, and Wellington Regional Council). But can also be tied to other things e.g., Tasman District Council Takaka freshwater plan change will be influenced and needs to wait for the Special Tribunal WCO outcome.
- Several programmes also factor in other work such as the Three Waters work, Urban Water Management Principles, etc.
- There are a range of processes where plans will be combined, and taken into a format supporting the National Planning Standard (required by 2022).